





affidavit of Defendant Essie Johnson) She was committed to the institution on May 25, 1994 and will be released on May 22, 1995.

Defendant has always considered 15A Bowdoin Avenue to be her exclusive residence. She has never given any address other than this, and she voted in the 1992 Presidential election under that address. (See Defendant's affidavit) She currently has a valid identification card with the Bowdoin address and has never filed a change of address with the United States Postal Office. The defendant is still receiving mail at the above address and does not receive mail at the Suffolk County House of Corrections. (See Defendant's affidavit)

Plaintiff alleges that defendant is in material noncompliance with her lease where the lease requires her to live in the apartment and to use it as her only place of residence (F16). (Exhibit B - Notice of Tenancy) However, the defendant still resides at 15A Bowdoin and has never indicated that she is domiciled anywhere else but at 15A Bowdoin Avenue.

The defendant moves, in accordance with Massachusetts Rule of Civil Procedure, Rule 56 (b), for this Court to enter judgment in her favor as there is no dispute as to any material facts and the defendant is entitled to judgment as a matter of law.

### **ARGUMENT**

**1. THE DEFENDANT, WHO IS INCARCERATED, HAS NOT CHANGED HER DOMICILE BECAUSE SHE DOES NOT INTEND TO REMAIN IN THE PRISON.**

The two elements needed to exist to establish domicile is physical presence and the intent to remain. Katz v. Katz, 274 Mass. 77, 79 (1974). The defendant is currently serving a one year sentence at the Suffolk House of Corrections and is scheduled to be released on May 22, 1995. The defendant's incarceration does not change her domicile. "Domicile once acquired is not lost until a new one is obtained, and the original domicile is

presumed to have continued in the absence of compelling evidence that it has changed." Dane v. Board of Registrars of Voters of Concord et al, 374 Mass. 152, 161, (1977) The defendant has been domiciled at 15A Bowdoin Avenue for five and one half years. She has been physically present there and intended to remain and still intends to remain there. There is a presumption that she has not changed her domicile. In a similar case Dane v. Board of Registrars of Voters of Concord et al, 374 Mass. 152 (1977) 300 inmates imprisoned at the Massachusetts Correctional Institution at Concord registered to vote within the town of Concord and executed an affidavit stating that they were a resident of the town and considered such residence to be their home. Id at, 153. The court held that prisoners like servicemen or students, should be able to "rebut" the presumption that by reason of their involuntary presence at the place of incarceration they have retained their former domicile. Id at, 165. Therefore, there is a presumption that involuntary presence does not change a person's domicile. In the case at bar, the defendant's incarceration presumes that she has not changed her domicile. The inmates in Dane v. Board of Registrars of Voters of Concord et al, signed an affidavit declaring their intent on establishing the prison as their domicile but the defendant in the case at bar has not made any declaration nor has any intention of changing her domicile to the prison. There is not any evidence that the presumption that incarceration does not change ones domicile has been overcome. The Court in Ramos v. Board of Registrars of Voters of Norfolk et al, 374 Mass. 176 reiterated the decision in Dane stating that incarceration by legal compulsion and physical force created a strong presumption that the inmates were not domiciled in the town. Id at, 178.

2. THE WORD "RESIDENCE" IN THE PROVISION OF THE LEASE, TO LIVE IN THE APARTMENT AND TO USE THE APARTMENT AS THE RESIDENT'S ONLY PLACE OF RESIDENCE (F16), SHOULD BE CONSTRUED TO MEAN DOMICILE.

The Supreme Judicial Court of Massachusetts has consistently held that the elements of domicile are physical presence in a place and the intent to make that place their home for the time at least. Hershkoff v. Board of Registrars of Voters of Worcester, 366 Mass. 570, 576 (1974) "An established domicile continues until a new one is acquired." Katz v. Katz, 274 Mass. 77, 79 (1931) "In order to acquire a domicile both the fact and the intent must occur." Id at, 79. "Actual residence and the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode are required to constitute a change of domicile." Id at, 79.

Many cases have construed the word "residence" to mean domicile. "Reside not infrequently is employed in common speech to express the same idea as to live, dwell, abide, inhabit, have one's home, or possess a domicile." City of Marlborough v. City of Lynn, 275 Mass. 394, 396 (1931). "In laws relating to taxation, voting and settlements the word 'residence,' in the absence of expressed, contrary, legislative intent, has always been interpreted as equivalent to the word 'domicile.'" Inhabitants of Town of Plymouth v. Inhabitants of Town of Kingston, 289 Mass. 57, 59 (1935) "The words 'resided' and 'inhabitant' in constitutional and statutory provisions relating to voting have long been construed to require that the voter have his 'domicile' in the appropriate city or town and that both terms indicate the place of one's home or dwelling place, which depends on the common law doctrine of domicile." Hershkoff v. Board of Registrars of Voters of Worcester, 366 Mass. 570, 576 (1974) The word "residence" as seen within the provision of the lease should be perceived to mean domicile.

"Residence" should also be construed within the context of where the word is being used. In the City of Marlborough v. City of Lynn, 275 Mass. 394 (1931), the court wrestled with interpreting the word "residence" within a Massachusetts statute. Id at, 396 The Court stated that the question to be decided is one of statutory construction and "resided" like most other words may have different meanings or shades of signification's

**CERTIFICATE OF SERVICE**

I David A. Jackson, attorney for the Defendant Essie Johnson hereby certifies that on the 2nd day of March 1995 I served a copy of the above document in hand upon the attorney for Plaintiff.

-----  
David A. Jackson, Esquire  
BBO#553915  
Inmate Legal Services  
20 Bradston Street  
Boston, MA 02118