



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 2, 1992

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 92- 74

Stan Teasley
Executive Director
Kansas Commission on Veterans' Affairs
Jayhawk Towers, Suite 701
700 S.W. Jackson
Topeka, Kansas 66603

Re: State Institutions and Agencies; Historical
Property--Kansas Soldiers' Home--Persons Eligible
for Admission; Application; Durational Residence
Requirement; Constitutionality

Synopsis: As it appears no compelling governmental interest
is served by the durational residence requirement
set forth in K.S.A. 76-1908(b), the requirement
results in a violation of the equal protection
clause and is therefore unconstitutional. Cited
herein: K.S.A. 76-1902b; 76-1908; L. 1889, ch.
235, § 11; U.S. Const., art. I, § 8; U.S.
Const., art. IV, § 2; U.S. Const., Amend. XIV.

* * *

Dear Mr. Teasley:

As executive director for the Kansas commission on veterans'
affairs, you request our opinion regarding whether the
residence requirement set forth in K.S.A. 76-1908 as a
prerequisite for admission to the Kansas soldiers' home is
constitutional.

The Kansas soldiers' home located at Fort Dodge was
established to provide support of disabled soldiers and

sailors of the United States. K.S.A. 76-1902b. Those persons eligible for admission to the soldiers' home include:

"(1) Any person who served in the active military service of the United States during any period of war, or who served in the active military service of the United States during peacetime and is entitled to veterans administration hospitalization or domiciliary care under title 38, United States code and veterans administration rules and regulations, and who has been discharged or relieved therefrom under conditions other than dishonorable, who may be disabled by disease, wounds, old age or otherwise disabled, and who, by reason of such disability, is incapacitated from earning a living.

"(2) The widow, mother, widower, father or minor child of any person who qualified under paragraph (1) of subsection (a), if such widow, mother, widower, father or minor child is incapable of self-support because of physical disability." K.S.A. 76-1908.

Subsection (b) of K.S.A. 76-1908 requires that applicants be "actual resident[s] of the state of Kansas for at least two years next preceding the date of application."

The constitutional right to travel from one state to another occupies a position fundamental to the concept of one federal union. Shapiro v. Thompson, 394 U.S. 618, 630, 89 S.Ct. 1272, 22 L.Ed.2d 600 (1969). The freedom to travel includes the freedom to enter and abide in any state in the union. Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 902, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986). The textual source of the constitutional right to travel has proved somewhat elusive, being variously assigned to the privileges and immunities clause of article IV, to the commerce clause of article I, and to the privileges and immunities clause of the fourteenth amendment. Id. The right has also been inferred from the federal structure of government adopted by the United States Constitution. Id.

"However, in light of the unquestioned historic acceptance of the principle of

free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision. Shapiro, supra 394 U.S., at 630, 89 S.Ct., at 1329. Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases. [Citations omitted.]" Soto-Lopez, 476 U.S. at 902-03.

A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. Soto-Lopez, 476 U.S. at 903. Methods of favoring prior residents over newer ones, such as limiting a benefit to those who resided in the state by a fixed past-date, granting incrementally greater benefits for each year of residence, and conditioning eligibility for certain benefits on completion of a fixed period of residence warrant careful judicial review. Soto-Lopez, 476 U.S. at 905. "[A]ny classification which serves to penalize the exercise of [the right to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro, 394 U.S. at 634 (emphasis in original); see Soto-Lopez, 476 U.S. at 904.

The United States Supreme Court in Shapiro reviewed provisions of Connecticut, the District of Columbia, and Pennsylvania which required applicants for assistance under the program for aid to families with dependent children (AFDC) to reside within the jurisdiction for one year prior to the date of application.

"[T]he effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very

means to subsist-food, shelter, and other necessities of life." Shapiro, 394 U.S. at 627.

The states and district primarily asserted that the waiting-period requirement was necessary as a protective device to preserve the fiscal integrity of state public assistance programs. This function was served as the waiting-period requirement provided a deterrence to the in-migration of indigents and distinguished between new and old residents on the basis of the contribution they had made to the community through the payment of taxes. Initially, the court determined that the waiting-period requirement impinged upon the constitutional right to travel. "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro, 394 U.S. at 629. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" Shapiro, 394 U.S. at 631.

The court then determined that the distinction between all new and old residents on the basis of contribution made through the payment of taxes would logically permit the state to apportion all benefits and services according to the past tax contributions of its citizens, a practice prohibited by the equal protection clause.

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . [The State] must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." Shapiro, 394 U.S. at 633.

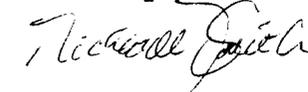
Lastly, the court rejected the assertion of the states and district that the waiting-period requirement advanced certain administrative and related governmental objectives. The states and district asserted specifically "that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force." Shapiro, 394 U.S. at 634. After reviewing each objective, the court concluded that the states and district "in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested." Shapiro, 394 U.S. at 638. As the waiting-period requirement impinges on the constitutional right to travel, the requirement must serve a compelling state interest. Because such interests are lacking, the waiting-period requirements in these cases result in a violation of the equal protection clause and are unconstitutional.

In Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), the Supreme Court reviewed an Arizona statute which required an indigent to be a resident of the county for the preceding twelve months in order to be eligible for free nonemergency medical care. The court provided that "it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." Memorial Hospital, 415 U.S. at 259. Because the effect of the residence requirement is to penalize "indigents for exercising their right to migrate to and settle in that State," the classification created by the requirement could be justified only if it was necessary to promote a compelling governmental interest. Memorial Hospital, 415 U.S. at 261-62. Rejecting many of the same arguments asserted in Shapiro, the court determined "[t]he Arizona durational residence requirement for eligibility for nonemergency free medical care creates an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life.'" Memorial Hospital, 415 U.S. at 269. As the appellees were unable to show a compelling governmental interest served by the durational residence requirement, the requirement was found unconstitutional.

While not all durational residence requirements are impermissible, Soto-Lopez, 476 U.S. at 905, fn. 5, we believe that the durational residence requirement set forth in K.S.A. 76-1908 would meet the same fate as those reviewed in Shapiro and Memorial Hospital. The purpose of the soldiers' home is to provide support of certain persons who are incapacitated from earning a living. K.S.A. 76-1902b; see K.S.A. 76-1908. The requirement that applicants for admission to the soldiers' home be residents of the state for the two years preceding the date of application impinges on the constitutional right to travel. Because the durational residence requirement was a feature of the enactment establishing the soldiers' home, see L. 1889, ch. 235, § 11, legislative history provides no assistance in determining the purpose for the requirement. However, as it appears no compelling governmental interest is served by the durational residence requirement set forth in K.S.A. 76-1908, the requirement results in a violation of the equal protection clause and is therefore unconstitutional.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm