

Opinion No. 64-26

March 9, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. William B. O'Donnell, Vice President, New Mexico State University, University Park, New Mexico

QUESTION

QUESTIONS

1. May an adult individual who moves to New Mexico, declare his residency to be within the state and because of the payment of certain taxes, such as State Income Tax, Sales Tax, etc., qualify as a resident of this state for college tuition purposes?
2. May a minor who moves to this state and who marries a spouse who is a New Mexico resident, establish by such marriage residency in New Mexico for college tuition purposes?

CONCLUSIONS

1. Yes, if the individual expresses and displays an actual bona fide intention to establish and maintain New Mexico residency.
2. See analysis:

OPINION

ANALYSIS

Several pertinent statutes and New Mexico state constitutional provisions relate to the issues presented. The 1963 state legislature in the General Appropriation Act (Laws 1963, Chapter 287, Section 6) sets out in part as follows:

"Tuition Charges. -- The University of New Mexico, New Mexico State University, the Institute of Mining and Technology, New Mexico Western College, Eastern New Mexico University, Highlands University and the New Mexico Military Institute shall charge a minimum tuition for resident students of one hundred dollars (\$ 100) per year and for non-resident students not less than one hundred dollars (\$ 100) per year in addition to that charged resident students, except that the Institute of Mining and Technology shall charge non-resident students not less than three hundred dollars (\$ 300) per year for tuition. Provided, further, that the board of educational finance shall define resident and non-resident students, for the purpose of administering tuition fees, in accordance with

the constitution and statutes of the state of New Mexico and after consultation with the appropriate officials of the institutions concerned; each of these institutions shall use the uniform definitions so established in assessing and collecting tuition fees from students. . ."

The statutory provision quoted above is similar to other legislative recitals contained in the general appropriation acts of prior years and such statute authorizes the state board of educational finance to define "resident" and "non-resident" students for the purpose of administering tuition fees in accordance with the constitution and statutes of the state of New Mexico. House Bill 300, 1964 Second Special Session contains similar statutory provision in Section 6 thereof.

Article VII, Section 4 of the New Mexico state constitution provides that "No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

The term "resident" as used in the statutes above is left in part to the determination of the State Board of Educational Finance and direction is expressed that such definition be in concert with the state constitution and statutes of New Mexico. In **Allen v. Allen**, (1948) 52 N.M. 174, 194 P.2d. 270, the New Mexico Supreme Court quoted with approval the language contained in **Shilkret v. Helvering**, 78 U.S. App. D.C. 178, 138 F.2d. 925:

". . . to effect a change from an old and established domicile to a new one, there must be the absence of any present intention of not residing in the latter permanently or indefinitely. Or, stated differently, there must be a fixed purpose to remain in the new location permanently or indefinitely. For domicile once acquired is presumed to continue until it is shown to have been changed, and to show the change two things are indispensable, -- 'First, residence in the new locality; and, second, the intention to remain there.' The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

An adult person may not by the payment of state taxes be deemed to have established residency within the state for college tuition purposes, but as stated above, such indicia may be considered by university and college authorities in weighing the question of whether or not the individual in fact actually possesses a bona fide intention to establish New Mexico residency. From a legal standpoint the requisites for establishing a valid residence for college tuition purposes for an **adult person** are: (1) actual physical presence in the state, (2) a bona fide intention to establish and maintain such residency in the state permanently or indefinitely. Since residency is in part manifested by a mental intent, **reasonable proof of such intent may be properly required by college authorities**. In such cases, payment of state taxes, such as state income tax, sales tax,

compensation tax, etc., may be considered as indicia of such mental intent to maintain and keep New Mexico residency.

It is therefore our opinion in answer to your first question that an adult individual who moves to New Mexico may not merely by the payment of state taxes be deemed to have established New Mexico residency for college tuition purposes, **but he must manifest a demonstrable intention to establish and maintain New Mexico residency and be physically present in the state** at the time he establishes such residency. Within the scope of the language of the above statutes, constitutional provisions and case law, the state board of educational finance may define "resident" for use by the state universities and colleges in determining which adult individuals are in fact "resident" persons for college tuition purposes. See Attorney General's Opinion No. 58-67, dated April 1, 1958.

Your second question poses the question of whether a minor who moves into the state and marries a spouse who is a New Mexico residence may by such action create a bona fide New Mexico residency.

It is our opinion that a minor moving into the state and who marries a spouse from New Mexico does not by the act of marriage alone establish New Mexico residency. Generally, it is considered that upon marriage a minor becomes an emancipated person free from parental custody and control. As pointed out in Attorney General's Opinion 1935-36, at page 97, a minor is deemed to have the same residence as their parent and the husband's residence governs that of the wife living with him. However, single women over twenty-one, widows, divorcees, and married women living apart from their husbands for good cause may establish their own residence and if they have custody of minors the residency of the minor is the same as the parent.

Once a minor becomes an emancipated child he is legally free to establish and maintain legal residence in the place of his choosing the same as an adult. As stated in Black's Law Dictionary, 4th Ed., the term "emancipation" means in respect to children: "The term is principally used with reference to the emancipation of a minor child by its parents, which involves an entire surrender of the right to the care, custody, and earnings of such child as well as a renunciation of parental duties. **Delaware L. & W. R. Co. v. Petrowsky**, C.C.A., 250 F. 554, 559; **Public Service Co. of Indiana v. Tackett**, 113 Ind. App. 307, 47 N.E. 2d. 851. The emancipation may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent, and it may be conditional or absolute, complete or partial. **Wallace v. Cox**, 136 Tenn. 69, 188 S.W. 611, 612, L.R.A. 1917 B, 690. Complete emancipation is entire surrender of care, custody, and earnings of child, as well as renunciation of parental duties. **Beebe v. Kansas City**, 223 Mo. App. 642, 17 S.W. 2d. 608, 612. And a 'partial emancipation' frees a child for only a part of the period of minority, or from only a part of the parent's rights, or for some purposes, and not for others. **Memphis Steel Const. Co. v. Lister**, 138 Tenn. 307, 197 S.W. 902, 903, L.R.A. 1818 B, 406."

Thus, in light of the above, it is our opinion that a minor by marriage generally becomes an emancipated person free to choose and select his own residence free from that of his parent. However, marriage alone does not establish residency in the state where marriage was celebrated. Generally, until a new residence is acquired, the old residence remains. Therefore, a minor upon marriage is deemed by law to continue his former residence until he (1) effects actual physical presence in a state, and (2) adopts an actual bona fide intention to establish and maintain residency in the state where he is present. It should be noted that unless such intention to adopt New Mexico as a place of residency is existent, then the wife would adopt by law the same residence as her husband. As pointed out above, generally the husband's residence governs that of the wife living with him. Once a bona fide residence is established in New Mexico, mere temporary absence from the state would not in and of itself alter residency.