

## Opinion No. 65-34

February 24, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Mr. Don Hancock, Assistant District Attorney, Third Judicial District, Second Floor Court House, Alamogordo, New Mexico

### QUESTION

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If a military person claims his legal residence in another state for voting and other purposes, although he physically resides in this state, can he claim and be allowed the head of household exemption?

#### CONCLUSION

No.

### OPINION

#### {\*59} ANALYSIS

Article VIII, Section 5 of the New Mexico Constitution provides that:

"The legislature may exempt from taxation property of each head of the family to the amount of two hundred dollars (\$ 200) . . ."

Pursuant to this permissive authorization the legislature enacted the necessary enabling statute (Section 72-1-4, N.M.S.A., 1953 Compilation). This section provides in pertinent part as follows:

"There shall be exempted from taxation property of each head of a family, resident in the state of New Mexico, to the amount of two hundred dollars (\$ 200), providing that the person claiming such exemption shall make a return of his property for taxation and shall make oath that he or she is such head of a family, **a resident of the state**, and . . . ." (Emphasis supplied).

The determining phrase in answering your question is "a resident of the state." Residence, as has frequently been stated, is largely a matter of intent. If a person is physically present within this state, and intends in good faith to remain here, the requisite physical presence and intention coincide to establish residence. Opinion No. 62-133.

Article VII, Section 4 of the 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 . . ."

Thus physical presence of a serviceman creates no presumption of residence. As our Supreme Court held in **Allen v. Allen**, 52 N.M. 174, 194 P. 2d 270, the above section of the Constitution does not mean that a soldier stationed in this state may not acquire residence in New Mexico, but it does mean that in order to do so he must, in addition to physical presence, establish his intention to become a resident.

Under the facts contained in your question, namely that the person claims legal residence in another state for voting and other purposes, we do not perceive how the military man in question can establish the required intention to be a resident of this state. Accordingly he is not eligible for the head of household exemption.