

## Opinion No. 89-16

May 4, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Carol A. Baca, Assistant Attorney General

**TO:** The Honorable Rebecca Vigil-Giron, Secretary of State, Executive Legislative Bldg., Santa Fe, New Mexico 87503

### QUESTIONS

- 1.) Must an individual be a resident of New Mexico for any particular period of time before receiving a notary commission? If so, what is the period of time?
- 2.) Can an individual claim residency in another state in addition to New Mexico when applying for a notary public commission?
- 3.) Must an individual be a citizen of the United States to receive a notary commission?

### CONCLUSIONS

- 1.) No.
- 2.) No, but see analysis.
- 3.) No.

### ANALYSIS

1. Section 14-12-2 NMSA 1978 provides: "Each notary public shall: (A) be **a resident of New Mexico** ; (B) be at least eighteen years of age; (C) be able to read and write the English language; (D) not have been convicted of a felony; and (E) not have had a notary public commission revoked during the past five years." (Emphasis added). In addition, Section 14-12-3 NMSA 1978 requires an applicant for appointment as a notary to submit a form prescribed by the Secretary of State as evidence of good moral character, take the oath prescribed by the Constitution for state officers, provide an official bond, and pay the prescribed application fee. Current law does not contain any express citizenship requirement or a requirement that notaries demonstrate any particular length of residency in the state.

Prior to the enactment of Sections 14-12-2 and 14-12-3 in 1981, state law required a notary to be "a qualified elector of this state and a person of good moral character." 1969 N.M. Laws, ch. 168, § 2. Article VII, Section 1 of the New Mexico Constitution specifies the qualifications of a "qualified elector" or voter. These qualifications include

United States citizenship, that the voter shall have attained the age of twenty-one years, and residency "in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election."<sup>1</sup>

We believe it is clear that there is no requirement that a person be a New Mexico resident for any particular time before qualifying as a notary public. One of the basic rules of statutory construction is that one is "not permitted to read into an statute language which is not there, particularly if it makes sense as written." *State ex rel. Barela v. New Mexico State Bd. of Ed.*, 80 N.M. 220, 222, 453 P.2d 583, 585 (1969). Sections 14-12-2 and 14-12-3 do not contain the durational residency requirements of former law and the statutes make sense as written.

2. The second question posed is more difficult to answer because no statute or case law defines "resident" for the purpose of the notary laws. The words "residence" and "resident" have no fixed meanings applicable to all cases, but are used in different and various senses, depending on the subject matter. *Gallup American Coal Co. v. Lira*, 39 N.M. 496, 497, 50 P.2d 430, 431 (1935).

The term "residence" may be employed to mean mere bodily presence in a place, so that any dwelling or abode, however temporary, may constitute a residence. *77 C.J.S. Residence* 291 (1952). Usually, however, the word is construed to mean something more than a place of brief sojourning or transient visiting. Under the latter definition, residence is established by both bodily presence in a place and the intention to remain in that place for a permanent, or least indefinite, period of time. Continuity in residence will not be lost by a temporary absence, even a prolonged one, if the intention remains to return to the place of residence. *Id.* at 291, 295-299.

In New Mexico, it is well-established that, for voting purposes, residence is determined by the more stringent definition involving intent, or the so-called domicile test.

The question of whether a person is a resident of one place or another is largely a question of intention, and, where the intention and the acts of the party are in accord with the fact of residence in a given place, there can be no doubt of the fact that such party is a bona fide resident of the place where he intends to and does reside, and that he has the right to exercise all the rights and privileges accorded actual residents of such place, provided he comes within the provisions of the law regulating such rights. Here the voter's intention was to make Taiban her home.

*Klutts v. Jones*, 21 N.M. 720, 727, 158 P. 490, 492 (1916). See also *State v. Williams*, 57 N.M. 588, 261 P.2d 131 (1953); 1912-13 Op. Att'y Gen. p. 239 (1913); 1929-30 Op. Att'y Gen. p. 57 (1930). The definition of residence found in voting cases has been codified in the Election Code. See Section 1-1-7 NMSA 1978.

The test of residence used in voting cases also has been adopted by two New Mexico courts in other contexts. In the *Gallup American Coal* case, the New Mexico Supreme Court interpreted a workmen's compensation statute that excepted from its coverage

relatives or dependents who were not "residents" of the United States at the time of a workman's injury. The court stated:

We do not have to go beyond the literal language of the statute to arrive at its meaning, but need only choose a meaning from recognized definitions of the word "resident" that would be consistent with the spirit and intent of the New Mexico Workmen's Compensation Act.

\* \* \*

We hold that "not a resident of the United States" as contemplated by the statute does not apply to one domiciled in the United States, although living in another country; if in fact there was always the intention to return to the domicile and never an intention that such temporary residence should be a permanent abode. Long absence would ordinarily be persuasive evidence of nonresidence it is true, but not necessarily conclusive.

39 N.M. at 500-501, 50 P.2d at 433-34.

In *Perez v. Health and Social Services*, 91 N.M. 334, 573 P.2d 689 (Ct. App. 1978), the New Mexico Court of Appeals considered whether an applicant for medical assistance was a state resident under the Special Medical Needs Act. The court asserted that "resident" should be given its "ordinary and common meaning," unless a different meaning was clearly indicated by the legislature. 91 N.M. at 336, 573 P.2d at 691. The court proceeded to apply the residency test of the *Klutts* case and found that the applicant for medical assistance had the "subjective intent" to remain in New Mexico. *Id.* at 337, 573 P.2d at 692.

Following the reasoning of the *Perez* and *Gallup American Coal* cases, we conclude that, for the purpose of the notary statutes, residency constitutes the fact of an abode in New Mexico coupled with the intent of remaining in the state for at least an indefinite period of time. This definition is both consistent with the ordinary meaning of the word and fact that the legislature has designated the notary public as the holder of a state "office" required to take the oath of a state officer. See Sections 14-12-1 and 14-12-3 NMSA 1978.<sup>2</sup> The importance that the legislature has assigned to the notary duties appears incompatible with the notion that mere sojourning or visiting would be sufficient to establish residency under Section 14-12-2.

A person can have only one domicile and, therefore, only one residence for the purpose of the notary statutes. 28 C.J.S. Domicile § 3 (1941). A person, however, may have more than one abode; in that loose sense of the word, he may "reside" in more than one place. "A man may have a city home, ranch home, summer home, as respondent in the case at bar had, and also a place of permanent abode." *State v. Williams*, 57 N.M. at 592, 261 P.2d at 133. A notary applicant may have his permanent abode in New Mexico, but may have another temporary abode outside the state. If a notary applicant indicates that he has "residences" or addresses in two states, you must determine the

sense in which he means he "resides" out of state. As indicated earlier, an absence from the state of domicile will not result in a change of domicile as long as the intent remains to return. A determination of "residency," however, will turn on the particular facts of each case.

3. As stated above, there is no longer an express citizenship requirement in the New Mexico notary statutes. A residency requirement is not necessarily synonymous with a citizenship requirement. 14 C.J.S. Citizens § 1(b) (1939). In any event, it is our conclusion that, under the circumstances, any attempt to impose a citizenship requirement, would be unconstitutional.

In *Bernal v. Fainter*, 467 U.S. 216 (1983), a resident alien successfully challenged the citizenship requirement in the Texas notary statutes on the ground that it violated the equal protection clause of the United States Constitution. The Court stated that, in general, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the challenged law must advance a compelling state interest by the least restrictive means available. *Id.* at 219. The Court rejected the state's argument that a lower standard of review was warranted because notaries carry out a critical political function similar to that performed by teachers, police and probation officers. The Court did not think such a comparison was appropriate because, although notaries have important duties, they are not invested with policy making responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. *Id.* at 225-226.

The *Bernal* Court also disagreed with the state's argument that requiring citizenship advanced the state's interest in ensuring notaries' familiarity with state law. Nothing in the state statutes asserted such an interest and the Court pointed out that the statutes did not require a test measuring an applicant's familiarity with state law. *Id.* at 227. The state's final argument was that citizenship was required to ensure later availability of notaries' testimony about documents. The Court believed this justification failed because there was no factual showing that the unavailability of testimony was a real, as opposed to a speculative, problem. *Id.*

The *Bernal* case suggests that states might be able to rewrite their statutes and perform factual investigations to support a citizenship requirement. Given the New Mexico law's lack requirement. Given the New Mexico law's lack of testing requirements and the absence of facts about problems that may have arisen concerning notaries' testimony, New Mexico cannot demonstrate a compelling state interest in a citizenship requirement.

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## **GENERAL FOOTNOTES**

[n1](#) Federal law has preempted Article VII, § 1's durational residency requirement for certain elections and the 1971 ratification of the 26th amendment to the United States Constitution has extended suffrage to 18-year-olds. See Att'y Gen. Op. Nos. 71-119 (1971), 71-117 (1971) and 71-86 (1971).

[n2](#) See also N.M. Const. art. XX, § 11, which states that women may hold the "office" of notary public.

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