

**Opinion No. 73****Residence—School Census, Residence  
for Purposes of**

**Held:** A family which moves from one county to another county, which change of habitation is on the same ranch, results in the family becoming residents of the latter county and the children should be included in the latter county.

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October 31, 1947

Mr. Chester E. Onstad  
County Attorney  
Powder River County  
Broadus, Montana

Dear I. r. Onstad:

You have requested my opinion concerning the residence of a family which lives on a ranch located in both Powder River County and Rosebud County. You state that the family resided on that portion of the ranch which is in Powder River County for a period of ten years, but in December, 1945, they constructed a \$10,000 house on the ranch property in Rosebud County, and have, since December, 1945, lived in the house the major part of each year. You also state that the family never intended to change residence to Rosebud County and the parents consider their residence to be in Powder River County.

You have also asked in which county the children should be considered residents for school census purposes.

Section 33, Revised Codes of Montana, 1935, states rules for determining residence. Rule one defines residence as follows:

"It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose."

If the above quoted rule were alone the test, then under the facts given habitation in the new home would make Rosebud County the residence. However, sub-section 7 of Section 33 states, "The residence can be changed only by the union act and intent." From the facts you give, it affirmatively appears that there is no intent to change the residence from Powder River County to Rosebud County. While this intent must be given great weight, yet in 17 Am. Jur. 605, the text states, "A man's home is where he makes it, not where he would like to have it."

The determination of the residence of a family is not a question of law alone, but is in great measure a question of fact. Our Supreme Court in *Sommers v. Gould*, 53 Mont. 538, 165 Pac. 599, recognized that rules for determining residence must be of necessity mere guides and rules of assistance. There might well be other facts which will alter the conclusion reached.

In the case *State ex rel. Duckworth v. District Court*, 107 Mont. 97, 80 Pac. (2d) 367, the Court recognizes the importance of habitation in fixing the domicile and said:

"That place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home unless and until something, which is uncertain and unexpected, shall happen to induce him to adopt some other permanent home."

Also, Subsection 9 of Section 574, Revised Codes of Montana, 1935, in relation to residence for the purpose of voting, states:

"A change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained."

The application of the above to the facts submitted results in the conclusion that Rosebud County is now the residence of the family. The construction of the new house and the habitation within the house constitutes the act of removal joined with the intent to remain sufficient to be a change in residence.

The holding in Opinion 510, Volume 15, Report and Official Opinions of the Attorney General, is contrary to the views herein expressed in that the intent for the purpose of residence in that opinion appears to be divorced from the acts of the parties. The acquisition of a permanent place of abode establishes an intent superior to the intent expressed, which amounts to a mere desire to retain a former residence from which the person has removed permanently. To the above extent, the former opinion is hereby expressly overruled.

The residence of minor children is that of the parents and this is true under both Section 33, Revised Codes of Montana, 1935, and Section 1051, Revised Codes of Montana, 1935, which latter section defines the manner of making the school census.

It is, therefore, my opinion under the facts given, that a family which moves from Powder River County to Rosebud County, which change of habitation is on the same ranch, results in the family becoming residents of Rosebud County and the children should be included in the census of the school district in Rosebud County.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General