

VOLUME NO. 35

Opinion No. 63

CONSTITUTIONAL LAW — Residency, county nursing home; COUNTIES — Nursing homes, residency requirements; NURSING OR BOARDING HOMES — County, residency for admission; RESIDENCE — Admission to county nursing home. Sections 16-1038, 71-309, and 83-303, R.C.M. 1947.

HELD: 1. Section 16-1038, R.C.M. 1947, does not require county boarding or nursing homes to provide care for indigent aged regardless of county residence.

2. A county may restrict entry into the county boarding or nursing home to only those indigent aged who are bona fide residents of the county.

January 18, 1974

Mr. Conrad B. Fredricks
Sweet Grass County Attorney
Big Timber, Montana 59011

Dear Mr. Fredricks:

You have requested my opinion on the following question:

Does section 16-1038, R.C.M. 1947, require a county boarding home or nursing home to provide care for indigent aged regardless of their county of residence?

Section 16-1038, Revised Codes of Montana, 1947, provides:

The county boarding home or nursing home shall provide care, nursing care, maintenance, board and room for the indigent aged. If facilities permit, the county boarding home or nursing home may provide similar services to nonindigent aged and shall charge and accept such reasonable payment for such care as is determined by the board of county commissioners.

The language of the above statute is neither mandatory nor prohibitory with regard to residency requirements for admission to county nursing homes.

However, it is reasonable to conclude that county welfare obligations, including nursing home care for indigent aged, are limited only to persons who are bona fide residents of the county. Indeed, considerable financial burdens would be placed on counties if legally obligated to care for all applicants regardless of county residence. As a general rule, county commissioners may exercise only the powers specifically granted by the legislature, and every act of the commissioners must be justified by specific reference to its statutory authority. **State ex rel. Bowler v. Daniels County Board of Commissioners**, 106 Mont. 251, 76 P.2d 648 (1938). See also: **State ex rel. Barnhart v. Cranston**, 113 Mont. 61, 120 P.2d 828 (1942). Thus, without specific statutory authority granting the county nursing homes power to provide services to nonresident indigent aged, it appears that the counties may restrict entry into the nursing homes only to those indigent aged who are bona fide residents of the county.

The intent of the legislature concerning the welfare obligations of the county commissioners is contained in section 71-309, R.C.M. 1947, which provides:

Except as otherwise provided in other parts of this act, it is hereby declared to be the primary legal duty and financial obligations of the board of county commissioners to make such tax levies and to establish such budgets in the county poor [*sic*] fund as provided by law and as are necessary to provide adequate institutional care for all such indigent residents as are in need of institutional care and to make such tax levies and establish such budgets in the county poor fund as are necessary to make provisions for medical aid and services and hospitalization **for all indigent county residents**. All such public assistance and services shall be charges against and payable from the county poor fund. (Emphasis supplied)

It is apparent that the care provided to indigent aged by the county nursing homes is institutional in nature as contemplated by the statute, and that the legislature intended to limit the obligation of the counties to indigents who are residents of the particular county. Therefore, the county may require nursing home applicants to be bona fide county residents before admission to the county nursing home. This determination must be made on a case-by-case basis depending upon the facts in each specific instance.

The general rules for determining residence are set forth in section 83-303, R.C.M. 1947, which provides:

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

1. 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.
2. There can be only one residence.

3. A residence cannot be lost until another is gained.

4. The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children.

5. The residence of the husband is presumptively the residence of the wife.

6. The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

7. The residence can be changed only by the union of act and intent.

This statute is not a definition of residency but only a guide to be applied to the particular facts of each case. **McCarthy v. Montana Power Co., et al.**, 143 Mont. 134, 387 P.2d 438 (1963).

The criteria for determining bona fide residency were discussed in the recent United States Supreme Court case of **Vlandis v. Kline**, _____ U.S. _____, 41 L.W. 4796 (1973). The Supreme Court declared unconstitutional a Connecticut statute that provided an irrebuttable presumption of nonresidency for any applicant to the state university system who resided in another state at the time of his application. Thus, any student wishing to take advantage of resident tuition fees was allowed to present evidence that he was a bona fide resident of the state of Connecticut. The *indicia* of residency included a year-round Connecticut home, state driver's license, state vehicle registration, and voter registration. The court also stated by way of dicta that a reasonable durational residency requirement satisfied during a student's college career would be constitutionally permissible as one element of determining bona fide residency. Thus, the appropriate *indicia* for determining county residency would include analogous criteria such as home ownership or lease, county vehicle registration, voter registration, property ownership in the county, payment of county property taxes, and the actual time one has resided in the county.

THEREFORE, IT IS MY OPINION, based upon the above considerations:

1. Section 16-1038, R.C.M. 1947, does not require county boarding or nursing home to provide care for indigent aged regardless of county residence.
2. A county may restrict entry into the county boarding or nursing home to only those indigent aged who are bona fide residents of the county.

Very truly yours,
ROBERT L. WOODAHL
Attorney General