seems particularly plausible since chapter 433 of NRS, as a whole, displays a legislative intent that the Nevada State Hospital be operated primarily for the benefit of Nevada residents. (*See* Attorney General Opinion No. 207, dated February 6, 1961 and Attorney General Opinion No. 159, dated May 27, 1960.)

Prior to its amendment in 1957, section 161 of the California Welfare and Institutions Code was similar to NRS 433.030. Section 161 then provided that a person who had lived continuously in California for 1 year and had not acquired residence in another state by living continuously therein for at least 1 year subsequent to his residence in California should be deemed a resident for purposes of entitlement to hospitalization and repatriation. In 5 Ops. Cal. Atty. Genl., 162, it was held that such statute required actual and continuous physical presence in California for 1 year and did not contemplate constructive residence, such as is derived by a minor child from the residence of the father. Probably as a result of this opinion, the California legislature amended their statute by adding provisions that residence acquired in California was not lost by reason of military service and that the residence of minor children during the period of such military service should be determined by the residence of the parent in such service or by the residence of the child. (Sec. 1, Ch. 489, Stats. 1957.) Perhaps the Nevada Legislature will consider that an amendment such as that adopted by California is warranted in order to cover a case such as this, which is admittedly a hard one.

Although it is our conclusion that the parents and child in question are not residents of Nevada for the purposes of admission of the child to the Nevada State Hospital, such determination is not inconsistent with their being domiciliaries and residents of Nevada for other purposes. In fact, Nev. Art. 2 expressly prevents the loss of residence for voting purposes by reason of absence while employed in the service of the United States, and, apart from statutory limitation, removal or absence from a domicile once acquired does not ordinarily result in loss of domicile if there is a bona fide intent to return to it and no intent to acquire a domicile elsewhere. The words "domicile" and "residence," which are at times convertible and at times not convertible terms, are frequently given different meanings even in the same jurisdiction, depending upon the legislative purpose of the statute involved and the context in which the word is used. In Chapter 433 of NRS, the word "residence" has a carefully defined and limited meaning. As used in other Nevada statutes, and for other purposes, the usage and interpretation of the word may well be broad enough to encompass the parents and child in question.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-276 ELECTIONS; RESIDENCE FOR ELECTION PURPOSES; REQUIREMENT OF DOMICILIARY INTENT PLUS PHYSICAL PRESENCE FOR REQUISITE PERIODS; ACQUISITION OF VOTING RESIDENCE BY MEMBERS OF ARMED FORCES STATIONED IN NEVADA—Under provisions of NRS 293.497, the residence for voting purposes of one who is employed in one county of the state but who permanently resides with his family in another county of the state is the county of residence, providing such person has the prescribed periods. Under provisions of NRS 293.497, Nevada is the residence for voting purposes of one who permanently resides and is employed within the state, although his family resides in another state, provided such person has the necessary domiciliary intent and actual residence for the prescribed periods. A member of the Armed Forces stationed in Nevada may acquire a domicile in

Nevada for voting purposes if he is able to prove an intent to make Nevada his domicile by evidence which is sufficiently clear and unambiguous.

Carson City, March 7, 1962

Honorable John Koontz, Secretary of State, Carson City, Nevada.

STATEMENT OF FACTS

Dear Mr. Koontz:

1. A is employed in X County, Nevada, but has his home and family in Y County, Nevada.
2. B is employed in X County, Nevada, but his home and family are outside the State.
3. C, a member of the Armed Forces now stationed in Nevada, entered military service while a resident of another state.

QUESTIONS

1. Where is the residence of A for voting purposes?
2. Where is the residence of B for voting purposes?
3. May C acquire a residence for voting purposes in Nevada?

CONCLUSIONS

Question No. 1: Y County, as qualified in this opinion.
Question No. 2: The State of Nevada, as qualified in this opinion.
Question No. 3: Yes, as qualified in this opinion.

ANALYSIS

Question Nos. 1 and 2: The Constitution and statutes of Nevada make residence a prerequisite to the privilege of voting. Section 1 of Article 2 of the constitution of Nevada requires actual, as opposed to constructive, residence in the State for 6 months and in the district or county for 30 days preceding the election, and NRS 293.485 requires continuous residence in the State 6 months, in the county 30 days, and in the precinct 10 days preceding the election.

While such provisions might seem to contemplate no more than bodily presence in the State, county and precinct for the specified periods of time, it is generally conceded that the term "residence," when used in constitutional and statutory provisions pertaining to elections, is synonymous with the term "domicile." This means that in order to acquire residence for voting purposes in a locality, an intention to make such locality home, and to abandon any former one, must concur with physical presence for the periods prescribed by the Constitution and statutes. (The provisions relating to length of time of residence are mandatory, and in this opinion it will be assumed that the persons in question have been physically present in the State, county and precinct for the requisite periods. The terms domicile and residence will be used interchangeably in this opinion.)

This additional requirement of intent admittedly makes measurement of the residence requirements of one seeking to vote difficult since there is no absolute criterion by which such intent may be ascertained. Each case must be determined upon its own facts, so that it would be improper and dangerously misleading to attempt to set forth any criteria in the abstract. About all that should be stated generally is that a person must have a domicile somewhere; that he cannot be domiciled in two places at once; and that one domicile is presumed to continue until a new one is established. In determining whether the necessary intent exists, declarations of the person seeking to vote are not controlling, and probably more consideration should be given to his

intention as manifested by his acts, conduct and other factors which serve to connect him with a given locality, such as payment of taxes and ownership of property.

According to the facts given, A and B are both married men employed, in the case of A, in a county other than that in which his family resides, and, in the case of B, in a state other than that in which his family resides. The facts related show that B resides where he is employed, but there is no indication whether A resides in the county of employment or commutes to work from the family residence. Moreover, in each case it is stated that the persons in question have their "home" at the place where their families reside, but it is not clear whether "home" refers to the family dwelling place in a physical sense, or the place to which A and B, when absent, intend to return. For the purposes of this opinion, it will be assumed that A lives with his family and commutes to work, and that "home" is used in the physical sense to designate the family dwelling.

In the absence of statute, the domicile of a married man for voting purposes is presumed to be at the place where his wife and family reside. But such presumption is rebuttable, since a husband may establish a legal residence apart from his wife and family. For example, in *Hill v. Niblett*, 187 At. 869, 171 Md. 653, a saloon keeper, who slept and kept his clothes in a room over his saloon and ate his meals at a restaurant he operated in conjunction with the saloon, and who regarded the saloon as his real home, was held to be a resident for election purposes of the precinct in which the saloon was located, notwithstanding that his wife and family, with whom he stayed two evenings a week, resided in another precinct and that he was listed in the police census as living at the residence of his family. The Court there held that the presumption of domicile at the residence of his family was overcome by the actual facts and circumstances, one of which was the intention of the voter.

By NRS 293.497, the Nevada Legislature has prescribed a rule for determining residence for voting purposes which appears applicable to the situations of both A and B. It provides:

> If a man has a family residing in one place and he does business in another, the former is his residence, unless his family is located there only temporarily, but if his family resides without the state and he is permanently located within the state, with no intention of removing therefrom, he shall be deemed a resident for election purposes.

The first clause of such section indicates that, for election purposes, the residence of A is Y County, the county in which his family lives, and the residence of B is the State of Nevada, provided he is permanently located here and has no intention of leaving. The second clause of the section clearly requires a domiciliary intent, and the first one states the presumption already mentioned.

This statute provides a useful guidepost, and, under the facts related, we advise its application to A and B to determine their residence for voting purposes. You should be cautioned, however, that the element of intent should always be kept in mind, since, in other jurisdictions which have established statutory rules for determining residence for voting purposes, it is held that the intention of the prospective voter remains a circumstance to be considered, although the statute is silent on that subject. (*McBride v. Cantu*, 143 S.W.2d 126.)

Question No. 3: Both Section 2 of Article 2 of the Constitution of Nevada and NRS 293.487 contain a provision to the effect that residence for the purpose of voting is not gained nor lost by reason of presence or absence while employed in the service of the United States, and NRS 293.105 declares persons in the Armed Forces of the United States to be in the "service of the United States."

No Nevada cases construing these cases have been found, but several opinions of former attorneys general indicate that, unless a member of the Armed Forces was a Nevada resident prior to his entering military service, he may not establish a voting residence here because he is subject to the will of superior officers and consequently has no power to select his domicile. (For example, *see* Attorney General Opinion No. B 962, dated October 27, 1950; and Attorney General Opinion No. 339, dated August 6, 1946.)

It is now felt that these opinions should be overruled, for, while it is true that the rule that the fact of actual residence in a place is prima facie evidence of domicile there in the absence of other evidence does not apply to a serviceman because a change of his domicile is not by his volition, still the weight of authority holds that constitutional and statutory provisions such as those of Nevada do not absolutely preclude a person in the military service from gaining a voting residence (29 A.L.R., 1387, 140 A.L.R. 1101, 148 A.L.R. 1415, 17 Cal.Jur.2d, section 12, page 259). Under these authorities, presence in a locality by reason of employment in the service of the United States is not to be taken into account in determining residence, but a change of domicile may be effected by a person in the military service if his actions sufficiently indicate his intention to change his permanent residence.

But it is also held that an intention of a person in the military service to change his domicile must be shown by clear and unequivocal evidence (129 A.L.R. 1389, 148 A.L.R. 1416). Because a person in such service does not have the benefit of the presumption that the place where one actually lives is his domicile, residence in an area is no evidence of an intention to make such place his home, and his burden of proof is very great. Although it is perilous to generalize in this area of the law, the difficulty of meeting this burden may well mean, as a practical matter, that the majority of servicemen stationed in Nevada, if they were not residents prior to their entry into service, will be unable to qualify as residents for voting purposes here.

As to the kind of proof necessary to establish the intention to effect a change of domicile, it has variously held that such intention must exist, concur with, and be manifested by resultant acts independent of the presence of the soldier in the new locality (Re Cunningham, 45 Misc. 206, 91 NYS 974); that it must be clear and associated with something fixed and established as indicating the purpose of change (*Ex parte* White, 228 F. 88); that it must be established by independent evidence (*Harris v. Harris*, 105 Iowa, 180, 215 NW 661); that it must be to make a home at the moment and not in the future (*Smith v. Smith*, 194 Miss. 431, 12 So.(2d) 428; that it must be of remaining in the area apart from military service (*Kennedy v. Kennedy*, 205 Ark. 650, 169 SW(2d) 876). For example, in In re Seld, 269 App.Div. 235, 51 NYS(2d) 1, it was held that a voting residence had been established in an area in which a naval officer was stationed where, in addition to this testimony that he intended to make the voting district his permanent abode, there was evidence that he had not other home, he lived with his wife in a rented apartment in the area although they could have lived at the naval base, his wife taught in the local high school, they maintained a bank account in the area, and they used the residence as their mailing address and registered their automobile at such address.

The facts of this case are given merely by way of example and are not intended to serve as an inflexible yardstick for the determination of residence for voting purposes. It should be noted that what constitutes sufficient evidence to prove a change of domicile by a person in the military service varies from jurisdiction to jurisdiction and that some other courts would require more or stronger evidence of an intent to make such a change. Again, each case must be resolved upon its own facts by application of the general principles enunciated, and it is the function of the county clerk, as ex officio county registrar, to make the factual determinations.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Kaye Richey
Deputy Attorney General

OPINION NO. 62-277 MANNER OF FILLING VACANCY IN THE OFFICE OF A MEMBER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF NEVADA; CONFLICT BETWEEN STATUTE AND CONSTITUTIONAL PROVISION—