December 30, 1993

OPINION NO. 93-077

David E. Aldstadt, Director
Governor's Office of Veterans Affairs
Office of the Governor
Columbus, Ohio 43266-0601

Dear Director Aldstadt:

You have requested an opinion regarding the legal residence of incarcerated persons for the specific purposes of R.C. 5901.08. Pursuant to R.C. 5901.08, an applicant for assistance from a county veterans service commission must be "a bona fide resident of the state for at least one year and of the county for at least six months." You wish to know whether a person incarcerated in a particular county can count the time spent as a prisoner toward the six months in the county required by R.C. 5901.08 or whether for these purposes the incarcerated person retains the residence he or she had prior to incarceration.[1]

I. Bona Fide Resident Is Person Who Has Established a Domicile

Previous opinions of the Attorney General have held that a "bona fide resident" for purposes of R.C. 5901.08 is a person whose domicile is in the state and the county where the application is made. *See* 1974 Op. Att'y Gen. No. 74-093 (syllabus, paragraph one); 1957 Op. Att'y Gen. No. 707, p. 263. Domicile is established by actual presence in a place coupled with the intent to make that place home and to return there whenever absent. *Sturgeon v. Korte*, 34 Ohio St. 525, 534 (1878); *Hager v. Hager*, 79 Ohio App. 3d 239, 607 N.E.2d 63 (Greene County 1992). The determination of a person's domicile thus is often quite fact-specific, though generally adults are free to change their

[1] It should be noted that R.C. 5901.08 requires first that an individual be a bona fide resident of the state and the county of application. The statute then imposes additional durational residency requirements for both the state and the county. Proposed legislation has been introduced that may change these durational residency requirements. The resolution of your question, however, depends on an analysis of how bona fide residence is established in the first instance; therefore, the conclusion reached in this opinion will not be affected by a change in the durational requirements. This opinion does not address any issues that may exist with respect to the imposition of durational requirements on bona fide residents who would otherwise be eligible for benefits.

domicile at will. When an adult is physically or legally incapable of forming the required intent toward a place, however, the law will assign that person a domicile. *Sturgeon*, 34 Ohio St. at 535.

II. Domicile of Prisoners

A. Generally

There are two different approaches to determining the domicile of prisoners. The strict traditional rule is reflected in the Restatement (Second) of Conflict of Laws §17 (1971), which stated that "[a] person does not acquire a domicile of choice by his presence in a place under physical or legal compulsion." Pursuant to this rule, prisoners are legally incapable of choosing a new domicile and, therefore, retain their pre-incarceration domicile as a matter of law. *Id.*, comment c. Any evidence of a prisoner's intent to change his or her domicile during the incarceration is irrelevant, because it is impossible to change domicile while incarcerated. *Id.*, comment b.

The more flexible "modern" rule provides that although a prisoner is presumed to retain his or her pre-incarceration domicile, in particular contexts the prisoner may rebut that presumption by appropriate evidence. This rule was first enunciated in the case of *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973), which involved domicile under federal law for purposes of diversity jurisdiction. *See also Sullivan v. Freeman*, 944 F.2d 334 (7th Cir. 1991); *Housand v. Heiman*, 594 F.2d 923 (2nd Cir. 1979); *Jones v. Hadican*, 552 F.2d 249 (8th Cir. 1977), *cert. denied*, 431 U.S. 941 (1977). Some courts have extended application of the modern rule into additional areas of law that involve determinations of domicile, which thus means that the determination may vary depending on the precise issues and interests at stake. *See Tate v. Collins*, 622 F. Supp. 1409 (W.D. Tenn. 1985) (voting); *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466 (S.D. N.Y. 1983) (RICO); *Dane v. Board of Registrars*, 374 Mass. 152, 371 N.E.2d 1358 (1978) (voting); *Curry v. Jackson Circuit Court*, 151 Mich. App. 754, 391 N.W.2d 476 (1986) (state freedom of information act requests); *McKenna v. McKenna*, 282 Pa. Super. 45, 422 A.2d 668 (1980) (divorce). The modern rule has been adopted in the current edition of the Restatement. Restatement (Second) of Conflict of Laws §17 and comment b (1988).

Under the modern rule, a prisoner must present objective evidence to establish a change of domicile, thus the determination is invariably fact-specific. An unsubstantiated declaration of intent to stay in the locality where incarcerated is insufficient. *Stifel*, 477 F.2d at 1126; *see also Jones*, 552 F.2d at 251 (rebuttable presumption rule allows prisoner to show "truly exceptional circumstances" that would justify a finding of domicile at place of incarceration); Restatement (Second) of Conflict of Laws §17 comment b (1988) (commenting that acquiring a domicile of choice in a prison is "difficult" and "highly unlikely," but not impossible).

B. Ohio Case Law

The only Ohio case that has expressly addressed the issue of whether a prisoner can effect a change of domicile while incarcerated is *Murray v. Remus*, 4 Ohio L. Abs. 7 (Ct. App. Hamilton County 1925), which concerned the service of a summons, in which context the court applied the

strict traditional rule that a prisoner cannot by any evidence change his or her domicile. No subsequent Ohio court has been presented with a direct challenge to application of the traditional rule, although several lower court cases contain general discussions of prisoner's domicile in terms that suggest there might be circumstances under which a prisoner's residence could be changed during incarceration. *See, e.g., Wernert v. Wernert*, 61 Ohio Misc. 2d 436, 439, 579 N.E.2d 800, 802 (C.P. Lucas County 1991) ("an involuntary incarceration alone will not effect a change of residence" (quoting *Gonzalez v. Gonzalez*, No. 3384 (Ct. App. Lorain County Feb. 9, 1983) (unreported))); *Bowers v. Baughman*, 29 Ohio App. 2d 277, 279, 281 N.E.2d 201, 202 (Allen County 1972) ("[g]enerally, a person's domicile is not changed by involuntary confinement in a penitentiary"). Nonetheless, the most recent discussion of prisoner's domicile by the Ohio Supreme Court, in *State ex rel. Saunders v. Court of Common Pleas*, 34 Ohio St. 3d 15, 516 N.E.2d 232 (1987), which concerned a dispute over venue, clearly reflects the strict traditional view:

> although sparse, precedent in this state indicates that this residence is not altered by imprisonment or other involuntary commitment. In *Sturgeon v. Korte* (1878), 34 Ohio St. 525, at 535, this court stated (albeit in dictum):
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> "*** A person under confinement for crime can not adopt a new residence until discharged from imprisonment. Such disability is said to arise from the general principle that a person under the power and authority of another possesses no right, or is incapacitated, to choose a residence. Story's Conflict of Laws, Section 46."
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> In *Murray v. Remus* (App. 1925), 4 Ohio Law Abs. 7, motion to certify overruled (1925), 3 Ohio Law Abs. 690, 691, the Court of Appeals for Hamilton County held:
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> "4. _Residence in a place, to produce a change of domicile, must be voluntary. If therefore it be by constraint or involuntary, as arrest, imprisonment, etc., the antecedent domicile of the party remains._"
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> In *Bowers v. Baughman* (1972), 29 Ohio App. 2d 277, 58 O.O.2d 492, 281 N.E. 2d 201, the Court of Appeals for Allen County held that a psychopathic offender committed to Lima State Hospital could not gain residence in Allen County for divorce purposes under Civ. R. 3(B)(9).

Id. at 16, 516 N.E.2d at 233.

While it must be acknowledged that the above language is dictum,[2] the fact that the Ohio Supreme Court, in 1987, did not use or acknowledge the language of the modern rule is relevant to the issue raised here, and suggests that Ohio law has not yet embraced the modern rule, at least in many contexts. Although it is possible that in particular contexts an Ohio court might find the reasoning of the modern rule cases persuasive, none of those cases stands as mandatory precedent for Ohio courts applying R.C. 5901.08. Additionally, sound arguments exist for retaining the

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[2] The Ohio Supreme Court decided the case by holding that the relator had an adequate remedy at law and therefore was not entitled to a writ of mandamus. *See State ex rel. Saunders v. Court of Common Pleas*, 34 Ohio St. 3d 15, 15, 516 N.E.2d 232, 232 (1987). Nevertheless, the court proceeded to discuss the law relating to residence in dictum, as set out above.

traditional rule for purposes of eligibility for county veterans' assistance under R.C. 5901.08, such as the clarity of the rule and the avoidance of undue burden on the resources of those counties where prisons are located. Therefore, unless the modern rule is expressly adopted by an Ohio court or by the legislature, veterans service commissions should continue to determine the residence of incarcerated persons for purposes of R.C. 5901.08 by applying the strict traditional rule.

III. Conclusion

It is therefore my opinion, and you are hereby advised that, for purposes of R.C. 5901.08, which specifically concerns eligibility for veterans' assistance funds within a particular county, an incarcerated individual remains a resident of the county where he or she had a domicile prior to the incarceration and the individual is precluded from changing his or her domicile until released. Unless an individual has already established bona fide residence in a county before being incarcerated there, the time spent as a prisoner does not count toward the six month county residence requirement of R.C. 5901.08.

Respectfully,

LEE FISHER
Attorney General

December 30, 1993

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SYLLABUS: 93-077

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