1992

Shawnta Herrera v. Utah Department of Health : Brief of Petitioner

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SHAWNTA HERRERA Petitioner, vs. UTAH DEPARTMENT OF HEALTH, DIVISION OF HEALTH CARE FINANCING, Respondent.	:	Case No. 920603-CA (Priority No. 15)

BRIEF OF PETITIONER

APPEAL FROM AN ORDER OF THE DIRECTOR
OF THE UTAH DEPARTMENT OF HEALTH

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PARTIES TO THE PROCEEDINGS

Shawnta Herrera, Petitioner

Utah Department of Health, Division of Health Care Financing, Respondent.

Primary Children's Medical Center, representing the interest of Shawnta Herrera in this matter.

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to section 78-2-3(2)(a) of the Utah Code, giving it appellate jurisdiction over the final Orders and Decrees resulting from formal adjudicative proceedings of state agencies. This action is an appeal from an Order issued by the Utah Department of Health following a formal hearing.

ISSUES PRESENTED AND STANDARD FOR REVIEW

ISSUES PRESENTED

The following are at issue in this Appeal:

1. Did the Utah Department of Health, Division of Health Care Financing erroneously apply the law in ruling that Shawnta Herrera was not a resident of the State of Utah between December 7, 1991 and February 1, 1991?

2. Did the Department of Health, Division of Health Care Financing, erroneously apply the law when it determined that Shawnta Herrera was not entitled to Medicaid benefits during the period stated above?

STANDARD OF REVIEW

The standard of review in this proceeding is set forth in Section 63-46b-16(4) of the Utah Code. It provides:

> The appellate court should grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
(b) the agency has acted beyond the jurisdiction conferred by any statute;
(c) the agency has not decided all the issues requiring resolution;
(d) the agency has erroneously interpreted or applied the law;
(e) the agency has engaged in an unlawful procedure decision-making process or has failed to follow prescribed procedure;
(f) the persons taking agency action were illegally constituted as a decision-making body or were subject to disqualification;
(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
(h) the agency action is:
(i) an abuse of the discretion delegated to the agency by statute;
(ii) contrary to the rule of the agency;
(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
(iv) otherwise arbitrary or capricious.

In addressing the issues presented, this court is not bound by the determination of the Department of Health. Addressing the statute just cited, particularly subpart (d), Utah appellate courts have held that "an agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question." *Morton International, Inc. v. Auditing Division*, 814 P.2d 581 (Utah 1991); *see also Mor-Flo Industries v. Board of Review*, 817 P.2d 328 (Utah Ct. App. 1991).

This case involves the application of facts to the regulatory definition of resident. As such, it is a question of application of the law, suitable for the correction of error

standard. *Morton International, Inc.*, 814 P.2d at 586-89. Further, there is no grant of discretion to the agency regarding application of the term. As will be discussed below, federal law requires that certain benefits be available to all eligible residents of a state. The term "resident" has been defined in detail by the United States Department of Health and Human Services. *See* 42 C.F.R. § 435.403, thus removing any agency discretion. In fact, as states have attempted to alter or interpret residency in an alternative fashion, the Department of Health and Human Services has amended the rule to clarify its intent and meaning. *See, e.g.*, 49 Fed. Reg. 13526-31. Hence, the Department of Health is not entitled to discretion in its application.

Neither does the decision of the Department of Health deserve deference because of its expertise. Courts have always been empowered to address residency laws, putting this court in just as good a position as the agency to make the determination.

Thus, in applying the findings of fact in this matter to the law, the court is entitled to apply a correction of error standard and ignore the decision of the Department of Health. It may "decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation." *Morton*, 814 P.2d at 587 (quoting *Savage Industries, Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991).

CONTROLLING LAW

Rule R414-1-17 of the Utah Administrative Code provides:

Medicaid is furnished to eligible individuals who are residents of the State under 42 C.F.R. § 435.403. (The addendum includes 42 C.F.R. § 435.403 in its entirety.)

Section 435.403(m) of 42 C.F.R. provides:

Cases of disputed residency. Where two or more States cannot resolve which State is the State of residence, the State where the individual is physically located is the State of residence.

Section 233.40 of 45 C.F.R. provides:

(a) *Condition for Plan Approval*. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act may not impose any residence requirement which excludes any individual who is a resident of the State except as provided in paragraph (b) of this section. For purposes of this section:

(1) A resident of a State is one: (i) Who is living in the State voluntarily with the intention of making his or her home there and not for a temporary purpose. A child is the resident of the State in which he or she is living other than on a temporary basis. Residence may not depend upon the reason for which the individual entered the State, except insofar as it may bear upon whether the individual is there voluntarily or for a temporary purpose; or

(ii) Who, in living in the State, is not receiving assistance from another State, and entered the State with a job commitment or seeking employment in the State (whether or not currently employed). Under this definition, the child is a resident of the State in which the caretaker is a resident.

(2) Residence is retained until abandoned. Temporary absence from the State, with subsequent returns to the State, or intent to return when the purposes of the absence have been accomplished, does not interrupt continuity of residence.

(b) *Exception*. A State plan under title I, X, XIV or XVI need not include an individual who has been absent from the State for a period in excess of 90 consecutive days (regardless of whether the individual has maintained his or her residence in the State during this period) until he or

she has been present in the State for a period of 30 consecutive days (or a shorter period specified by the State) in the case of such individual who has maintained residence in the State during such period of absence or for a period of 90 consecutive days (or a shorter period as specified by the State) in the case of any other such individual. An individual thus excluded under any such plan may not, as a consequence of that exclusion, be excluded from assistance under the State's Title XIX plan if otherwise eligible under the Title XIX Plan (see 42 C.F.R. § 436.403).

STATEMENT OF THE CASE

This is an appeal from an Order of the Utah Department of Health, Division of Health Care Financing which denied Medicaid benefits to an infant. The infant was born in December 1990 in Murray, Utah and was hospitalized from that date through April 1991. Although the Department of Health paid Medicaid benefits for the infant between February and April 1991, it denied benefits for the months of December 1990 and January 1991 on the grounds that the infant was not a resident of the state of Utah but of Arizona. The Arizona Physicians IPA, Inc., Arizona's Medicaid administrator, also refused to pay benefits during this period, which decision was affirmed by the Arizona Health Care Cost Containment System following a hearing (Appellate Record at Exhibits, hereinafter "R. at _____").

Primary Children's Medical Center, who provided medical care to the infant, requested, on her behalf, a hearing addressing the denied benefits before the Utah Department of Health (R. at 1-2). That resulted in an Order from the Department of Health ruling that the infant was ineligible for Medicaid because she was not

a resident of Utah (R. at 69-77). The Order was affirmed in Response to a Request for Reconsideration (R. at 83-91). Following that ruling, this appeal was filed (R. at 92-93).

STATEMENT OF FACTS

In October 1990, Norma Molina came to Utah from Arizona. She owned no property in Arizona, nor did she leave an apartment in her own name. Upon her arrival in Utah, she stayed with friends and family. (Agency Findings of Fact, R. at 72-73).

On December 6, 1990, Norma Molina gave birth to a baby girl, Shawnta Herrera, at Cottonwood Hospital Medical Center in Murray, Utah. (Agency Findings of Fact, R. at 72-73). Because Shawnta was born prematurely, she was transferred to Primary Children's Hospital the next day, where she remained hospitalized until April 1991. (Agency Findings of Fact, R. at 72-73).

Ms. Molina resided continuously in Utah after October 1990 (Agency Findings of Fact, R. at 72-73). She applied for prenatal benefits in that month, and was deemed eligible for such benefits through Shawnta's birth. (R. at Exhibits). She applied for Medicaid assistance in December 1990 and again in March 1991, (Response to Request for Reconsideration, R. at 83-91). When making those applications, she expressed her intent to make her home in Utah. (Request for Reconsideration, R. at 80).

Between January 9, 1991 and March 8, 1991, Ms. Molina was employed by Northwest Textiles in Midvale, Utah. (Agency

Findings of Fact, R. at 72-73; Letter from Anna Navarrate, R. at Exhibits).

According to the notes of representatives of the Department of Health, during the months of December 1990 and January 1991, Ms. Molina, despite her residency in Utah, did not surrender her rights to certain benefits from Arizona, nor did she notify Arizona authorities of her Utah residence (Response to Request for Reconsideration, Exhibits, R. at 83-91). She allegedly received AFDC support in these months, although it is unclear how it was delivered to her. (Response to Request for Reconsideration, Exhibits, R. at 83-91; Transcript of Hearing, R. at 29). When Ms. Molina spoke with representatives of Primary Children's Medical Center in December 1990, however, she stated that she had no means of paying for medical services rendered. (Transcript of Hearing, R. at 30-31). Arizona closed its file on Ms. Molina on January 31, 1991. (Response to Request for Reconsideration, Exhibits, R. at 83-91).

After learning that Norma Molina was living in Utah, APIPA, the Arizona Medicaid administrator, refused to pay Shawnta's medical expenses for December 1990 and January 1991. (R. at Exhibits). In justifying denial of the claim, the Director of the Arizona Health Care Cost Containment System stated that (1) APIPA was not properly notified of the care at Primary Children's Medical Center, and (2) "testimony and the records support the contention that the patient was not a resident of the state of Arizona." (Decision, R. at Exhibits). He ordered a reevaluation

of Ms. Molina's eligibility for AFDC and Medicaid benefits, (R. at Exhibits), and since that time, Arizona authorities have refused to pay any of Shawnta's medical expenses for this period. (Letter from Leonard J. Kirschner, R. at 82).

In March 1991, the Utah Department of Health, Division of Health Care Financing approved Ms. Molina's application for Medicaid benefits retroactive to February 1, 1991. (Agency Findings of Fact, R. at 72-73). Shawnta Herrera's medical expenses incurred at Primary Children's Medical Center from that date forward were paid by the Department of Health, Division of Health Care Financing (Transcript of Hearing, R. at 61). The expenses for December 1990 and January 1991 have not been paid, despite the residency of Ms. Molina and Shawnta in Utah (Transcript of Hearing, R. at 38).

Shawnta Herrera moved to Arizona with her mother in June 1991. (Transcript of Hearing, R. at 47).

SUMMARY OF ARGUMENT

At its essence, this claim involves a disagreement between Utah and Arizona as to who should provide Medicaid benefits for an infant, the petitioner Shawnta Herrera. The Utah Department of Health takes the position that Shawnta and her mother were not residents of Utah, citing a future intent to return to the mother's previous state of residence, Arizona. Arizona authorities, on the other hand, claim that the mother's extended presence in Utah, without leaving a home in Arizona, make Shawnta

a resident of Utah. In the middle of this dispute, the infant, her mother and health care providers are left with significant medical expenses.

In outlining the regulatory framework for Medicaid, federal authorities anticipated such disputes. For this reason, they adopted a regulation to govern them. In the case of a dispute, residency is determined according to physical presence. Because Shawnta was physically in the State of Utah, she is deemed a Utah resident for Medicaid purposes. Hence, she is entitled to any benefits from Utah for which she is eligible.

Furthermore, Shawnta was in fact a resident of Utah. Federal Regulations governing Medicaid benefits define residence according to physical presence other than on a temporary basis. Viewed in light of existing legal authority concerning residency, this signifies presence in a locale coupled with an intent to remain there for an indefinite time.

When Norma Molina came to Utah, she intended to remain for an indefinite time. She left no home or apartment in Arizona, and although she intended to return at some time, the date of and place for that return was uncertain. One and one-half months after arriving in Utah, she gave birth to Shawnta Herrera, who was hospitalized for the first four and one-half months of her life. Although Ms. Molina might have returned to Arizona for a time during these months, she did not. Even after Shawnta's discharge from the Hospital, Ms. Molina continued to reside in Utah, staying through June 1991.

While in Utah, Norma Molina took a job, applied for medical and welfare benefits, and otherwise made Utah the center of her life. In so doing, on at least one occasion she expressed her specific intent to make her home in Utah. Although she maintained some future intent to return to Arizona, during the period at dispute herein, her intent was to remain in Utah for an indefinite period. As such, she was a resident of Utah and her daughter is entitled to Medicaid benefits.

ARGUMENT

This Appeal involves a dispute as to residency. Following her premature birth in Murray, Utah on December 6, 1990, Shawnta Herrera was hospitalized for the first four and one-half months of her life. Despite her apparent eligibility for Medicaid benefits, which were paid for February, March and April of 1991, The Utah Department of Health, Division of Health Care Financing ("Department of Health"), denied those benefits for December 1990 and January 1991 on the grounds that Shawnta was not a resident of Utah. Arizona, the site designated by the Department of Health as Shawnta's State of Residence during those months, did the same. As a consequence, the medical expenses incurred by Shawnta at Primary Children's Medical Center remain unpaid. For this reason, Shawnta appeals the denial of those benefits by the Department of Health.

I. BECAUSE UTAH AND ARIZONA CANNOT RESOLVE THE DISPUTE AS TO HER RESIDENCY, SHAWNTA HERRERA MUST BE CONSIDERED A RESIDENT OF THE STATE OF UTAH.

A. Federal Law Requires States to Provide Medicaid Benefits to All Eligible Residents and Allows Every Individual to Have a Residence for the Purpose of Such Benefits.

To obtain federal assistance for its Medicaid program, the Department of Health had to adopt a plan meeting statutory and regulatory requirements, as well as receiving the approval of the United States Department of Health and Human Services ("HHS"). *See generally* 42 U.S.C. § 1396a *et seq*. Among the requirements is the condition that a "plan may not contain any residence requirement which excludes any individual who resides in the state," even if that person has no fixed address. 42 U.S.C. § 1396a(b). Thus, the Medicaid plan for Utah cannot be interpreted to deny benefits to an otherwise eligible resident of the state.

To determine who is a resident to in order to qualify for Medicaid benefits, the Utah plan incorporates the regulations promulgated by HHS. Utah Admin. Code R414-1-17 (1992) (incorporating 42 C.F.R. § 435.403). As HHS has amended these regulations since their inception, it has made clear its intent to allow every eligible[1] individual access to Medicaid benefits. Thus, HHS supported certain changes by stating that the purpose of the rule is:

> to permit uniform application and to insure that no otherwise eligible individual is denied Medicaid because no

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[1] Eligibility, in this context, refers not to residency but to factors relating to income and disability which determine who is entitled to Medicaid benefits. *See generally* 42 U.S.C. § 1396a.

> state recognizes him as a resident .... We want to insure that no individual finds himself without any state of residence for Medicaid purposes or is denied his Constitutional rights to travel freely among states.

Summary, Supplementary Information, 44 Fed. Reg. 41434 (1979); *see also* Supplementary Information, 49 Fed. Reg. 13527 (1984). Given this language, there can be no question that Shawnta Herrera is entitled to residency in some state for the purpose of obtaining Medicaid benefits.

The regulatory section governing residence, 42 C.F.R. § 435.403, provides numerous rules to determine the residency of persons in distinct situations. Shawnta's residency, for instance, is determined according to a separate regulation governing residence under AFDC programs. 42 C.F.R. § 435.403(h)(3). It provides that "A child is a resident of the state in which he or she is living other than on a temporary basis." 45 C.F.R. § 233.40(j)(1). Other sections clarify the state of residence where a person might be considered a resident of either of two states. *See* 42 C.F.R. § 435.403(h)(4) (residence of institutionalized minors). Of particular importance for this case is the rule dealing with disputed residency, a "tie breaker" provision. It provides: "Where two or more states cannot resolve which State is the State of residence, the state where the individual is physically located is the state of residence." 42 C.F.R. § 435.403(m). Thus, when states are unable to resolve the question of residency, physical presence becomes the determining factor.

B. As Utah and Arizona Cannot Resolve Shawnta Herrera's Residence During December 1990 and January 1991, She was a Resident of Utah, the State where She was Physically Present.

In this case, both Arizona and Utah have refused to provide Medicaid payments for December 1990 and January 1991. Although the Department of Health paid benefits between February and April 1991, it denied those benefits for December 1990 and January 1991 on the grounds that Shawnta was not a resident of Utah, but of Arizona. Similarly, Arizona refused to pay medicaid such benefits for this period, in part because "the patient was not a resident of the state of Arizona at the time services were provided." Challenges to the denial of benefits in each state were unsuccessful and negotiations between the states upon Request for Reconsideration in Utah proved fruitless. When Arizona refused to pay, Utah did the same.

Hence, this matter obviously involves a dispute in which "two or more states cannot resolve which State is the State of residence." As such, "the State where the individual is physically located is the State of Residence." Without dispute, Shawnta Herrera and her mother were physically present in Utah during December 1990 and January 1991. Therefore, Utah is the State of Residence. Shawnta is entitled to medicaid benefits in Utah for those months.

II. SHAWNTA HERRERA WAS A IN FACT A RESIDENT OF UTAH IN DECEMBER 1990 AND JANUARY 1991, AND THEREFORE ENTITLED TO MEDICAID BENEFITS DURING THAT TIME.

As noted above, Shawnta Herrera should be considered a resident of Utah during December 1990 and January 1991 based on the dispute between Utah and Arizona and her physical presence in Utah. Aside from that determination, however, Shawnta also qualified as a resident of Utah under the provision defining residency for children. That states: "A child is a resident of the state in which he or she is living other than on a temporary basis." 45 C.F.R. § 233.40(j)(1). Because Shawnta was in Utah for an indefinite period, not on a temporary basis, she was a resident of the state.

A. A Resident Intends to Remain in a State For a Time or Indefinitely.

Courts have not addressed the regulatory provision governing Shawnta's residency. Interpretation of that provision, however, is aided by reference to judicial decisions relating to residency or domicile.[2] *See Application of Ruiz v. Lavine*, 49 A.D.2d 1,

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[2]Residency is a term subject to numerous interpretations, *see Ortman v. Miller*, 33 Mich.App. 451, 190 N.W.2d 242, 244 (1971)(discussing various interpretations). In most cases involving determination of residency for purposes of legal rights and privileges, however, residency is deemed the equivalent of the common law doctrine of domicile. *See, e.g.*, Utah Code Ann. § 53B-8-102(1) (1992); *Paulson v. Forest City Community School Dist.*, 238 N.W.2d 344 (Iowa 1976).

Such is the case here, given the governing regulation's reference to physical presence "other than on a temporary basis." The cases addressing domicile, however, substitute "intent to remain for an indefinite time" for the regulatory language. *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978).

370 N.Y.S.2d 710 (1975)(using rules of common law domicile to determine whether individual qualified for Medicaid).

Justice Holmes defined domicile as "the technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined." *Williamson v. Osenton*, 232 U.S. 619, 625 (1914). Every person must have a domicile, *See Frame v. Residency Appeals Committee*, 675 P.2d 1157, 1168 (Utah 1983)(Howe, J. dissenting), which is usually a person's home, "where a person dwells and which is the center of his domestic, social and civil life." Restatement (Second) of Conflict of Laws §§ 11-12. Where an individual resides is presumed to be her domicile. *See District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941).

Along with physical presence, the critical element in determining an individual's residence or domicile is intent. The Restatement states: "To acquire a domicil ... a person must intend to make that place his home for a time at least." Restatement (Second) of Conflict of Laws § 18; *Frame*, 675 P.2d at 1168 (Howe, J. dissenting); *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698 (1st Cir. 1979). Courts addressing the same concept have emphasized that the individual must intend to remain for an "indefinite" time, *Allen*, 583 P.2d at 615, *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979), looking specifically at whether an individual has a present intention to reside elsewhere. *Williamson v. Osenton*, 232 U.S. 619 (1914). In this case,

therefore, the key is whether Shawnta and her mother intended to reside in Utah for an indefinite time.

B. Shawnta Herrera was a Resident of Utah Because She Intended to Remain for an Indefinite Time.

In this case, the expressions and actions of Shawnta's mother demonstrate that Shawnta was not in Utah for a temporary purpose, but that she was living in Utah indefinitely.[3] Norma Molina came to Utah from Arizona in October 1990. Although she stayed with friends and family, obtaining no home or apartment of her own, she neither left real estate or an apartment in her name in Arizona. Shortly after arrival, she applied for prenatal benefits through the Department of Health, for which she was classified as eligible.

After Norma Molina had been in Utah for a month and a half, longer than a typical vacation or visit, she delivered Shawnta. As was noted above, Shawnta was hospitalized until she was four and one-half months old. During this time, Ms. Molina was free to return to Arizona. Instead, however, she remained in Utah, taking employment with a Utah firm[4] and working during several

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[3]The domicile of a child is that of its parent, *Oleen v. Oleen*, 15 Utah 2d 326, 392 P.2d 792, 794 (1964), and the domicile a child born out of wedlock, as was Shawnta, is that if its mother, *Application of Morse*, 7 Utah 2d 312, 324 P.2d 773 (1958). Thus, the determination of whether Shawnta was in Utah for a temporary purpose hinges on her mother's intent.

[4]According to the Assistance Payment Administration Manual III-F, used by the Department of Health to determine residency, Utah residency can be demonstrated by verification of employment in the state. *See* APA, Volume IIIF, Table VIII, Examples of Acceptable Verifications, included in addendum. Further, persons

months that Shawnta was hospitalized. She also made application for Utah Medicaid benefits, both in December 1990 and again in March 1991. On those applications, she expressed her intent to make Utah her home.

In the hearing on this matter, the Department of Health emphasized that Norma Molina intended to return to Arizona. Such intent, however, is not inconsistent with Utah residency. Utah courts have held that "A floating intention to return to a former abode is not sufficient to prevent the new abode from becoming one's domicile." *Gardner v. Gardner*, 118 Utah 496, 222 P.2d 1055, 1057 (1950). Thus, contemplation of retirement in a location other than one's principal residence has not prevented the establishment of domicile, *Perito v. Perito*, 756 P.2d 895 (Alaska 1988), and college students have been allowed to acquire domicile at the college, despite the fact that they intend to move elsewhere following graduation. *Lloyd*, 251 S.E.2d at 861-65; *Liberty Mutual Ins. Co. v. Craddock*, 26 Md.App. 296, 338 A.2d 363 (1975). In this case, while Norma Molina intended to return to Arizona, she knew neither when nor where she would return. Thus, her present intent, demonstrated by her actions, was to remain. The "future" or "floating" intent would not prevent her from claiming Utah residency.

"who are employed in another state are usually not Utah residents unless they commute regularly." APA, Volume IIIF, Glossary, "Resident". Using this definition, Norma Molina could not be a resident of any other state based upon her employment in Utah between January and March 1991.

Further, the fact that Norma Molina was in Utah for only eight months does not prevent her from claiming Utah residence. If the requisite intent is present, domicile can be acquired instantly, *Krasnov v. Dinan*, 465 F.2d 1298 (3rd Cir. 1972). For instance, in *Person v. Person*, 563 N.E.2d 161 (Ind. Ct. App. 1990), a woman who had apparently reestablished her domicile in Indiana, her childhood home, who returned to her marital home in Illinois to attempt a reconciliation with her estranged husband, but stayed only for a week, acquired an Illinois residency during that time. *Id.* at 164. In this case, Shawnta acquired Utah residency upon arrival, in that she immediately made Utah the center of her life's activity.

In summary, Norma Molina came to Utah with the intent of making it her home for a time. Upon arrival, she made it the center of her activity, which continued for eight months. While she considered returning to Arizona, that was not her present intention, reflected further in the fact that she remained in Utah more than a month after Shawnta's release from the hospital. Given such facts, Shawnta and her mother were residents of Utah, entitled to the benefits of such residency. This includes entitlement to Medicaid benefits for December 1990 and January 1991.

In arguing against this conclusion, the Department of Health argued that Norma Molina remained eligible for and received AFDC benefits from Arizona during December 1990 and January 1991. Although it is unclear whether she actually received benefits,

and such action would admittedly be inconsistent with Utah residency, such conduct would be understandable in light of Ms. Molina's situation and the behavior of each state agency.

With respect to the agencies, although Arizona allegedly provided AFDC benefits in December and January, it denied Medicaid payments. While that denial was based in part on procedural defects in the claim, after a hearing on the matter, the Director of Arizona's Cost Containment System also determined that Shawnta was not a resident of Arizona during those months and that Ms. Molina's eligibility should be reevaluated. Arizona has persisted in its refusal to pay those benefits.

In contrast, the Department of Health paid no benefits for December and January, but did pay Medicaid and AFDC benefits to Ms. Molina between February and June of 1991.[5] Following a hearing, however, the Department determined that those benefits

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[5]The Department of Health paid Medicaid benefits on Shawnta's behalf for the months of February, March and April 1990, but denied the same for December 1990 and January 1991. At the hearing of this matter, representatives of the Department of Health justified the distinction by explaining that Ms. Molina considered herself a resident of Arizona during December 1990 and January 1991, but not thereafter (R. at 33). While the Department based its distinction on residency, it resembles a waiting period. Waiting periods for new residents to obtain Medicaid benefits have been deemed unconstitutional, since they violate equal protection because of their potential effect on interstate travel. *Shapiro v. Thompson*, 394 U.S. 618 (1968).

Recognizing this problem, the Utah hearing officer recommended that Shawnta be deemed a resident of Utah from December forward, noting that there was no significance to February 1, 1991 (R. at 74-71). The Director also refused to accord significance to that date, but instead held that Shawnta was not eligible for benefits at any time, and that an overpayment should be requested (R. at 69-77).

were improperly paid because Ms. Molina was not a resident of Utah.

In these circumstances, with both agencies paying benefits which they later described as improperly paid, Norma Molina cannot be faulted for accepting benefits from either state. She was on public support in Arizona and applied for the same in Utah, suggesting dependency. She was most likely without sufficient understanding of the system to know of her inconsistencies, and would reasonably have accepted a check without asking questions or considering the legal ramifications of acceptance. Further, this is in no way a case where duplicate benefits were sought, and this appeal is made only to obtain benefits for medical care already provided to Shawnta Herrera. Hence, the residency of Shawnta Herrera and her mother should not revolve on benefits she may have accepted from Arizona in the months in question.

Thus, based on their intent to remain in Utah for an indefinite time. Shawnta Herrera and her mother should be considered residents of Utah.

CONCLUSION

At the root of this appeal is the unwillingness of both Arizona and Utah to provide Medicaid benefits to an infant. The states, thereby, seek to transfer the cost of medical care to the infant, her mother, and the hospital. While the States have an interest in preserving their limited funds, in this case the

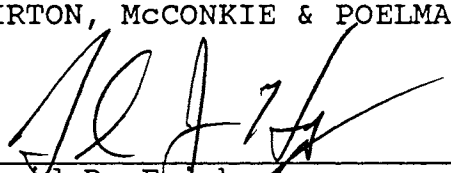
refusal of the Department of Health is unjustified. Federal regulations specifically fix residence at the site of physical presence where there is a dispute between states. Thus, the Department of Health is responsible for Shawnta's medical care.

Further, When Norma Molina came to Utah, she came for an indefinite period. While she intended to return to Arizona, she knew neither when or to where she would return. While in Utah, she acted as a resident, making her home here, working and otherwise making it the center of her domestic, social and civil life. As such, she was a resident of Utah and entitled to the benefits of residency, including Medicaid benefits for her daughter.

Therefore, this court should reverse the Order of the Department of Health and Order payment of Medicaid benefits on behalf of Shawnta Herrera for the months of December 1990 and January 1991.

RESPECTFULLY SUBMITTED this 30th day of November, 1992.

KIRTON, McCONKIE & POELMAN



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 1992, four true and correct copies of the BRIEF OF PETITIONER were deposited in the United States Mail, postage prepaid to:

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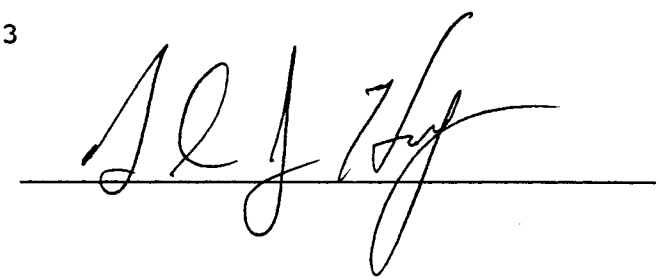

ADDENDUM

Contents

cover the medically needy, it may provide Medicaid to individuals who—

(a) Are 65 years of age and older, as specified in § 435.520; and

(b) Meet the income and resource requirements of Subpart I of this part.

[46 FR 47986, Sept. 30, 1981]

§ 435.322 Medically needy coverage of the blind in States that cover individuals receiving SSI.

If the agency provides Medicaid to individuals receiving SSI and elects to cover the medically needy, it may provide Medicaid to blind individuals who meet—

(a) The requirements for blindness, as specified in §§ 435.530 and 435.531; and

(b) The income and resource requirements of Subpart I of this part.

[46 FR 47986, Sept. 30, 1981]

§ 435.324 Medically needy coverage of the disabled in States that cover individuals receiving SSI.

If the agency provides Medicaid to individuals receiving SSI and elects to cover the medically needy, it may provide Medicaid to disabled individuals who meet—

(a) The requirements for disability, as specified in §§ 435.540 and 435.541; and

(b) The income and resource requirements of Subpart I of this part.

[46 FR 47986, Sept. 30, 1981; 46 FR 54743, Nov. 11, 1981]

§ 435.326 Individuals who would be ineligible if they were not enrolled in an HMO.

If the agency provides Medicaid to the categorically needy under § 435.212, it may provide Medicaid under the same rules to medically needy recipients who are enrolled in a federally qualified HMO or in an entity specified in § 434.20 (a)(3) and (a)(4), § 434.26(b)(3), § 434.26(b)(5)(ii) or section 1903(m)(6) of the Act which provides services as described in § 434.21(b) of this chapter.

[55 FR 23745, June 12, 1990]

§ 435.330 Medically needy coverage of the aged, blind, and disabled in States that impose eligibility requirements more restrictive than used under SSI.

(a) If an agency provides Medicaid as categorically needy only to those aged, blind, or disabled individuals who meet more restrictive requirements than used under SSI and elects to cover the medically needy, it may provide Medicaid as medically needy to those aged, blind, or disabled individuals who—

(1) Are not categorically needy, as specified in paragraph (b) of this section;

(2) Have income and resources within the standards established under Subpart I of this part; and

(3) If applying as blind or disabled, meet the blindness or disability requirements established under § 435.121.

(b) To determine whether an individual is covered as categorically needy or medically needy, the agency must—

(1) Consider as categorically needy those individuals who meet the State's categorically needy financial standard and—

(i) Who, before their incurred medical expenses are deducted from income, meet the financial eligibility requirements for SSI or a State supplement; or

(ii) Whose OASDI increases are not counted under §§ 435.134 and 435.135.

(2) Consider as medically needy all other individuals.

[46 FR 47986, Sept. 30, 1981]

§ 435.340 Protected medically needy coverage for blind and disabled individuals eligible in December 1973.

If an agency provides Medicaid to the medically needy, it must cover individuals who—

(a) Where eligible as medically needy under the Medicaid plan in December 1973 on the basis of the blindness or disability criteria of the AB, APTD, or AABD plan;

(b) For each consecutive month after December 1973, continue to meet—

(1) Those blindness or disability criteria; and

(2) The eligibility requirements for the medically needy under the December 1973 Medicaid plan; and

(c) Meet the current requirements for eligibility as medically needy under the Medicaid plan except for blindness or disability criteria.

[46 FR 47987, Sept. 30, 1981]

§ 435.350 Coverage for certain aliens.

If an agency provides Medicaid to the medically needy, it must provide the services necessary for the treatment of an emergency medical condition, as defined in § 440.255(c) of this chapter, to those aliens described in § 435.406(c) of this subpart.

[55 FR 36819, Sept. 7, 1990]

Subpart E—General Eligibility Requirements

§ 435.400 Scope.

This subpart prescribes general requirements for determining the eligibility of both categorically and medically needy individuals specified in Subparts B, C, and D of this part.

§ 435.401 General rules.

(a) A Medicaid agency may not impose any eligibility requirement that is prohibited under Title XIX of the Act.

(b) The agency must base any optional group covered under Subparts B and C of this part on reasonable classifications that do not result in arbitrary or inequitable treatment of individuals and groups and that are consistent with the objectives of Title XIX.

(c) The agency must not use requirements for determining eligibility for optional coverage groups that are—

(1) For families and children, more restrictive than those used under the State's AFDC plan; and

(2) For aged, blind, and disabled individuals, more restrictive than those used under SSI, except for individuals receiving an optional State supplement as specified in § 435.230 or individuals in categories specified by the agency under § 435.121.

§ 435.402 [Reserved]

§ 435.403 State residence.

(a) *Requirement.* The agency must provide Medicaid to eligible residents of the State, including residents who are absent from the State. The conditions under which payment for services is provided to out-of-State residents are set forth in § 431.52 of this chapter.

(b) *Definition.* For purposes of this section—"Institution" has the same meaning as "Institution" and "Medical institution", as defined in § 435.1009 of this chapter. For purposes of State placement, the term also includes "foster care homes", licensed as set forth in 45 CFR 1355.20, and providing food, shelter and supportive services to one or more persons unrelated to the proprietor.

(c) *Incapability of indicating intent.* For purposes of this section, an individual is considered incapable of indicating intent if the individual—

(1) Has an I.Q. of 49 or less or has a mental age of 7 or less, based on tests acceptable to the mental retardation agency in the State;

(2) Is judged legally incompetent; or

(3) Is found incapable of indicating intent based on medical documentation obtained from a physician, psychologist, or other person licensed by the State in the field of mental retardation.

(d) *Who is a State resident.* A resident of a State is any individual who:

(1) Meets the conditions in paragraphs (e) through (l) of this section; or

(2) Meets the criteria specified in an interstate agreement under paragraph (k) of this section.

(e) *Placement by a State in an out-of-State institution*—(1) *General rule.* Any agency of the State, including an entity recognized under State law as being under contract with the State for such purposes, that arranges for an individual to be placed in an institution located in another State, is recognized as acting on behalf of the State in making a placement. The State arranging or actually making the placement is considered as the individual's State of residence.

(2) Any action beyond providing information to the individual and the individual's family would constitute arranging or making a State placement. However, the following actions do not constitute State placement:

(i) Providing basic information to individuals about another State's Medicaid program, and information about the availability of health care services and facilities in another State.

(ii) Assisting an individual in locating an institution in another State, provided the individual is capable of indicating intent and independently decides to move.

(3) When a competent individual leaves the facility in which the individual is placed by a State, that individual's State of residence for Medicaid purposes is the State where the individual is physically located.

(4) Where a placement is initiated by a State because the State lacks a sufficient number of appropriate facilities to provide services to its residents, the State making the placement is the individual's State of residence for Medicaid purposes.

(f) *Individuals receiving a State supplementary payment (SSP).* For individuals of any age who are receiving an SSP, the State of residence is the State paying the SSP.

(g) *Individuals receiving Title IV-E payments.* For individuals of any age who are receiving Federal payments for foster care and adoption assistance under title IV-E of the Social Security Act, the State of residence is the State where the child lives.

(h) *Individuals under Age 21.* (1) For any individual who is emancipated from his or her parents or who is married and capable of indicating intent, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(2) For any individual not residing in an institution as defined in paragraph (b) whose Medicaid eligibility is based on blindness or disability, the State of residence is the State in which the individual is living.

(3) For any other non-institutionalized individual not subject to paragraph (h)(1) or (h)(2) of this section, the State of residence is determined in accordance with 45 CFR 233.40, the rules governing residence under the AFDC program.

(4) For any institutionalized individual who is neither married nor emancipated, the State of residence is—

(i) The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or

(ii) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State or residence of the guardian is used instead of the parent's).

(iii) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(i) *Individuals Age 21 and over.* (1) For any individual not residing in an institution as defined in paragraph (b), the State of residence is the State where the individual is—

(i) Living with the intention to remain there permanently or for an indefinite period (or if incapable of stating intent, where the individual is living); or

(ii) Living and which the individual entered with a job commitment or seeking employment (whether or not currently employed).

(2) For any institutionalized individual who became incapable of indicating intent before age 21, the State of residence is—

(i) That of the parent applying for Medicaid on the individual's behalf, if the parents reside in separate States (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's);

(ii) The parent's or legal guardian's State of residence at the time of placement (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's); or

(iii) The current State of residence of the parent or legal guardian who files the application if the individual is institutionalized in that State (if a legal guardian has been appointed and parental rights are terminated, the State of residence of the guardian is used instead of the parent's).

(iv) The State of residence of the individual or party who files an application is used if the individual has been abandoned by his or her parent(s), does not have a legal guardian and is institutionalized in that State.

(3) For any institutionalized individual who became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual is physically present, except where another State makes a placement.

(4) For any other institutionalized individual, the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period.

(j) *Specific prohibitions.* (1) The agency may not deny Medicaid eligibility because an individual has not resided in the State for a specified period.

(2) The agency may not deny Medicaid eligibility to an individual in an institution, who satisfies the residency rules set forth in this section, on the grounds that the individual did not establish residence in the State before entering the institution.

(3) The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from the State if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid.

(k) *Interstate agreements.* A State may have a written agreement with another State setting forth rules and procedures resolving cases of disputed residency. These agreements may establish criteria other than those specified in paragraphs (e) through (i) of this section, but must not include criteria that result in loss of residency in both States or that are prohibited by paragraph (j) of this section. The agreements must contain a procedure for providing Medicaid to individuals pending resolution of the case. States may use interstate agreements for purposes other than cases of disputed residency to facilitate administration of the program, and to facilitate the placement and adoption of title IV-E individuals when the child and his or her adoptive parent(s) move into another State.

(l) *Continued Medicaid for institutionalized recipients.* If an agency is providing Medicaid to an institutionalized recipient who, as a result of this section, would be considered a resident of a different State—

(1) The agency must continue to provide Medicaid to that recipient from June 24, 1983 until July 5, 1984, unless it makes arrangements with another State of residence to provide Medicaid at an earlier date; and

(2) Those arrangements must not include provisions prohibited by paragraph (h) of this section.

(m) *Cases of disputed residency.* Where two or more States cannot resolve which State is the State of residence, the State where the individual is physically located is the State of residence.

[49 FR 13531, Apr. 5, 1984, as amended at 55 FR 48609, Nov. 21, 1990]

§ 435.404 Applicant's choice of category.

The agency must allow an individual who would be eligible under more than one category to have his eligibility determined for the category he selects.

§ 435.406 Citizenship and alienage.

(a) The agency must provide Medicaid to otherwise eligible residents of the United States who are—

(1) Citizens; or

(2) Aliens lawfully admitted for permanent residence or permanently residing in the United States under color of law as defined in § 435.408 of this part;

(3) Aliens granted lawful temporary resident status under sections 245A and 210A of the Immigration and Nationality Act if the individual is aged, blind, or disabled as defined in section 1614(a)(1) of the Act, under 18 years

GLOSSARY

Resident (Utah Resident)	An individual who lives in Utah permanently or indefinitely. Ususally, people who own homes in other states are not Utah residents because their primary place of residence is somewhere else. If a client who owns a home in another state claims NOT to be in Utah for a temporary purpose, that client may be a Utah Resident if he intends to become a Utahn. ~~Clients who are employed in another state are usually not Utah residents unless they commute regularly.~~
Retroactive Month	Any of the three months immediately preceding the initial month.
Safeguard	To protect information about clients so that unauthorized people may not see it.
Sales Contract	A method of selling property, usually real estate. The seller exchanges the property for a contractual promise of a certain amount of money at specific times. The sales contract is an asset that may or may not be exempt.
SAVE	Systematic Alien Verification for Entitlements. This is a computerized information exchange system that gives us information from INS to verify citizenship status.
SAWs	Special Agricultural Workers. A group of aliens who may be eligible for legal temporary status or legal permanent status (amnesty) under the Immigration Reform and Control Act.

TABLE VIII - EXAMPLES OF ACCEPTABLE VERIFICATIONS

Verification: The act of establishing the validity and accuracy of information received in the process of determining eligibility of each applicant or recipient.

This table provides EXAMPLES of acceptable verifications. The worker may use any other reasonable method of verification as long as it provides the necessary information to determine eligibility.

ELIGIBILITY ITEM	ACCEPTABLE VERIFICATION
U.S. RESIDENCE: AGE IDENTIFICATION	(1) Birth Certificate (2) Hospital Birth Record (3) Church Records (4) Recipient of Scoial Secruity Benefits (5) FSA Form 125 (6) Alien Registration (7) Naturalization Papers (8) Correspondence from Immigration and Naturalization service (9) Tribal Records (10) Census Record (11) Driver's License for I.D. only.
SOCIAL SECURITY NUMBER	(1) Social Security Card (2) SSA form 5028
UTAH RESIDENCE	(1) Current Utah DL (2) Employment payroll check stubs (3) Current USES registration (4) House payment receipt (5) Current rent receipt showing 30 days or more (6) Utah telephone book listing (referenced) (7) Tribal Record correspondence (8) Children's residence usually follows that of parents (9) MAO-patient in nursing home ~~(10) Statement of intent to remain in Utah~~
INCOME Earned	(1) Employment payroll check stubs (2) Employer's wage record (3) Self-employment records (4) Tribal records correspondence (5) Copy of most recent 1040
Earned Income Deductions	(1) Check stubs showing payroll deductions or a signed statement from employer (2) Complete expense record for the self-employed (3) Farmer's Home Administration Statement if self-employed farmer.
Free Housing Provided	(1) Employer's records (2) Written agreement
Foster Care Payments	(1) Agency records