

STATE OF WISCONSIN
Department of Health & Family Services
Division of Disability and Elder Services

DDES **Numbered** Memo Series 2007-01
DATE: January 8, 2007
RE: RESIDENCY DETERMINATIONS
PURSUANT TO S. 51.40, STATS.
AND ADMINISTRATIVE
DETERMINATIONS

Supercedes Numbered Memo
DCS Memo Series 95-28

To: Listserv

For: Area Administrators/Human Services Area Coordinators
Division Administrators
DDES Bureau / Office Directors
County Corporation Counsels
County Departments of Community Programs Directors
County Departments of Developmental Disabilities Services Directors
County Departments of Human Services Directors
County Departments of Social Services Directors
Developmental Disability Services Coordinators
Mental Health Coordinators
Mental Health Institutes
Substance Abuse Coordinators
Tribal Chairperson/Human Services Facilitators

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Document Summary

This Memo Series contains the criteria (statutory and policy) to make a determination of the county of residency of persons age 18 years and older in need of services under Chapters 46, 51, and 55. The county of residency is the county responsible to provide the services to the individual. Residency determinations issued by the Department of Health and Family Services (DHFS) will be based on the criteria herein, on other applicable statutes, and on precedents established in other formal DHFS residency determinations and court decisions. The criteria in this Memo Series apply to residency determinations made pursuant to s. 51.40, stats. and administrative residency determinations. This memo was previously issued as DCS Memo Series 95-28.

**Wisconsin Department
Of
Health and Family Services**

Residency Manual

January, 2007

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I. INTRODUCTION

A. Intent and Scope

The Residency Manual contains the criteria (statutory and policy) to make a determination of the county of residency of persons age 18 years and older in need of services under Chapters 46, 51, and 55. The county of residency is the county responsible to provide the services to the individual. Residency determinations issued by the Department of Health and Family Services (DHFS) will be based on the criteria herein, on other applicable statutes, and on precedents established in other formal DHFS residency determinations and court decisions. The criteria in this Memo Series apply to residency determinations made pursuant to s. 51.40, stats. and administrative residency determinations. This memo was previously issued as DCS Memo Series 95-28.

B. Section 51.40 Residency Determinations

This policy applies to s. 51.40 residency determinations for persons who are age 18 or older and who have a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like capacity who are living in any facility. The roots of s. 51.40 go back to 1974 when county 51.42/437 agencies were first created statewide and the present definition of residency was applied. This represented a departure from the concept of "legal settlement", which required county governments to provide funding for individuals for up to a year after they lived elsewhere.

C. Administrative Residency Determinations

This policy also applies to administrative residency determinations (when s. 51.40 does not apply), and reflects the criteria for making those decisions originally published in Memo Series 86-76, and later republished in Memo Series 95-28. Some updates in the criteria have been made where appropriate. The criteria for Administrative residency determinations was developed by a Central Office Project Experience (COPE) Committee appointed by the then Secretary of the Department of Health and Family Services. Participants on this committee consisted of county representatives, client advocacy groups and state representatives to recommend a policy to more equitably resolve county responsibility for funding human services in situations where s. 51.40 does not apply. The criteria that resulted from that effort are incorporated in this Memo Series.

D. Requesting a Residency Determination

The individual in question, an interested person on behalf of the individual, or any county agency may make a request to the Department for a formal residency determination. The county should indicate whether the request is for a s.51.40 or an administrative residency determination, if known.

E. **Definitions** – See Appendix at the end of this Memo Series for applicable definitions.

F. Definition of Legal Residency in Wisconsin

Section 51.40, Stats., specifies for certain individuals the point in time when the determination of the individual's residence will be made and who will make that determination.

For those persons who are covered by s. 51.40, the authority of the guardian to express the individual's intent to reside somewhere is limited by s. 51.40(2)(f) **(See II.B.5. on page 8 for further information on guardian's right to determine county of residence)**

With the exceptions noted below in this paragraph, county agencies under Chapter 46, 51 and 55, are responsible for providing services to legal residents of their county. The only exceptions to the principles of county responsibility based upon a client's legal residence are for emergency services under Chapter 51 and 55 based upon the "found" principle, [see sections 51.42(1)(b) and 51.437(4)(c)], and emergency services and other Chapter 48 services ordered by the juvenile court to be provided by the agency which is appointed as legal custodian of a child [see sections 48.02(12), 48.57(1)(a) and (b) and 46.26(4)(b)].

Legal residence is defined in sections 49.001(6), 49.001(8), 51.01(14) and 51.42(1)(b) as follows:

- Section 49.001(6). "The voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence shall be prima facie evidence of intent to remain."
- Section 49.001(8). "Voluntary means according to an individual's free choice, if competent, or by choice of his or her guardian if the individual is adjudicated incompetent."

There are **four criteria** in the statutory definition of "**legal residency**":

- **(1) Physical presence** within the state/county.
- Physical presence must be (2) **voluntary** on the part of the individual, or by choice of the person's legal guardian appointed by a court under ch. 880, Wis. Stats. (Note that guardianship court orders issued in another state are honored in Wisconsin.)
- The individual has the (3) **intent to remain** in (4) **a place of fixed habitation** within the state/county.

All of these four criteria must occur simultaneously. If any one or more of the four criteria do not simultaneously apply to a person, legal residency is not established.

1. **Physical Presence**

Physical presence in a county creates a rebuttable presumption that the individual intends to reside there. This presumption can be overcome by a preponderance of evidence to the contrary, such as the individual's expressed intent to reside elsewhere. The intent must have existed when the individual was physically present in the other county. The physical presence presumption places the burden on the county where the individual is located. If the individual is covered by s. 51.40, the wording of some provisions in that section overcomes the physical presence presumption.

2. **Voluntary**

The simultaneous concurrence of all four criteria must be voluntary on the part of the person or his or her legal guardian. Examples of physical presence not being voluntary include, but are not limited to, placement pursuant to a court order such as a protective placement order, or placement pursuant to the conditions of probation or parole supervision.

Placement for care or treatment by a county 51.42/437 department to another jurisdiction does not change the individual's legal residence while the individual is receiving care or treatment. See s. 51.22(4) and s. 51.40(2)(a)2.

3. **Intent to Remain**

Intent to remain has been interpreted to mean "to live in that county for the foreseeable future." A person, or his or her guardian on behalf of their ward, must have the intent to remain, for the foreseeable future, in the county where he or she is physically present. Generally, intent to remain may be expressed verbally by the individual or his or her guardian. However, a written expression of intent by a person's legal guardian is preferable when the person has a legal guardian and the person's county of residency is in dispute.

No specific time period must have elapsed to establish the intent to remain for Wisconsin residency. Situations such as, but not limited to, seasonal employment in Wisconsin, an extended vacation, temporarily caring for a sick relative / friend, or for educational / training purposes do not alone qualify as having the intent to remain. Other facts that may be considered as indicators of intent include the location from which the individual files tax returns, or maintains financial accounts, or has a driver's license, or votes, for example.

4. **Place of Fixed Habitation**

Examples of a place of fixed habitation include a home, apartment, condominium, residential hotel or a mobile home (fixed on a site). It also may include a nursing home, CBRF or other supervised residential facility when the person intends to live there for the foreseeable future because he or she has long term care needs and the services of the facility are needed to meet those needs. A motel, hotel (except a residential hotel), or rooming house are generally not considered places of fixed habitation. However, in limited situations a motel, hotel or rooming house may be considered a place of fixed habitation if the person lives there voluntarily and intends to remain there for the foreseeable future.

A place of fixed habitation does not include a car or other motorized vehicle because it is not a fixed habitation. Nor does it include an emergency shelter for the homeless because it is by definition a temporary shelter, a shelter for victims of domestic abuse, or a nursing home, CBRF or other supervised residential facility where a person's stay is temporary to address acute care needs.

When all four criteria are met simultaneously, the person becomes a resident of the State of Wisconsin and the respective county where there is concurrence of physical presence. There is no waiting period before a person establishes legal residency in Wisconsin.

Once a person establishes legal residency in a Wisconsin county, he or she does not lose that residency until he or she establishes legal residency in another Wisconsin County or in another state. Even in extreme situations where a person has been homeless, perhaps for years, he or she retains their legal residency in the county and state where they last established legal residency before becoming homeless.

II. DETERMINING RESIDENCY PURSUANT TO SECTION 51.40, WISCONSIN STATUTES

A. Application and Basic Provisions of Section 51.40, Wis. Stats.

1. Application

Section 51.40 applies only to a determination of residency for persons who are 18 years old or older and who have a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like capacity, who are living in any facility.

Section 51.40 identifies five main methods to determine residency for persons identified above:

- a. Court ordered commitment, protective placement or protective services.
- b. Placement by a county.
- c. Individuals in State facilities.
- d. Individuals in nursing homes.
 - 1) Admitted prior to 12/1/06.
 - 2) Admitted on or after 12/1/06.
- e. Guardian's intent

Each of these will be addressed in detail.

Section 51.40 does not apply to:

- a. Other residents in a facility who do not have a developmental disability, a serious and persistent mental illness, degenerative brain disorder or other like incapacity.
- b. Persons under age 18.

For persons not covered by s. 51.40, the determination of legal residence is based upon the definition of residence per s. 49.001(6) and (8) discussed in Section CC below entitled Administrative Residency Determinations.

2. Basic Provisions of s. 51.40

- a. The criteria for determining legal residency based on s. 51.01(14) and 49.001(6) and (8), are applied in many s. 51.40 determinations.
- b. Several paragraphs in s. 51.40 set a point in time at which an individual's residence is conclusively established. See s. 51.40(2)(b)1 and (b)2.ag., bg., eg., and fg
- c. Other paragraphs determine who can make the determination (e.g., the guardian). See s. 51.40(2) (f) and s. 51.40(2)(b)cg. (if person is in a nursing home)..
- d. Still other paragraphs cite court (legal) actions or county agency actions as determinative. See s. 51.40(2)(a) 1. and 2.
- e. For those cases where a specific point in time is not solely determinative, the statutes refer to ". . . the county in which the individual has (or had) residence at a specific time." Thus, careful analysis of s. 49.001(6) and (8) as it applies to s. 51.40 is critical.
- f. Section 51.40 applies to both competent persons as well as those adjudicated incompetent under Chapter 880.

- g.** The definition of "mental illness", s. 51.10(13), is broader than the definition of "chronic mental illness", s. 51.01(3g). **Section 51.40 only applies to residency determinations of persons with a serious and persistent mental illness, a developmental disability, degenerative brain disorder, or other like capacity in a facility.**

B. Determination Criteria

Subsection 51.40(2), "Determination of Residence" specifies the conditions and circumstances to make decisions.

1. Court Commitment

Subdivision 51.40(2)(a)1. states, that if a person is under a court ordered commitment under Ch. 51, or a protective placement or protective services under Ch. 55, the individual remains a resident of the county where he/she resided at the time the initial commitment or initial order for protective placement or protective services is made. If the court makes no specific finding of a county of residence, the individual is a resident of the county where the court is located. After notice, including notice to the corporation counsel of each affected county by certified mail, after an opportunity to be heard has been provided to all affected counties and parties, and if there is no objection, the court may make a specific finding of a county of residence. If any affected county or party objects to the court's proposed finding, a county or party may request the department to make a determination. Any transfer of venue may be suspended until the department's determination is final.

Pre-Lessard (prior to 1974) Ch. 51 commitments without an "order for discharge" or "termination of services" can still form the basis for determining residency.

2. Placement by a County

Subdivision 51.40(2)(a)2, "Placement by a County". Except for the provision of emergency services, if a county department or an agency of the county department places or makes arrangements for placement of the individual into a facility, the sending county is the person's county of residence.

Any agency of the county department is deemed to be acting on behalf of the county in placing or making arrangements for placement. Placement of an individual by a county department in a facility outside the jurisdiction of the county department or agency does not transfer the individual's legal residence to the county in which the facility is located. If a resident of a county is physically present in another county and is in need of immediate care, the county in which the individual is present may provide for his or her immediate needs under Ch. 51, 54 or 55 without becoming the individual's county of residence.

3. State Facilities

Subdivision 51.40(2)(b)1, "Individuals in State Facilities", states, "An individual who is in a state facility is a resident of the county in which he/she was a resident at the time the admission to the state facility was made. This subdivision may not be applied to change residence from a county, other than the county in which the facility is located, that has accepted responsibility for or provided services to the individual before December 1, 2006."

4. Nursing Homes

The following are presumptions regarding the county of residence of an individual in a nursing home that may be overcome by substantial evidence that clearly establishes other county residence:

a. **Admissions after December 1, 2006:**

Subdivision 51.40(2)(b) 2, "Individuals in Nursing Homes", states "An individual who was admitted under 50.04 (2r) after December 1, 2006, is a resident of the county which approved the admission under s. 50.04(2r)."

b. **Admissions prior to December 1, 2006:**

- 1) An individual in a nursing home on December 1, 2006, is a resident of the county in which they are physically present, i.e., the county in which the nursing home is located unless another county accepts the individual as a resident.
 - 2) If the individual had established residence in another county prior to entering the nursing home; the individual (or guardian) indicates an intent to return to that county when the purpose of entering the nursing home has been accomplished **or** when needed care and services are available in the that county; **and** the individual, or the guardian, has made no clearly documented expression to a court or a county department of an intent to establish residence elsewhere since leaving that county, the individual is a resident of that county.
 - 3) If the individual is incapable of indicating intent as determined by the county department, has no guardian, ordinarily resides in another county and is expected to return to that county within one year, the individual is a resident of that county.
 - 4) If another county has accepted responsibility for, or provided services to, the individual prior to December 1, 2006, the individual is a resident of that county. Although not specifically referenced in s. 51.40, the provision of Chapter 49, "Income Maintenance Services" does apply per s. 46.22(1)(b), "County Social Services, Powers and Duties." However, application for a Medical Assistance card does not, in and of itself, determine residency because eligibility is frequently determined in the county where the person is placed, not necessarily their county of residence.
 - 5) If the individual is incapable of indicating intent; was living in another county outside of a nursing home or state facility on December 1, 2006, **or** under circumstances that established residence in that county after December 1, 2006, **and** that county was the last county where the individual had residence prior to entering a nursing home or state facility, the individual is a resident of that county.
- c. For the procedures regarding the admission of non-Wisconsin residents suspected of being incompetent into nursing homes in Wisconsin resulting from the U.S. Court of Appeals decision effective August 21, 1997, involving Bethesda Lutheran Homes and Services and this Department, see section "VI" on page 12.

5. **Guardian's Authority to Declare County of Residence**

A guardian may declare any of the following, under any of the following conditions:

- a. The ward is a resident of the guardian's county of residence, if Section B. 1 and 2, Directed Placement, and 3 and 4, Individuals in State Facilities and Nursing Homes, do not apply, if the guardian's ward is in a facility and is incapable of indicating intent, and if the guardian is a resident of the county in which the facility is located or states in writing that the ward is expected to return to the guardian's county of residence when the purpose of entering the facility has been accomplished or when needed care and services can be obtained in the guardian's county of residence.
- b. The ward is a resident of the county in which the ward is physically present, if Section B. 1 through 4 do not apply and if all of the following apply:

- 1) The ward's presence in the county is voluntary.
 - 2) There is no current order under ch. 55 in effect with respect to the ward, and the ward is not under any involuntary commitment order to the department of corrections or to a county other than the county in which the ward is physically present.
 - 3) The ward is living in a place of fixed habitation.
 - 4) The guardian states in writing that it is the ward's intent to remain in the county for the foreseeable future.
- c. The ward is a resident of the county specified by the guardian, regardless if a previous determination of county of residence has been made, notwithstanding Section B. 1 through 4 for good cause shown, if, in the ward's best interest, the guardian files with the probate court having jurisdiction of the guardianship and protective placement a written statement declaring the ward's domiciliary intent, subject to court approval, and if notice and opportunity to be heard are provided to all affected counties and parties.

Note: The rights of a guardian to affect the placement of a ward are limited if the ward is covered by s. 51.40. These restrictions were placed into law to specifically provide added protection to this vulnerable population.

C. Change of Venue

An individual, an interested person on behalf of an individual, or any county may request that the department make a determination of the county responsibility of an individual. Any motion for change of venue pending before the court of jurisdiction may be stayed until the determination is final. Within 10 days after receiving the request, the department shall provide written notice to the individual, to the individual's guardian, guardian ad litem, and counsel, if any, to the individuals' immediate family, if they can be located; and all potentially responsible counties that a determination of county responsibility shall be made and that written information and comments may be submitted within 30 days after the date on which the notice is sent.

When a county court is considering a change of venue, the county to which the venue is to be transferred must be notified. This notification shall allow sufficient time for the county to which venue may be transferred to become aware of the facts of the case and to present their own case. For Chapter 55 cases, thirty days is considered a reasonable period of time. Chapter 51 cases must be acted on within 14 days; therefore, 7 days is considered a reasonable period of time.

III. ADMINISTRATIVE RESIDENCY DETERMINATIONS (Not covered by 51.40 Wis Stats)

A. County Responsibility to Provide Services

Sections 51.42, 51.437 and 46.23 state that county social services departments and community boards are required by law to provide services to the residents of their counties within available State, Federal and local match dollars. The county board of supervisors has the primary responsibility for the care, treatment and well-being of individuals with a mentally illness, developmentally disability, and/or substance abuse issues residing within its county, and for ensuring individuals in need of emergency services found within its county receive immediate care. County liability for care and services is based upon the individual's county of residence, except for emergency services under Chapter 51 where fiscal responsibility is based on the "found" principle. In emergency cases, fiscal liability is limited to 72 hours (plus intervening weekends and legal holidays) of care and services. [See DSL Memo Series 2002-19, "Emergency Detention Services for Non-Wisconsin Residents and Procedures for Reimbursement Authorization", and ss. 51.42(1)(b), and 51.437(4)(c)].

B. County Responsibilities: Commitments and Admissions

Section 51.22 addresses commitments to and responsibilities of 51.42/437 boards. Except for inmates committed to the Department per s. 51.20(13)(a)4 and (5), persons committed under Chapter 51 shall be committed to the county department under 51.42 or 51.437 serving the person's county of residence. Likewise, voluntary admissions under s. 51.10 (adults), s. 51.13 (minors), and s. 51.45 (alcoholism) are made through the 51.42/437 department serving the person's county of residence. The county shall authorize placement in an appropriate facility for care, custody and treatment.

The county board to which the person is committed shall provide the least restrictive treatment alternative appropriate to the individual's needs, and guide the person's movement through all appropriate and necessary treatment components to assure continuity of care per s. 51.22(5).

Admissions through counties are made in accordance with s. 51.42(3)(as) or s. 51.437(4rm)(a). Non-Wisconsin residents are admitted through DHFS in accordance with s. 51.22(3).

C. Service Referrals to Other Counties

To facilitate the provision of needed and appropriate Chapter 51 services, and recognizing that certain services are located in counties other than the individual's county of residence, the following procedures shall apply:

1. When a resident of one county is placed in an institutional or residential facility such as a CBRF or Adult Family Home in another county, the referring county remains liable for the cost of authorized services stipulated in an intercounty agreement [see s. 51.22(4)]. The county in which the facility is located shall be notified in advance of the anticipated placement and participate in the planning. The placement does not transfer the person's legal residence to the county where the facility is located. The placement may be voluntary or as part of a commitment order.
2. The inter-county agreement should anticipate the potential for the individual to remain in the receiving county after the contracted services are no longer needed, as determined by the placing county. The placing county may discharge the individual from commitment or, if placed voluntarily, the individual may, at any time, choose to remain in the county where the facility is located.

However, when a person voluntarily moves to another county while under involuntary outpatient civil commitment to a county, and the person remains a proper subject of continued commitment and supervision under s. 51.20, the county to which the person is civilly committed retains responsibility for the person's services and supervision until court venue for the person is transferred to the receiving county or until the person is no longer a proper subject of continued commitment under s. 51.20. There is no provision in statute that authorizes discharge of a person's involuntary civil commitment when he or she continues to be a proper subject of commitment and supervision.

3. If the receiving county disputes the individual's competency to choose to remain, or the receiving county disputes the sending county's discharge criteria, informal negotiations between the counties are to be pursued. If agreement cannot be reached, a request to the DHFS for a formal residency determination should be initiated.

D. Competency

1. Definition of "Competent"

For the purpose of obtaining human services, a person shall be presumed to be competent to choose where he or she wishes to reside, unless the person has been adjudicated incompetent. In this policy, "presumed" means . . ."having grounds for a reasonable belief." This presumption of belief shall prevail unless it is proven to be untrue.

2. Determining Competency

The following procedures shall be used to determine a person's competency:

- a The two counties involved shall jointly assess the individual's competency, level of independent decision-making, and wishes.
- b If the counties agree that the individual can make a competent, independent decision regarding where to reside, the individual's decision shall prevail unless otherwise determined by statute or court order.
- c. If counties cannot agree on the individual's competency, either county may initiate a petition to determine competency under Chapter 54. Definitions of "incompetent," "degenerative brain disorder" and "incapacity" are included in the Appendix.

3. Residency for Competent Adults

Competent adults who chose to enter a facility within their county of residence may do so if they meet the admission requirements. Competent adults who choose to move from other counties or states and voluntarily admit themselves to a facility for congregate care with intent to establish residency are considered residents of the county in which the facility is located. In both cases, counties are responsible to provide or contract for services for these residents, if and when they need them.

"Congregate care" includes any care and treatment facility owned and operated by the State of Wisconsin, the Federal government (VA Hospitals), or any county or municipality. It also includes non-publicly owned facilities such as Adult Family Homes, Community-Based Residential Facilities (CBRFs), Nursing Homes, Residential Care Apartment Complexes, and other like facilities.

E. Determining Residency for Persons Who are Adjudicated Incompetent

Subsection 54.30(2) allows the court to appoint a guardian of anyone subject to guardianship who is a resident of the county, or physically present in a county, and for non residence of Wisconsin under certain circumstances. Subsection 54.30(3) states that the court in which the petition is first filed shall determine venue.

If the counties agree that the person is not competent to indicate a firm residency decision, and there is a finding of incompetence under Ch. 54, the following residency rules shall apply.

1. Persons in State Facilities

Persons who do not meet the criteria of s.51.40 (see page 3), and who are currently institutionalized in a state-operated facility, shall be presumed to be residents of the county which is fiscally responsible for that individual as indicated on institutional records and commitment orders. If such documentation does not exist, then the county where the person had established residency at the time he or she was admitted to the state-operated facility is the county of responsibility.

2. Juveniles in Congregate Care Facilities

Juveniles who reside in a facility for congregate care shall be presumed to be residents of the county in which their custodial parent resides or, if they are subject to guardianship or legal custody by a public agency, the county in which they last resided prior to entering a facility. It is common (case) law that a minor's residence follows that of his/her parent. This principle is nationally recognized. Section 49.001(6) and (8) defining residency applies to the parent and thus the minor.

3. Adults in Congregate Care Facilities

Adults who reside or are placed in a facility for congregate care shall be presumed to be residents of the county in which they last resided prior to entering the facility. The admission records of the facility shall indicate the county of residence when the placement occurred. Completion of a DDE-822 form is required for admission of a person with a developmental disability and a person with a mental illness to a nursing home, an ICF/MR, or an IMD. There are, however, placements from another facility and/or county or state where the "receiving" county was not involved in the placement. An example is a transfer from a VA hospital to a VA-contracted CBRF. These residency determinations are problematic and must be addressed individually.

4. Residents in Large Extended Care and Inpatient Settings

The Department recognizes that counties with large inpatient facilities can become magnet counties. The majority of residents in these facilities (ICFs/MR, Veteran's Hospitals, Inpatient Psychiatric Hospitals and State Facilities) are from other states or counties. These facilities are under pressure to place their residents in less restrictive settings in the community, thus the need to determine the individual's county of residence and fiscal responsibility. Many long-term residents do not have a home county, or there is at best a sketchy pre-admission history. Prior to 1974, the term "legal settlement" was used on Institution Admission records. While this phrase does not establish county of residence, it may be used in conjunction with other records to establish residency in these cases.

When there is no easily identifiable county of residence, as a matter of courtesy and expediency, the "host" county and court may attempt to clarify the person's county of residence, perform an annual WATTS review or perform guardianship proceedings. These actions in and of themselves do not necessarily mean the county is fiscally responsible. Because a facility is located in a county does not mean the residents in the facility are the fiscal responsibility of the county unless they were county residents prior to entering the facility (or unless s. 51.40(2)(f), "Exception: county of guardian's Residence," applies). However, if a resident of a facility requires a Ch. 51 commitment, or a Ch. 55 protective placement, the county, through its Corporation Counsel, should ensure the individual's county of residence is clearly stipulated.

5. Guardian's Rights

- a. The guardian can authorize admission of his or her ward to a foster home, group home, or CBRF with 15 or fewer beds without court involvement (see 55.055(1) and 50.06).
- b. If the admission is not primarily for treatment of the mental illness or developmental disability the guardian may authorize admission to a nursing home for an initial period of 60 days without court involvement (see 55.55(1)(b)).

[The following in c. d. and e. are based upon the definition of residence in sections 49.001(6) and 51.01(14) and court law. This does not apply to situations covered by section 51.40]

- c. A guardian may make a written declaration that his or her ward's county of residence is the county where the ward is physically present if all of the following apply:
 - 1) The ward's presence in the county is voluntary; and
 - 2) The ward is residing in a place of fixed habitation; and
 - 3) The guardian states in writing that it is his or her ward's intent to remain in that county for the foreseeable future.

- d. A guardian may make a written declaration that his or her ward is a resident of the guardian's county of residence if either of the following apply:
 - 1) The ward is living in a place of fixed habitation located in the guardian's county of residence; or
 - 2) The guardian states in writing that his or her ward is expected to return to the guardian's county of residence when any of the following apply:
 - a) The ward is living in a congregate care facility in another county and the purpose of the ward's entering the facility has or will be accomplished in the foreseeable future; or
 - b) When the care and services needed by the ward become available in the guardian's county of residence.

- e. The ward is a resident of the county specified by the guardian, regardless if a previous determination of county of residence has been made, notwithstanding that the individual has been placed by a county agency in a facility or a resident of a state facility:
 - 1) If in the ward's best interest, the guardian files with the probate court having jurisdiction of the guardian and protective placement a written statement declaring the ward's domiciliary intent, subject to court approval, and
 - 2) If notice and opportunity to be heard are provided to all affected counties and parties. Notice shall be sent to the corporation counsel of each affected county by certified mail.

F. Admission of Non-Wisconsin Residents to Nursing Homes and Other Facilities.

For many years, it was often very difficult for persons living in other states to be admitted to nursing homes and other facilities in Wisconsin, particularly when they might later need community services. In 1997, the U.S. Court of Appeals in Chicago held that Wisconsin statutes imposed an unconstitutional barrier on disabled persons who wanted to be admitted to facilities in Wisconsin. See *Bethesda Lutheran Homes v. State DHFS and Jefferson County*, August 21, 1997, 122 F.3rd 443, 7th Circuit.

In 2005, the Wisconsin Supreme Court issued a decision addressing similar issues in the case entitled *In the Matter of the Guardianship of Jane E. P.*, July 7, 2005, reported at 2005 WI 106. The Supreme Court adopted specific procedures enabling guardians to transfer guardianship cases from other states (these are called "foreign guardianships") to Wisconsin courts, and to

process petitions for protective placement of the guardians' wards into facilities for treatment in Wisconsin.

By passage of 2005 Wisconsin Act 387, the Wisconsin Legislature adopted (with slight modification) the July 7, 2005, decision of the Wisconsin Supreme Court in the *Jane E.P.* case cited above. These new statutes appear in sections 54.30(1), 54.34(3), and 54.38(1m), Wis. Stats. They are effective beginning December 1, 2006.

The petition for guardianship and protective placement in Wisconsin must include a certified copy of certain guardianship papers and other information from the court in the other state. These court procedures are quite complex. Wisconsin county agencies involved in cases of this nature should consult the County Corporation Counsel Office.

Wisconsin County Departments of Human Services, Social Service, Community Programs and Development Disabilities Services should accept, consider, and approve requests from non-Wisconsin residents on the same basis, and apply the same clinical and programmatic criteria, as residents of the county when considering approval of admissions to ICF's-MR, IMD's and nursing homes under ss. 50.04(2r), Stats. (Originally published in INFO MEMO 97-19).

The DHFS has also established policy and funding for non-Wisconsin residents who are placed under a Chapter 51.15, Emergency Detention, in an approved psychiatric inpatient program. Please refer to DDES Numbered Memo 2002-19 for further instructions on the handling of these cases and the application for funding.

IV. MECHANISMS TO RESOLVE DISPUTES

A. Informal Mechanisms

1. Counties must first attempt to resolve residency disputes informally.
2. In lieu of submitting a contested matter to the Division of Disability and Elder Services (DDES), counties may agree to submit the matter to a peer review group composed of three other county directors. Each disputing county shall select one county for the review group and those two shall select the third. These directors shall review the dispute and make a binding decision. The decision shall be transmitted to the DDES Administrator. Any cost related to the peer review process shall be charged to the county determined to be responsible under this procedure.

B. Formal Residency Request Process

1. Per s. 51.40(2)(g)1, "An individual, an interested person on behalf of the individual, or any county may request that the department make a determination of the county of responsibility of the individual." This should occur only after the affected counties attempt to resolve the matter informally. Requests should be submitted in writing to:

Chris Hendrickson
Residency Determination Facilitator
Office of Strategic Finance
P. O. Box 7850
Madison, WI 53707-7850

2. The letter should state the basis for the request, the statutory authority to request a residency determination [s. 51.40(2)(g)], background information about the individual and his or her family and documentation that the counties and other interested parties have attempted informally to resolve the dispute. The letter should also identify (names, addresses and phone numbers) all potentially interested parties including other county agencies, congregate

living facilities where the person has lived, if any, other family members, and the guardian, if any.

3. Within 10 business days after receiving the request, the Residency Determination Facilitator will provide written notice of the request to all interested parties and request background information about the person and his or her family. The letter will state that the department will make a determination of the county of responsibility. To assist counties, a copy of the request will be sent to the County Corporation Counsel.
4. Written information and comments must be submitted to the Residency Determination Facilitator within 30 business days after the date of the notice. **County agencies and other service providers may, pursuant to s. 51.30 (4) (b) 5, stats., send confidential treatment information to the Department's Residency Determination Facilitator without informed written consent of the client or their guardian.**
5. The Residency Determination Facilitator will review the information submitted and "make such investigations as he or she deems necessary." The Residency Determination Facilitator may request additional information and institution / facility / county agency records.
6. The Residency Determination Facilitator will draft a residency determination that is reviewed by the DHFS Office of Legal Counsel. Within 30 days after the period for submitting information, the DDES Administrator will issue a written decision.
7. The decision will be addressed to the party who requested the decision, and a copy will be sent to all other interested parties.
8. The decision may be appealed under s. 227.44 by the county determined to be the county of responsibility.
9. While the decision is pending, the county department, which has been providing services to the individual, shall continue to provide necessary services to the person.
10. If no county is currently providing services, the county in which the individual is physically present shall provide necessary services pending the determination.
11. A determination by the department may provide for a period of transitional services to assure continuity of services. The transition period shall clearly state the beginning and ending dates and responsible counties by specifying a date until which the county department, which has been providing services, shall continue to do so.
12. The formal residency determination of the department is binding on the county determined to have responsibility for the person. Unless noted in the determination letter, the county determined to be the county of responsibility shall assume responsibility immediately following receipt of the determination and during any pending appeal brought under Chapter 227. If a county does not comply with the finding, the Department, a county, the individual's guardian, or a facility providing services may go to court for an order to enforce the legal determination.
13. If the county of responsibility or the county where the person is physically present refuse to cooperate, the facility, relatives or potential guardians may initiate a petition for guardianship based on s. 880.08, or as otherwise appropriate, for the purpose of determining responsibility.
14. The department shall have the final authority to decide responsibility for funding and provision of services.

C. Private Placements

There are occasions when private attorneys' request residency determinations without first consulting the county. These requests may be in response to placements in facilities without county knowledge. To minimize these types of placements, the county agency and the

corporation counsel should establish a system of notification with the Probate Court so they will be informed up front of such requests. Likewise, county agencies need to make residential care facilities aware of the requirement to complete necessary paperwork and receive county approval prior to accepting the person for placement.

D. Change of Venue

When a county is considering a change of court venue, the county to which the venue is to be changed must be notified. This notification shall allow sufficient time for the county to which venue may be changed to become involved with the facts of the case and to present their own case.

E. Adjustment Period

When a person or guardian decides that the person will remain in the receiving (service) county, and when appropriate or similar services are not available in the referring county, or when the referring county agrees with the plan, there shall be a plan for an adjustment period to allow the receiving (service) county to assume the cost and provision of services. In anticipation of this, receiving counties should negotiate adjustment period provisions with the sending county. If incorporated into the original contract, clear fiscal responsibility will be established if an adjustment period is needed. Both counties involved must agree to the adjustment plan, which shall be in effect for not less than three months or more than twelve months. If two counties agree that it is in the best interest of the person to extend services beyond one year, the agreement must be renegotiated.

Most counties have waiting lists for services. This will impact on the need for out-of-county referrals and the availability of services in other counties. In all cases, residency must be clearly documented.

F. Emergency Detentions and County Mandated Services

Persons who are in need of emergency services shall be provided such services by the county in which the person is present. Circumstances may result in detentions that frequently lead to Chapter 51 commitments. In all these proceedings, determining the county of residence is important. The County Circuit Court where the facility is located or where the person is detained usually processes the paperwork. A court action in a county does not, in and of itself, mean that the county where the court is located is the county of fiscal responsibility.

G. State Institution Referrals and Releases

Prior to release of a person institutionalized in a State facility, both the county where the placement is to occur and the county of fiscal responsibility must be advised and participate in planning. The county agency under s. 51.42 or 51.437 to which the person is committed must approve the discharge. The fiscally responsible county / county of residence, as indicated by institutional records, shall be responsible for the cost of service. Each State facility shall notify the appropriate Chapter 51 Board whenever there is a transfer that may affect that Board.

CENTRAL OFFICE CONTACT: Chris Hendrickson
Residency Determination Facilitator
Office of Strategic Finance
P.O. Box 7850
Madison, WI 53707-7850
Phone (608) 261-7812; FAX (608) 266-8278
Hendrch@dhfs.state.wi.us

MEMO WEB SITE: http://dhfs.wisconsin.gov/dsl_info/

Attachment

cc Disability Rights Wisconsin
DDES Client Rights Office

#memo/DDE/residency determination.doc

APPENDIX

DEFINITIONS

The following definitions are specifically listed in subsection 51.40(1). They apply only to residency determinations that are covered by section 51.40.

- 51.40(1)(a) **"Agency of a county department"** means a public or private organization with which a county department contracts for provision of services under Chapters 46, 51, or 55.
- 51.40(1)(b) **"Arrange or make placement"** means perform any action beyond providing basic information concerning the availability of services, facilities or programs in a county to an individual or the individual's family.
- 51.40(1)(c) **"Capable of indicating intent"** means able to express by words or other means an informed choice of a place to live.
- 51.40(1)(d) **"County department"** means a county department under ss. 46.23, 51.42 or 51.437, Wis. Stats.
- 51.40(1)(e) **"County of responsibility"** means the county responsible for funding the provision of services under Chapter 46 or 55 to an individual. (Chapter 46 includes numerous references to Chapter 51 services and therefore a particular reference to Chapter 51 is not included in this definition.)
- 54.01 (6) **"Degenerative Brain Disorder"** means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.
- 51.40(1)(f) **"Guardian"** means a guardian of the person appointed by a court under Chapter 54, Wis. Stats.
- 51.40(1)(g) **"Incapable of indicating intent"** means one of the following:
1. The status of an individual who has had a guardian appointed under Chapter 880, unless the court made a specific finding under Section 880.33(3) that the individual is competent to make an informed choice of a place to live.
 2. The status of an individual for whom there is substantial evidence, based on documentation from a licensed physician or psychologist who has personally examined the individual and who has expertise concerning the type of mental disability evidenced by the individual, that the individual is incapable of indicating intent.
- 54.01(15) **"Incapacity"** means the inability of an individual effectively to receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power.
- 54.01(16) **"Individual found incompetent"** means an individual who has been adjudicated by a court as meeting the requirements of s. 54.10(3).

51.40(1)(h) **"Nursing home"** has the meaning specified under ss. 50.01(3), except that "nursing home" does not include a facility that is operated directed by the department.

Other definitions relevant to residency determinations are:

50.01(3) **"Nursing home"** means a place which provides 24-hour services including board and room to 3 or more unrelated residents who because of their mental or physical condition require nursing care or personal care in excess of 7 hours per week.

51.40(1)(i) **"Parent"** has the meaning specified under s. 48.02(13), **"Parent"** means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40, or a parent by adoption. If the child is a non-marital child who is not adopted or whose parents do not subsequently intermarry under s. 676.60, "parent" includes a person adjudged in a judicial proceeding to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

51.40(1)(j) **"State facility"** means a state mental health institute, center for the developmentally disabled, or prison as specified in s. 302.01, or a facility that is operated directly by the Department of Health and Family Services (DHFS) or the Department of Corrections (DOC).

51.01(5)(a) **"Developmental disability"** means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, which has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include senility which is primarily caused by the process of aging or the infirmities of aging.

51.01(5)(b) **"Developmental disability"** for the purposes of involuntary commitment, does not include cerebral palsy or epilepsy.

51.01(3)(g) **"Serious and persistent mental illness"** means a mental illness which is severe in degree and persistent in duration, which causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, which may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support and which may be of lifelong duration. "Serious and persistent mental illness" includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include infirmities of aging or a primary diagnosis of mental retardation or of alcohol or drug dependence.

880.01(4) **"Incompetent"** means a person adjudicated by a court of record to be substantially incapable of managing his property or caring for himself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence.

54.01(17) **"Interested person"** means any adult relative or friend of a person to be protected under this subchapter, or any official or representative of a public or private agency, corporation or association concerned for his welfare.

- 49.001(6) **"Legal Residence"** means the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence shall be prima facie evidence of intent to remain.
- 49.001(8) **"Voluntary"** means according to a person's free choice, if competent, or by choice of a guardian if incompetent.
- 880.01(5) **"Infirmities of aging"** means organic brain damage caused by advanced age or other physical degeneration in connection therewith to the extent that the person so afflicted is substantially impaired in his ability to adequately provide for his own care or custody
- 880.01(8) **"Other like incapacities"** means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, continued consumption or absorption of substances, producing a condition which substantially impairs an individual from providing for his own care or custody.
- 51.20 **"Involuntary commitment for treatment."** The basis for involuntary commitment included in definitions/criteria include:
- 51.20(1)(a)1 The individual is mentally ill, drug dependent, or developmentally disabled and is a proper subject for treatment.
- 51.20(1)(a)2 The individual is dangerous because he or she does any of the following:
- a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm . . .
 - b. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent homicidal or other violent behavioral, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. . .
 - c. Evidences such impaired judgement, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself. . . .
 - d. Evidences behavior manifested by recent acts or omissions that due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. . .
 - e. Evidences, because of a mental illness, either the incapability of expressing and understanding the advantages and disadvantages of accepting medication or treatment and the alternatives . . . and evidences a

substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration. In addition, there is a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional or physical harm that will result in the loss of the individual's ability to function independently in the community, or the loss of cognitive or volitional control over his or her thought or actions. . . (The so-called 5th Standard.)

- 51.01(1) **"Alcoholic"** means a person who is suffering from alcoholism.
- 51.01(1m) **"Alcoholism"** is a disease which is characterized by the dependency of a person on the drug alcohol, to the extent that the person's health is substantially impaired or endangered or his or her social or economic functioning is substantially disrupted.
- 51.01(2) **"Approved treatment facility"** means any publicly or privately operated treatment facility or unit thereof approved by the department for treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons.
- 51.01(2g)(a) **"Brain injury"** means an injury to the brain, regardless of age at onset, whether mechanical or infectious in origin, including brain trauma, brain damage and traumatic head injury, the results of which are expected to continue indefinitely, which constitutes a substantial handicap to the individual, and which directly results in any 2 or more of the following:
1. Attention impairment.
 2. Cognition impairment.
 3. Language impairment.
 4. Memory impairment
 5. Conduct disorder
 6. Motor disorder
 7. Any other neurological dysfunction
- 51.01(2g)(am) **"Brain injury"** includes any injury to the brain under par (a) that is vascular in origin if received by a person prior to his or her attaining the age of 22 years.
- 51.01(2g)(b) **"Brain injury"** does not include alcoholism, Alzheimer's disease as specified under s. 46.87(1)(a) or the infirmities of aging as specified under s. 55.01(3).
- 51.01(10) **"Inpatient facility"** means a public or private hospital or unit of a hospital which has as its primary purpose the diagnosis, treatment and rehabilitation of mental illness, developmental disability, alcoholism or drug abuse and which provides 24-hour care.
- 51.01(13)(a) **"Mental illness"** means mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community.

51.01(13)(b) **"Mental illness"** for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgement, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

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