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CONFIDENTIAL MEMORANDUM

PRIVILEGED ATTORNEY-CLIENT MEMORANDUM NOT TO BE PLACED IN CENTRAL FILES. ANY CIRCULATION OR DISTRIBUTION TO PERSONS OUTSIDE THE EMPLOY OF THE CLIENT MAY WAIVE THE PRIVILEGE.

TO: Geoff Barsch, Colorado Commission on Higher Education.

FROM: John R. Sleeman, Jr., Assistant Attorney General JRS

RE: Updated Tuition Classification Guidelines

The purpose of this memorandum is to highlight the revisions to the Tuition Classification Guidelines ("Guidelines"). It is not intended to replace the Guidelines. This memo and the Guidelines are not intended to be definitive, but rather are designed to assist registering authorities to make decisions based on the facts of each particular case. We recommend that each registering authority undertake a review of any material used by the institution to make decisions about residency or to advise students or parents about residency to insure that the material is current and not misleading.

Section 2.3 -- Registering Authority

§ 2.3(2) regarding allowing exceptions in cases of unusual circumstances or hardship was deleted pursuant to the repeal of § 23-7-105-2.5, C.R.S.

Section 2.7 -- "Definitions". "**rules**". and "presumptions"

§ 2.7(4) regarding **the discretion** of CCHE to **make exceptions to the residence** presumptions and **rules in certain circumstances was deleted because the** portion of the **statute authorizing these exceptions was repealed.**

Section 2.11 -- Whose domicile controls: derivative domicile

§ 2.11(1)(a), (b) and (d) were changed to reflect that the age of presumed emancipation was raised from 21 to 22.

§ 2.11(1)(e) was changed to reflect **amendments** covering students who derived domicile from **their parents** and whose parents have left Colorado.

§ 2.11(2)(b) regarding guardians was clarified to state that "conservators" are generally not guardians of the minor's person and therefore generally cannot provide derivative domicile. This section was also clarified regarding students with no parent or guardian domiciled in Colorado to refer to the circumstances addressed in § 2.1 l (1)(e) above.

§ **2.11(5) regarding hardship exceptions was deleted.**

Section 2.12 -- Achieving **in-state status while a student**

This section was clarified to state that changes in classification must be in writing, signed by the registering authority and become effective at the student's next registration.

Section 3.1 -- The significance of emancipation

Changed to reflect the change **in the age of presumed emancipation from** 21 to 22.

Section 3.9 -- Evidence of Emancipation

This section was changed to clarify issues surrounding the receipt of gifts, loans, or proceeds from an inter vivos trust because of contradictions raised by previous revisions. Language was also added regarding temporary visits to the parents' home.

Section 3.11 -- Trust Funds and Section 3.12 -- Emancipation followed by attainment of age 22

These sections were changed to reflect the change in the age of presumed emancipation from 21 to 22.

Section 5.2 -- Aliens

This section was changed to clarify ability of foreign nationals to qualify for in-state tuition.

Section 5.4 -- Prisoners and other inmates

This section was changed to reflect change in the age of presumed emancipation from 21 to 22.

Section 5.5 -- Olympic Athletes

The section was changed to reflect expansion of locations where Olympic athletes may be classified as in-state and prohibition against athletes considered in-state under this section from receiving state financial aid.

This memorandum contains the legal opinion of the authoring attorney and is not be construed as an official opinion of the Attorney General.

TUITION CLASSIFICATION GUIDELINES

Chapter 1.

INTRODUCTION TO THE PURPOSE AND USE OF THESE GUIDELINES

These guidelines for application of the Colorado tuition classification law, revised September, 1998, are prepared for use by registering authorities at the institutions covered by the tuition classification law ("tuition law"), sections 23-7-101 to 107, C.R.S., at the request of the Colorado Commission on Higher Education ("CCHE"). The guidelines are prepared by the Office of the Attorney General **as legal counsel** to the **state** institutions of higher education, their respective governing boards, officers, employees and to the CCHE.

The tuition law is reproduced as an appendix to these guidelines. A simplified citation system is utilized in the guidelines when reference is made to the -statute, omitting the title and article numbers,. e.g., section 23-7-101, 7 C.R.S. (1998 Repl. Vol.), is cited as 101.

There will be questions which are not easy to answer according to the terms of the statute and these guidelines. When such questions **arise**, the registering authorities of the covered institutions should consult with their assigned attorneys at the Office of the Attorney General for legal advice. Registering authorities can consult with their assigned attorney by calling (303) 866-5680.

Because the Office of the Attorney General is bound by statute to represent the institutions in any dispute over the interpretation or application of the tuition law with respect to particular individuals, it is not possible for the Attorney General's office to give tuition advice to individuals whose interests may be adverse to the interests of one of the institutions. If an individual objects to a tuition classification decision, she/he may request the registering authority to consult the Office of the Attorney General.

Chapter 2.

BASIC PRINCIPE OF THE TUITION CLASSIFICATION LA

Section 2.1 -- Covered **institutions**

The tuition law applies to the University of Colorado, Colorado State University, the University of Northern Colorado, the Colorado School of Mines, Fort Lewis College, University of Southern Colorado, the institutions under the governance of the Trustees of the State Colleges in Colorado, the state system of community and junior colleges and the district community colleges in the state, which receive some support from general assembly appropriations.

Section 2.2 -- Uniform rules for tuition classification

(1) The Colorado statute reflects the historic practice of Colorado and other states, upheld in several court decisions, of charging certain students higher tuition rates than others depending upon whether a student is classified as an "in-state" or "out-of-state" student.

(2) The statute, section 101, declares that the covered institutions "shall apply uniform rules, as prescribed in this article and not otherwise," in determining questions of classification for tuition purposes. The words, "and not otherwise," emphasize that the application of certain uniform rules does not necessarily guarantee uniform classification decisions. Because the rules prescribed by the statute leave room for judgment on the facts of particular cases and confer that judgment upon the respective registering authorities of each institution independently, it is possible that the same individual might be classified as in-state by one institution and out-of-state by another without doing any violence to the statute.

(3) The tuition law is designed for determining classification for tuition purposes. Since its enactment, however, institutions have sometimes elected to utilize the statute for purposes of classifying students or potential students for various other purposes, including financial aid and eligibility for limited enrollment programs. While the use of the tuition law for non-tuition purposes is not prohibited by statute, it should be kept in mind that the law was designed specifically for the peculiar problems of tuition classification and that it therefore may be poorly suited or even legally objectionable for certain other purposes.

Section 2.3 -- Registering authority

(1) The tuition law makes the determination of classification for tuition purposes the function of the "registering authority" at each covered institution. The term "registering authority" is not defined in the statute. Each institution is therefore free to designate the person or persons, by whom such determinations are to be made. There are, however, certain principles apart from the statute itself which must be observed in the designation and functions of the "registering authority." Classifying students for tuition purposes is a difficult task which requires thoughtful judgment on numerous factors. This judgment must be unaffected by any financial concerns or other policies of the institution. The function is "quasi-judicial" in character and should be performed with the independence and autonomy appropriate to such a function. Although this function may be performed by a person who also has other duties, the concerns that may bear upon those other duties must not be allowed to interfere with impartial judgment on tuition classification matters. Experience in the administration of this statute is invaluable, and therefore the classification function should be treated as a specialized one in which the development and maintenance of expertise is essential.

(2) The tuition law does not require an institution to establish any internal appellate procedure for the review of tuition classification decisions. However, CCHE requires each institution to have in place a process whereby a decision of the registering authority may be appealed. Such process should include, at a minimum, an opportunity for the petition and supporting documentation to be presented to a panel of institutional or governing board representatives for review and resolution, and an opportunity for the student to appear and be present during the review. No member of the panel should act in the capacity of an "advocate" for the institution. The decision of the institution's appeals panel will be final. The petitioner is to be notified of the decision made by the appeals panel and any reasons why the petition was denied. (CCHE In-State Tuition Classification Section VI, Part B, 4.08). If an evidentiary hearing by the Appeals Board is held, a record of the appeals process must be kept to allow for a "meaningful" review, according to a Boulder District Court Decision. Mayer v. University of Colorado, Dist. Ct., Boulder County 93 CV 103, (Colo. 1994.) Classification determinations made by an institution's "registering authority" are subject to judicial review, but such review is limited by the discretionary power of the "registering authority."

Section 2.4 -- Burden of persuasion rests upon student

(1) Section 103(2)(k) of the statute imposes the burden of persuasion upon the person seeking to qualify for in-state classification. Ordinarily, initial determinations of status are made by registering authorities at the institutions on the basis of initial application documents. Persons dissatisfied with their classification can, within a prescribed period of time, challenge their classification. It is entirely the responsibility. of the challenger to persuade the registering authority of his/her entitlement to the change. Failure to timely produce clear and convincing evidence justifies a denial of the challenge.

(2) Section 103(2)(k) states that classification determinations may be made on the basis of written forms and documentation. There is no statutory right to a personal conference or oral hearing. The institution, at its option, may provide a conference or hearing. In addition to information forms prepared by CCHE, the registering authority may require additional documentation so long as it is not forbidden by other laws. An individual who fails or refuses to produce any documentation that is requested by the registering authority does so at the risk of having his/her request for change of status denied.

Section 2.5 -- Registration

The tuition law makes eligibility for in-state status contingent upon the emancipated minor, the parent or legal guardian of an unemancipated minor or the adult student being domiciled in Colorado for 12 continuous months or more immediately preceding "registration." Each registering authority must reasonably establish some date as the date of "registration" for purposes of tuition classification in any given academic term at his/her institution. There is no requirement that the date chosen as the date of "registration" be the same at all institutions.

Section 2.6 -- Time. finality and effective date of classification

(1) Section 102(5) designates the date of "registration" as a critical date for purposes of determining in-state or out-of-state status. The statute, however, does not require that the determination of one's status as of that date must be made on or before that date. Each institution should adopt a reasonable procedure, including a timetable fixing deadlines for challenging classifications, to enable students to seek changes in their classification. The procedure and timetable may vary from institution to institution. It is essential that each institution give full, fair and adequate notice to students concerning the deadline for challenging classifications for tuition purposes at that institution. Further, the institution must inform each student of his/her classification long enough in advance of that deadline to allow the student a fair and reasonable opportunity to make a timely challenge.

(2) If sufficient evidence is not presented within the time allowed for challenge under the institution's procedural timetable, the classification becomes final as to that term. If a timely challenge is made, the classification for the term in question remains subject to change until the review procedure is exhausted. If that procedure extends beyond the time for classification for a subsequent academic term, the classification for the subsequent term is also contingent upon the appeal. In some instances, the evidence may justify a change in classification for the later but not for the earlier term. Once a person has been classified, has failed to make a timely challenge or has failed to produce sufficient evidence to persuade the registering authority, his/her classification for that term stands. ,,deg, section 103(2)(c).

(3) A determination that is not timely challenged remains final, even if it is based on errors of law. Factual information submitted after the institution's deadline for challenging classifications for a given academic term need not be taken into account for purposes of that term's classification. Legal advice from the Office of the Attorney General received by the registering authority after the

deadline, which has the effect of correcting errors of law, can be taken into account for purposes of changing the determination for the academic term in question, if the student challenged within the prescribed period. These rules are based upon the practical need for finality of classification determinations and upon the provision in section 103(2)(k) that places the burden upon the student to establish his/her entitlement to in-state status.

Section 2.7 -- "Definitions," "**rules**," and "presumptions"

(1) Section 102 contains specialized definitions of certain terms. These terms, for the purpose of tuition classification, are to be understood as having the specialized meaning regardless of the different meanings the terms might have in other legal or nonlegal contexts, "unless the context otherwise requires." This qualification makes it possible to disregard the specialized definition given to a term in section 102 only if in the context of a particular section the specialized definition makes so little sense that it is clear the legislature could not have intended the term to carry the specialized meaning in that context.

(2) Section 103(2) and section 103(3) contain rules which **must be utilized in determining tuition classification**. These **rules are of** two types: 1) rules which **prescribe** the law that is to be **applied in determining classification, (e.g., sections** 103(2)(d), 103(2)(c), 103(2)0), 103(2)(k), 103(2)0), and 103(2**)(m)); and 2) rules which describe various** factors which **may be considered in classification decisions** or which **give relative weight to certain evidentiary factors** (**e.g., sections** 103(2)(f), 103(2)(g), 103(2)(h), and I03(2)(i)). The first type **of rules must** be followed. The **second type are only rules pertaining** to the relevancy and weight of **evidence**, which still **allow and indeed require** thoughtful **judgment on the part** of the **registering** authority.

(3) Section 103(1) contains a number of "presumptions" that are to be utilized by registering authorities in making classification decisions. These "presumptions" differ from the "rules" that are contained in sections 103(2) and 103(3) in that they can be rebutted by the presentation of evidence to the contrary. The language introducing these statutory "presumptions" states only that the presumption is to control "unless the contrary appears to the satisfaction of the registering authority ...." Of course, under the rule of section 103(2)(k), it is up to the person seeking to establish eligibility for in-state status to produce clear and convincing evidence sufficient to persuade the registering authority that the facts of his /her case are contrary to any of these presumptions.

Section 2.8 -- "In-state" status

(1) It is only by virtue of classification **as an "in-state"** student that one can enjoy the advantage of lower tuition **rates at** the covered institutions. Neither Colorado "residency" nor Colorado "domicile," by themselves, entitles one to the lower tuition rates. An "in-state" student is defined as a student who has been domiciled in Colorado for 12 continuous months or more

immediately preceding registration at the covered institution. This durational domicile requirement was upheld as a valid prerequisite to in-state tuition rate eligibility in Montgomery v Douglas, 388 F. Supp. 1139 (D.D.C. 1974), affd., 422 U.S. 1030 (1975).[1] Consequently, in order to qualify for "in-state" status a person must persuade the registering authority that his /her Colorado domicile commenced and continued without interruption at least one full year prior to registration. When Colorado domicile is inferred from specific facts, it is not necessary that those facts have occurred a year or more before registration, so long as the registering authority is convinced that the facts prove that a Colorado domicile commenced at least 12 months before registration and continued until registration.

(2) Because of the durational domicile requirement, it is currently possible for a person to be domiciled in Colorado and yet be ineligible for classification as an in-state student.

Section 2.9 -- "Domicile"

(1) "Domicile" requires more than presence in the state. Rather, it requires a fixed, not merely temporary, "place of habitation." A place of habitation may be shown to be permanent rather than temporary in spite of a short-term lease, or no lease at all. Section 103(1)(d) provides that physical presence in Colorado, coupled with the lack of intent to return to a previous domicile or to acquire a domicile elsewhere gives rise to a presumption that a Colorado domicile has been created. This presumption is sufficient to prove Colorado domicile. The presumption, however, is rebuttable, based on the premise that presence usually evidences habitation. If there is evidence that the physical presence was merely transient or that the person had no place of habitation in Colorado, the presumption is overridden. On the other hand, in certain -circumstances a person might be found to have established a permanent Colorado place of habitation for himself/herself, as for example by locating his/her family at that place, and yet not be personally present there until some time later. Such cases should be examined very carefully to insure that the Colorado habitation can fairly be said to have become the person's "true, fixed, and permanent home." The burden of proof rests upon the person seeking to establish domicile.

(2) For most legal purposes, once a domicile has been created in a particular state, it continues until there is an intent to change it and a new domicile has been created elsewhere. This presumption can be rebutted by evidence sufficient to persuade the registering authority to the contrary. Section 103(2)(g)(IIl) provides that prolonged absence from Colorado may be considered as evidence that domicile has been created in another state, thus terminating the Colorado domicile. However, the presumption in section 103(1)(e) and the evidentiary rule in section 103(2)(g)(III) are

[1] However, in a 1994 6th circuit decision, Eastman v. University of Michigan, 30 F.3d 670 (6th Cir. •1994), the court held that although the one year durational requirement may be relevant .evidence on the question of domicile, the 12 months cannot be dispositive. According to Eastman, the registrar should determine residency based on all of the evidence presented, which may include the 12 months of domicile. What ultimate effect this ruling, which is not directly applicable to Colorado, will have on our 12 month residency requirements remains to be seen.

only devices to aid in making determinations when unambiguous evidence of a person's domiciliary intent is lacking. If there is no other evidence regarding intent to establish a new domicile elsewhere, the presumption controls, regardless of the length of the absence. If there is other evidence, but it is equivocal, the registering authority is free to exercise his discretion. Other evidence considered relevant on this point is evidence that the person either has ceased to maintain a "true, fixed, and permanent home and place of habitation" in Colorado or else has intended to establish a new domicile elsewhere while being present at that other place. Examples of evidence relevant to the latter point are discussed in chapter four of these guidelines entitled "Proving Domicile."

Section 2.10 -- "Residence"

"Resident" or "residency" requires only physical **presence as an inhabitant of a place and does not** imply any **intention to remain or to make that place one's home. Residence or nonresidence is important as some evidence of domicile or nondomicile. See sections** 103(2)(f)(IV) and 103(2)(g)(**III). It may also bear upon the emancipation of a minor, see section** 103(2)(i)(III). Proof **of residence does not in itself determine domicile.** Although a **person may have several residences, she/he can have only one domicile at a time.**

Section 2.11 -- Whose domicile control . derivative domicile

(1) The student's domicile controls if

(a) She/he is over the age of 22 years;

(b) She/he is. under the age of 22 years and is "emancipated";

(c) She/he is a student commencing a postbaccaluareate degree granting program [erg, section (102)(9)); or

(d) She/he is unemancipated, under the age of 22 years and continues to physically reside in Colorado with domiciliary intent notwithstanding the abandonment of a Colorado domicile by persons from whom she/he previously derived a Colorado domicile.

(e) Notwithstanding the abandonment of a Colorado domicile by persons from whom she/he previously derived a Colorado domicile if she/he is unemancipated, under the age of 22 years, and the parent/guardian was a Colorado domiciliary for the four years immediately preceding the application and 1) the parent/guardian left Colorado after she/he completed her/his junior year of high school and 2) she/he is admitted to a Colorado Institution within three years and six months after the parent/guardian left Colorado.

If a person becomes qualified to determine his/her own domicile on a date within the year preceding registration, then in order to qualify for in-state status both his/her domicile since

emancipation and his/her derivative domicile prior to emancipation must be shown to be in Colorado.

(2) The domicile of his/her parent or guardian controls the student's domicile if she/he is an unemancipated minor. The student's intentions and contact with the State of Colorado are irrelevant. It is possible for a student's derivative Colorado domicile, having commenced by virtue of one parent's or guardian's domicile in Colorado, to continue in spite of that parent's or guardian's loss of Colorado domicile, if prior to that loss the other parent or a guardian has a Colorado domicile [Lqe section 103(2)(m)(I)].

An unemancipated minor is presumed to have a Colorado domicile if:

(a) He/she has a parent who is domiciled in Colorado, whether or not that parent provides any actual support or has legal custody (see section 103(l)(a)), together with sections 102(8) and 103(1)(f)); or,

(b) She/he has a court-appointed guardian of the person, who is domiciled in Colorado (5,ee section 103(1)(a)). In order to derive domicile from the guardian, the student must show that:

(i) The guardian has "legal custody" which means he/she has "the right to the care, custody, and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, and discipline for a child and, in an emergency, to authorize surgery or other extraordinary care", section 19-1-103(18)(a), 8B C.R.S. (1986, 1995 Supp.);

(ii) The court appointing the guardian has certified that the primary purpose of such appointment is not to qualify the minor as a domiciliary of Colorado; and

(iii) The parents, if living, do not provide substantial support to the child.

A guardian appointed as a guardian only of the estate or property of a minor is not a guardian of the minor's person (generally this type of guardian is referred to as a "conservator"). Furthermore, a legal instrument merely granting, or relinquishing custody, or granting a power of attorney, etc., is not a judicial appointment of guardianship of the person.

One can derive a Colorado domicile for tuition purposes from a legally appointed guardian, subject to the foregoing requirements, even though one's parents are living and domiciled elsewhere. If there is no qualifying guardian or parent domiciled in Colorado, the unemancipated minor is presumed to have a non-Colorado domicile (except as provided in 2.11(1)(d) or (e) above).

(3) A change in classification status may be recognized in the term following 12 continuing months of Colorado residence.

(4) Marital status cannot be regarded as giving rise to any presumption concerning domicile. Of course, either or both of the spouses may be bound by the derivative domicile of his/her respective parent or guardian for the period of unemancipated minority which precedes the marriage.

Section 2.12 -- Achieving **in-state status while a student**.

Students are not entitled to in-state classification merely because they have been in the state for 12 continuous months. Section 102(5) provides that "attendance at an institution of higher education, public or private, within the State of Colorado shall not alone be sufficient to qualify for domicile in Colorado." Section 103(2)(e) states that no person may establish a Colorado domicile solely for the purpose of tuition classification. It also states that once a student is classified as out-of-state, he/she cannot have his/her status changed absent clear and convincing evidence. These sections read together mean that a person's status as a student is not determinative of the question of tuition classification. Classification must be determined by the registering authority on the basis of written evidence submitted and in accordance with the rules and presumptions of the tuition law. Changes in classification, whether from out-of-state to in-state or the reverse, must be in writing signed by the registering authority and become effective at the time of the student's next registration.
This is also true for those students attending Colorado institutions under the auspices of the Western Undergraduate Exchange and Western Regional Graduate Programs, as well as under the Reciprocal Tuition Agreement with the State of New Mexico.

Students classified as out-of-state attending Colorado institutions under the Colorado Educational Exchange Program, Section 23-3.3-601, 9 C.R.S. (1995 Repl. Vol.), are not permitted to apply the time spent in the program toward satisfaction of residency requirements for tuition purposes. However, due to the often thorny legal implications of the imposition of such a durational residency restriction, we urge you to contact your attorney in the Office of the Attorney General for legal advice prior to denying a student in-state classification based upon this provision.

Chapter 3.

PROVIN EMANCIPATION

Section 3.1 -- The significance of emancipation

The tuition law establishes a presumption that an unmarried student under the age of 22 is "unemancipated." The question of emancipation must be answered before one knows whose domicile controls. Emancipation occurs by operation of law upon attaining the age of 22, marriage or by intent of parents who have no duty to support, have made no provision to support and have relinquished care, custody and earnings of the child.

Section 3.2 -- Eman cipation by marn age

Emancipation automatically occurs through marriage regardless of any support that might continue to be provided by parents. Furthermore, since emancipation by marriage occurs by operation of law and not by virtue of the intent of the parent or parents, the person who has been married remains emancipated even if the marriage is dissolved before the person is 21 years of age.

Marriage must be recognized as such for all purposes of legal rights and obligations in Colorado. A ceremonial marriage performed anywhere in the United States or in any foreign country is recognized as a marriage in Colorado if it was valid where performed. A ceremonial marriage may be proved by any evidence found sufficient by the registering authority. In addition, Colorado recognizes nonceremonial, so-called "common-law" marriages. However, common-law marriage is not to be confused with cohabitation. A common-law marriage occurs where the parties consent to be husband and wife and there is a mutual and open assumption of a marital relationship. For. purposes of proving common law marriage, the parties' consent may be proven by, or presumed from, evidence of cohabitation as husband and wife and general repute as husband and wife. Conduct in the form of mutual public acknowledgment of the marital relationship is essential to establish a common law marriage. People v. Lucero, 747 P.2d 660 (Colo. 1987). A common-law marriage is just as permanent as a ceremonial marriage and can only be terminated by the same kind of legal dissolution proceedings as are necessary to terminate a ceremonial marriage. The existence of a common law marriage must be proved to the satisfaction of the registering authority with objective evidence of cohabitation, along with such proof of reputation as statements on tax returns, car registration, charge accounts, employment applications and records, etc.

Section 3.3 - Emancipation by parental intent

Emancipation by parental intent exists when the minor establishes two elements:

(1) that his/her parents have entirely surrendered the right to his/her care, custody, and earnings; and

(2) that his/her parents are no longer under any duty to support him/her and have made no provision to support or maintain him/her.

Section 3.4 - The parental duty of support

The parental duty of support is a duty imposed by law -- either common law, statute, or judicial decree. Regardless of the domicile of the parents, the parental duty of support will be determined by reference to Colorado law. This is consistent with the general legal principle that the law of the place where rights are sought to be enforced governs a parent's rights over a child, 67 C.J.S., Parent and Child, sec. 4. Colorado recognizes and gives effect to decrees rendered in other states which have not been subsequently modified or superseded. If there is a decree in force, providing for parental support of the minor, whether obeyed or not, there can be no emancipation by intent.

A parent cannot effectively terminate his/her common law or statutory duty to support minor children by simply renouncing it and surrendering his/her rights to the child's care, custody, and earnings. College age minors present a different situation. One Colorado case suggests that the parent can terminate his/her common law or statutory duty to support college age minors. See Poudre Valley Hospital District v. Heckart, 491 P.2d 984 (Colo. App. 1971).

Section 3.5. -- Emancipatory intent and presumption of nonemancipation

Whether a parent has surrendered the right to the care, custody, and earnings of the minor and made no provision for support are questions of fact. Registering authorities need to determine how "and has made no provision for support" will be interpreted. It is capable of a very strict interpretation, i.e., if the parents give the child any amount of money, e.g., $10, the student is unemancipated. It is our opinion that a more defensible classification decision would be reached if the registering authority looked at the total student-parent relationship, to wit: the amount and regularity of support and the nature of the support. Some questions to be addressed are: whether the parents treat the child differently from other people; or whether the support is regular.

No evidence of emancipation is needed to sustain a finding of nonemancipation since the law presumes that a parent does not intend to surrender the right to the minor's care, custody, and earnings. The minor has the burden of producing evidence of emancipation that is sufficient to persuade the registering authority that emancipation has occurred. Once the minor has produced some evidence to rebut the presumption, the registering authority has the discretion to find for or against emancipation.

The intention of the parent, express or implied, are crucial to emancipation. Although a person is entitled to vote at the age of 18, this has no bearing on the question of emancipation. Van Orman v Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971). Furthermore, the fact that persons 18 years of age or older are given certain other rights of majority by statute, section 13-22-101, C.R.S., is also irrelevant to tuition classification.

The factors which are significant in determining whether a child is emancipated include the financial independence of the child, the child's establishing a residence away from the family domicile, especially with parental consent, and the creation of new relationships incompatible with the notion that the child occupies a subordinate position in his/her parent's family. In re the Marriage of Clay, 670 P.2d 31 (Colo. App. 1983).

Section 3.6 -- Reversal of emancipation by intent

Except in the case of emancipation by marriage and age, emancipation is reversible. This is because emancipation is an act of will on the part of the parent or parents, and that will may change. Consequently, if the available evidence persuades the registering authority that even though emancipation might have taken place earlier the parent or parents now are exercising their parental rights and duties with regard to the minor, the minor may be found to be unemancipated.

Section 3.7 -- Evidence of emancipation

Because the intent of the parent and nonsupport are determinative, the factors suggested by the statute as evidence either of emancipation or of nonemancipation -- sections 103(2)(h) and (i) -- are to be given relatively greater or lesser weight insofar as they can be taken to be more or less indicative of the parents' intent and nonsupport.

An affidavit of the parent or parents declaring their relinquishment of any claim or right to the care, custody, and earnings of the minor, nonsupport and disavowing any duty to support the minor is extremely strong evidence of such intent and nonsupport. A parental affidavit should be taken as conclusive of emancipation unless: (1) there is a court decree requiring support; (2) other evidence contraindicating emancipation is so strong that it indicates persuasively that the affidavit is false, or (3) there is persuasive evidence that the emancipation has been reversed.

Entry into the military service, referred to in section 103(2)(h)(II), is not very persuasive evidence of emancipation, because it is an act of the minor and does not necessarily reflect any intention of the parent. During the term of an active duty enlistment, military status may be taken as some evidence of emancipation. After the completion of active duty, however, the fact that one has been in the military service does not necessarily indicate anything about emancipation.

The parents' failure to provide support, coupled with evidence that the minor is independently able to meet his/her financial obligations, including education costs, can be strong evidence of emancipation, provided there is no court decree requiring support. On the other hand, if the failure of parental support is due to the economic hardships of the parent, it might not reflect a parental intent to emancipate at all. If the failure of parental support reflects parental abandonment of the minor, that abandonment may be taken as equivalent to an intent to emancipate. There are cases from other states holding that emancipation by abandonment gives a child capacity to establish his/her own domicile, e_ g., In re Sonnenberg, 256 Minn. 571, 99 N.W.2d 444 (1959).

"Any other factor peculiar to the individual which tends to establish that the minor is independent of his parents and is providing his own support," section 103(2)(h)(IV), is relevant to the question of emancipation. The registering authority has discretion to decide how much weight should be given to a particular piece of evidence.

Section 3.8 -- No factor "**conclusive"**

Section 103(2)(h) acknowledges that not one of the criteria listed there would necessarily be "conclusive" evidence of emancipation if considered alone. This, however, only means that none of the factors constitutes irrefutable proof of emancipation. It does not mean that the registering authority cannot find emancipation to have occurred where only one of the factors or "criteria" is present, and there is no evidence to the contrary. In such a case, the question to be asked is whether the evidence that does exist is sufficient, in. the judgment of the registering authority, to override the presumption of nonemancipation.

Section 3.9 -- Evidence of nonemancipation

Evidence of nonemancipation is aided by the statutory presumption of nonemancipation. The registering authority need go no further than proof of age or marriage to conclude nonemancipation. The burden is on the student to produce contrary evidence.

The factors suggested by the statute as evidence of nonemancipation also have different weights. A minor student may not be claimed by a parent as an exemption for federal income tax purposes unless more than half of his/her support is provided by the parent, 26 U.S.C. 152. While such support may be provided, and the exemption lawfully taken, whether or not there is a duty to provide the support, it would be evidence that the parents had provided for the child's support. However, support may be provided for much of the year and emancipation be accomplished late in the year, after enough support to qualify for the exemption has been provided. Therefore, claiming the minor as an income tax exemption is strong evidence against emancipation unless it is explained by other evidence, and might even be considered sufficient to discredit an affidavit of relinquishment under section 103(2)(h)(I).

Receipt of gifts, loans or proceeds from an inter vivos trust, regardless of the date of receipt and regardless of whether from parent, other relative or friend, is evidence of nonemancipation, pursuant to section 103(2)(i)(II)..The registering authority can find a student unemancipated even if the gift was received 10 years before the date of registration if the student is presently relying on the gift for his/her support. If the student has received a loan, it does not matter that the student has signed a promissory note or other agreement and has to pay the loan back. The loan may still be considered evidence of non-emancipation. Gifts need not be monetary, but could be cars, houses, condominiums, etc. Receipt of gifts, loans or inter vivos trust proceeds from friends or relatives other than parents does not necessarily bear on parental intent to relinquish support (unless the parents have channeled support to the minor through others), but it is evidence that the minor is not independent.

Residence in the parents' home except for temporary visits, section 103(2)(i)(III), is strong evidence of nonemancipation since it is difficult to reconcile the parents' intention to disavow parental rights and duties with the parents' provision of shelter and care. A student who spends the entire summer vacation residing with his/her parents and rents living facilities near the college during the period when she/he is enrolled for classes can hardly be said to be on a "temporary visit" to the parents' home. However, evidence that the minor pays rent, or contributes from his/her own resources to the expenses of the home, may neutralize this factor of residence eliminating its persuasiveness as to parental intent, and leaving the question of emancipation to be determined on the basis of other evidence.

"Any other factor peculiar to the individual which tends to establish the minor's lack of independence and his dependency upon his parents," section 103(2)(i)(IV), is relevant to the emancipation question only insofar as it is reasonable to infer that the parent -- not the minor -- has intended that parental rights and duties not be terminated and has made no provision for the child's support.

Section 3.10 -- Miscellaneous Factors.

It would be impossible to catalogue all of the peculiar factors that might be found to have value as evidence on the question of emancipation in particular cases. A few common and recurring factors, however, deserve comment. The statute does not state a dollar figure parental support in excess of which would be conclusive evidence against emancipation. Forms of assistance or support other than cash must also be considered. Allowing the minor to use a parent-owned car, co-signing a note for a loan, carrying the minor on the parents' automobile insurance policy, or carrying the minor on the parents' medical insurance policy are a few of the factors that may be considered. It is to be emphasized again, however, that the crucial issues are the parents' intent to entirely surrender the right to care, custody, and earnings of the child and nonsupport. If the parents have made any provision for the child's support that is more than de minimis, the registering authority should find the student unemancipated.

Section 3.11 -- Trust funds

The issue of a trust fund is relevant to the question of whether a person under the age of 22 is emancipated. A trust fund may be considered as evidence that a person under the age of 22 is not emancipated under Section 103 (2)(i)(II). The intent of the statute is to allow a student to establish his/her own domicile if the parents are not supporting him/her and he/she is supporting himself/herself from independent sources. Parental gifts, proceeds from inter vivos trusts, loans, or shares in parent-owned business or limited partnerships that benefit the student support the presumption of nonemancipation.

Section 3.12 -- Emancipation followed by attainment of age 22

Sometimes a person who turns 22 at some time within the statutory one-year period before registration will claim that emancipation occurred at some time before that one-year period commenced. The claim is made that his/her habitation in Colorado with domiciliary intent should be given effect as of the date of emancipation rather than as of date of the 22nd birthday. Although his/her means of support -- parental or otherwise -- after reaching 22 is irrelevant to tuition classification, it is permissible to regard the continuation of parental support after that birthday as some evidence that the parents provided for the support of the student before that date. It might also be reflective of continued parental concern and provision inconsistent with the claim that some months earlier the parents had repudiated all parental rights and duties.

Chapter 4.

PROVIN DOMICILE

Section 4.1 -- Elements of domicile for tuition classification purposes

As discussed earlier in these guidelines, the elements to be proved in order to establish a Colorado domicile for tuition classification purposes are: (1) a fixed and permanent place of habitation in Colorado; and (2) the intent to remain at that place, with no intent to be domiciled elsewhere. The burden is on the person seeking in-state classification to persuade the registering authority that both of these elements are present.

Proof of the first element is normally not difficult. Rent receipts, a copy of a lease, ownership papers, and statements of landlords or cohabitants are a few examples of evidence that might be found persuasive of the existence of a fixed and permanent place of habitation in Colorado.

Proof of the second element -- intent -- is much more difficult. The problem is that the registering authority must be convinced of what is inside another person's mind. Obviously the statements of that person with regard to his/her subjective intent are significant evidence of that intent. However, to rely wholly upon statements made by a person who has much to gain by proving a particular intent would be to invite misrepresentation. Therefore, while the statements of the interested party as to his/her intent are certainly to be taken into account as evidence, the registering authority must also consider various objective factors -- acts of the party and circumstances that tend to confirm or impeach the party's own statements regarding his/her intent.

Section 4.2 -- The crucial finding of intent

It must be emphasized, however, that intent, and intent alone, is the key to this second element of domicile for tuition classification purposes. If the registering authority is convinced that the requisite intent is present, it makes no difference that some of the objective factors mentioned in the statute are absent; and if the registering authority is convinced (on reasonably supportable grounds) that the requisite intent is not present, it makes no difference that some of the objective factors are present. The objective factors listed in the statute are only evidence of intent, and there are innumerable other factors which might be present in particular cases that also provide evidence of intent. None of these factors is significant for its own sake; they are all significant only insofar as they provide evidence concerning intent, and it is that intent, not the evidentiary factors, that is decisive on the question of domicile.

Section 4.3 -- Payment of income tax "highly persuasive evidence"

Sections 103(2)(a) and (b) of the statute provide that payment of Colorado income tax is highly persuasive evidence of domicile in Colorado, and that nonpayment of Colorado income tax by a person whose income is sufficient to be taxed is highly persuasive evidence of non-Colorado domicile. This is not in any sense a trade-off of tax payment for tuition benefits. It is simply a recognition of the fact that Colorado law requires Colorado domiciliaries with sufficient earnings to pay income tax. It is the most commonly available objective evidence of domiciliary intent. Although nonpayment of Colorado income tax in these circumstances is highly persuasive evidence of non-Colorado domicile, it is not conclusive evidence. A Colorado domiciliary may disobey the tax laws without ceasing to be a domiciliary, and the tuition law is not a device for enforcing tax liabilities. A person who has not paid Colorado income taxes, therefore, may nevertheless prove a Colorado domicile if there is other persuasive evidence.

Conversely, persons who are not domiciliaries of Colorado are nevertheless generally obligated to pay income tax to Colorado on income earned in Colorado; consequently, payment of Colorado income tax is not conclusive evidence of domicile, and may be overridden by other evidence. The fact that payment of income tax is said to be "highly persuasive" evidence merely means that the registering authority must be satisfied that the countervailing evidence is quite strong before finding lack of domicile in the face of evidence of payment of Colorado income tax. The "highly persuasive" rule applies only to the payment of Colorado income tax, not to the payment of any other kind of tax. Finally, If spouses file income tax returns in different states, the amount of income tax paid to each state may be considered in determining whether domicile in Colorado is proper.

Section 4.4 -- Income "sufficient to be taxed"

All income including wages, tips, royalties, self-employed income, etc., must be taken into account for purposes of determining whether a person's income was sufficient to be taxed. Income earned by Colorado domiciliaries in military service is not taxable by Colorado for the period of time when a person is actually assigned to a combat zone. The liability for paying taxes resumes immediately upon leaving the combat zone. If a person once domiciled in Colorado ceased paying Colorado income tax in spite of having sufficient income to be taxed, the nonpayment is highly persuasive evidence that the Colorado domicile was abandoned. Such evidence could only be overcome by strong evidence that the habitation and intent necessary to Colorado domicile had been retained.

Section 4.5 -- What constitutes "payment" of income tax

"Payment" of Colorado income taxes may be accomplished by submitting payment when a tax return is filed; or it may be accomplished by an employer withholding from wages. Conversely, filing a return if no tax is paid, such as, for example, to secure the food tax rebate, does not qualify one for this "highly persuasive evidence" rule.

Section 4.6 -- Payment of income tax by married persons

Returns of married persons present special problems. Taxes reported on a joint return generally are said to have been paid by both parties, even if only one had income. Where a joint return has been filed, taxes withheld from the wages of either party should be regarded as having been paid by both parties as of the date of the withholding. If spouses file income tax returns in different states, the amount of income tax paid to each state may be considered in determining whether domicile in Colorado is proper. If marriage or dissolution occurred within the tax year, any amounts withheld before the marriage or after the dissolution must be regarded as having been paid only by the party from whose wages the sums were withheld. If either party files a separate return, each party must be regarded as having paid only the tax computed on his/her own tax return or withheld from his/her own wages.

Section 4.7 -- Evidentiary value of income tax return

Although the filing of a tax return is not necessarily indispensable to qualify one for the benefit of this "highly persuasive evidence" rule, a copy of the return for the years in question is very useful as evidence if it is available. This is true for several reasons. First, it takes account of the possibility that payment by withholding might have been negated by filing for a full refund, as nondomiciliaries in certain circumstances may be entitled to do. Second, the identification of oneself on the tax return as "resident" or "nonresident" has important evidentiary value. Although residency for income tax purposes is not necessarily the same as domicile for purposes of tuition classification, one's description of oneself as a nonresident for tax purposes casts significant doubt upon one's claim of domiciliary intent. In the absence of sufficient countervailing evidence such evidence would be persuasive that the intent essential to domicile was lacking. Third, domiciliaries with incomes sufficient to be taxed are subject to a mandatory duty to file an income tax return with the state, and the failure to comply with this duty may 'be taken as some evidence of domicile in another state, pursuant to section 103(2)(g)(I).

Section 4.8 - Backfiling income tax returns

Nothing is to be gained for purposes of tuition classification by "backfiling" income tax returns for former years. Registering authorities are not tax collectors, and it is not their function to cause disobedient taxpayers to pay their back taxes. The only significance of income tax payment is as evidence of domiciliary intent. What is relevant is the intent at certain times in the past, not the intent at the time the individual applies for in-state classification. Filing a tax return today, covering a past period has absolutely no value as evidence that one had a domiciliary intent at that earlier time. It should therefore be regarded as irrelevant to tuition classification.

Section 4.9 -- Evidentiary factors other than payment of income tax

Sections 103(2)(f) and (g) of the tuition law list several factors which may be taken into account as evidence in support of or in opposition to a claim of Colorado domicile. A great variety of other factors also may be taken into account. Any factor that seems reasonably probative with respect to either of the two elements necessary to establish domicile for this purpose -- habitation and intent -- may be considered by the registering authority, whether or not it is listed in the statute. The factors listed in the statute, with the exception of income tax payment or nonpayment as discussed above, are not entitled to any more weight than any other factor, not listed in the statute, which seems reasonably probative.

Section 4.10 -- No factor "conclusive"

The statute provides that "no one of these criteria (i.e., the listed evidentiary factors), if taken alone, may be considered as conclusive evidence ...." This does not mean that a decision cannot be based upon one factor alone when other evidence is lacking. It does not mean that the registering authority cannot find one particular factor to be dispositive where other evidence is conflicting. It merely means that none of the factors is sufficient to control the decision regardless of other evidence.

Section 4.11 -- Burden of proof concerning domicile

It must be remembered that the burden of proving domicile rests upon the student, who must prove domicile in Colorado by "clear and convincing evidence." Section 103(2)(k). Consequently, no evidence indicating domicile in another state is necessary in order to support a classification of out-of-state, unless and until the student has produced clear and convincing evidence of Colorado domicile.

Domicile has been proved by "clear and convincing evidence" if, considering all the evidence, the registering authority finds Colorado domicile to be highly probable and free from serious doubt. f f. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). In general, "clear and convincing evidence" means something more than a probability or a preponderance, but less than proof beyond a reasonable doubt.

Section 4.12 - Exercise of judgment by re isteri n authority

The evidentiary factors listed in the statute are merely illustrations of the kinds of things that might be considered as evidence upon which to base thoughtful judgments on questions of domicile. These factors are in no sense "tests" of domicile or "steps" for establishing domicile. For example, it is pointless to inquire whether a person's failure to comply with two separate laws imposing mandatory duties constitutes two factors or only one factor contraindicating Colorado domicile, it is not a matter of "keeping score" or accumulating points on one side or another of a scale. In a particular case, half a dozen or more failures of mandatory duty might be outweighed, in the

registering authority's reasoned judgment, by a single factor evidencing domicile; or several factors evidencing domicile might be outweighed by one failure of mandatory duty. What is decisive is the registering authority's reasoned judgment on the whole of the evidence that is produced, as to whether the person had the habitation and intent necessary to establish Colorado domicile for tuition classification purposes.

Because of this, great care must be taken in advising students or prospective students concerning "steps" that may be taken toward establishing a Colorado domicile for tuition classification purposes. Such things as car registration, driver's license, voting registration, professional licensure, Colorado employment, Colorado public school attendance, even payment of Colorado income taxes, and various other factors are not "steps" toward the creation of a Colorado domicile. All that is necessary to establish a Colorado domicile is to have the requisite place of habitation and intent and to be able to prove the existence of these two elements to the registering authority. All of the factors like car registration, etc., are merely bits of evidence whose persuasive weight will vary from case to case depending upon what other factors or combinations of factors are present. It is not possible to rank or weigh such factors in the abstract. Therefore, it is not possible to tell a person that if she/he does this, that, or the other thing the registering authority will find a Colorado domicile.

Chapter 5.

SPECIFIC CIRCUMSTANCES

Section 5.1 -- Military personnel

Military personnel are treated slightly differently from others under the tuition classification law. Sections 103(1)(c) and 103(2)(g)(III) clearly state that in-state status is not lost by a person because of absence, even if prolonged, due to the requirements of military service. In this case, absence is involuntary and therefore has no evidentiary value as to domiciliary intent.

A member of the United States armed forces from outside of Colorado or his dependents can be considered "in-state students" under the definition in section 102(5) if they qualify under section 103(1)(c). This section sets forth the eligibility requirements as follows: either the armed forces member must have been domiciled in Colorado for 12 continuous months and must have. complied with the provisions of Article 7 that apply to civilians, or, notwithstanding the length of his residency, he must have moved to Colorado on a permanent change-of-station basis, as defined by the armed services, in which case no other proof need be submitted in order to obtain in-state status. Regarding the latter, it is the interpretation of this Office that "moving to Colorado on a permanent change-of-station basis" includes two components: permanent assignment to a Colorado base; and maintenance of a full-time, principal residence in Colorado. It must be noted, however, that qualification for in-state status due to "permanent change-of-station basis" does not confer domicile.

Military personnel, no less than other persons, may establish a Colorado domicile, then leave the state within a year without intent to abandon, and be eligible for in-state status upon the expiration of 12 continuous months from the date of establishing the Colorado domicile.

Unlike civilians, military personnel ordinarily have additional documentation available as evidence on the question of domiciliary intent. For example, statements appearing on the military person's "W4" form as to residence are some evidence probative of domiciliary intent. A military person's "Affidavit of Nonresidence" for the purpose of securing exemption from the Specific Ownership Tax on an automobile should be regarded as very persuasive evidence of the lack of Colorado domiciliary intent. However, the so-called "home of record" of military personnel is not very significant evidence. "Home of record" is the place from which a person is inducted, and originated as a concept related to enlistment quotas; the "home of record" may remain unchanged in spite of a bona fide change of domicile.

The rule of derivative domicile in section 103(1)(f) applies to unemancipated minor children of a parent who is in the military as in the case of any other parent. Nothing in section 103(1)(c) should be taken as providing for derivative domicile for an emancipated child of a parent who is in the military service, where the principle of derivative domicile would be inapplicable if the parent were not in the military.

Any member of the military forces of Canada stationed at a military base located in Colorado, or the dependent of any such member, is allowed to receive in-state tuition status at any institution of higher education in Colorado. However, no member of the Canadian military shall be considered to be stationed in Colorado unless he/she also maintains a full-time principal residence in this state. Section 106.

Section 5.2 -- Aliens

Domicile for tuition classification depends upon place of habitation and intent. Neither of these elements is necessarily inconsistent with foreign citizenship; it is possible for an alien to qualify for in-state classification. The initial question to be addressed is the alien's status under the Immigration and Nationality Act, title 8, United States Code, section 1101.

Under the Immigration and Nationality Act, all aliens are either "immigrants" or "nonimmigrants." Certain nonimmigrant aliens are required to have a residence in a foreign country which they declare they have no intention to abandon, see e.g., 8 U.S.C. sec. 1101(a)(15)(B), (F), (H), (J) and (M). See also list of nonimmigrant visa categories, attached as Appendix II. A nonimmigrant alien with an F-1, F-2, H-3, or M-1 visa is legally incapable of establishing a Colorado domicile for tuition classification purposes so long as she/he remains in such a restricted nonimmigrant alien status. Seg, a g., Seren v. Douglas, 489 P.2d 601 (Colo. App. 1971). Mr. Seren was found to be legally incapable of establishing a Colorado domicile until after his student visa had expired. The holder of an H-4 visa is not eligible if the H-4 visa was granted because of the nonimmigrant alien's relationship with the holder of an H-3 visa. The holder of an M-2 visa is not eligible if the M-2 visa was granted because of the nonimmigrant alien's relationship with the holder of an M-1 visa. J-1 visa holders (exchange students or professors) may be eligible if they are in Colorado to teach rather than to learn. The status of a J-2 visa holder depends on the status of the J-1 visa holder to whom the J-2 visa holder is related. Other foreign nationals, including undocumented aliens, whose primary purpose for being in Colorado is their own education or the education of a family member are not eligible to establish domicile in Colorado. All other foreign nationals are capable of establishing Colorado residency for purposes of tuition if they meet the other requirements.

A person whose restricted nonimmigrant alien status has expired may become eligible to choose a Colorado domicile with little or no official action. For example, in the Seren case, the nonimmigrant alien was held to become capable of establishing domicile by virtue of his remaining in the United States after the expiration of his "F" or student visa, even though he had not yet either sought or been granted immigrant status. While there may have been legal grounds on which Mr. Seren could have been deported, the legal disability that prevented him from establishing a Colorado domicile for tuition classification purposes ceased to exist. From then on, he was legally capable of establishing a Colorado domicile for tuition purposes upon proof of place of habitation and intent, whether or not he had sought or been granted the status of lawful permanent residence in the United States.

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In June 1982, the United States Supreme Court reviewed a Maryland classification law which excluded all nonimmigrant aliens from in-state tuition classification. Toll v. Moreno, 458 U.S. 1 (1982). The court held that nonimmigrant aliens with an 8 U.S.C. sec. 1101(a)(15)(G)(iv) visa were not statutorily prohibited from forming the necessary intent to establish a domicile in the State of Maryland. Hence, Colorado cannot restrict all classifications of nonimmigrant aliens from establishing domiciles. All other immigrant and nonimmigrant alien. classifications must be considered on an individual basis. The presumptions and evidence that are considered for U.S. citizens should be applied to these applicants.

After Toll v. Moreno, the critical question is when the student under a restricted nonimmigrant visa becomes capable of forming a Colorado domicile. The options are at the date of expiration of his restricted visa, the date of application for an adjustment of status with Immigration and Naturalization Services, or the date the individual's application for adjustment of status is approved. Seven held that Mr. Seven was free to form the intent to have a Colorado domicile upon the expiration of his student visa. This was several months before his application for an adjustment of status and several years before his application was approved. It is our opinion that the preferred date should be the date of expiration of the alien's restricted visa. Our reasoning is that as long as the restricted visa is in effect, the individual is legally incapable of forming the intent to establish a Colorado domicile.

Where the disability inherent in nonimmigrant alien status is absent, either because the alien entered the country as an immigrant or because his/her restricted nonimmigrant alien status has ended, the question of the alien's domicile for tuition classification purposes is to be determined according to the same principles that apply to nonaliens. The one year period starts to run at such time after the termination of restricted nonimmigrant alien status (if any) when the appropriate intent and Colorado place of habitation are found to have existed.

Proving domicile may be different in the case of aliens than in the case of U.S. citizens, simply because aliens may be unable because of language barriers, voting ineligibility, etc., to present some of the factors normally looked to as evidence of domiciliary intent. However, none of those factors is a prerequisite, and the tuition law specifically contemplates reference to "any other factor peculiar to the individual which tends to establish" the necessary intent or lack thereof. A case by case assessment of the apparent intent of such aliens will have to be made. One factor that might provide evidence against establishment of a Colorado domicile is the failure of an alien to make timely application to the United States for immigrant or permanent resident status, since such failure tends to negate the alien's intent to remain permanently in Colorado.

Section 5.3 -- Chinese **and Russian students in** graduate public policy **programs** at the University of Colorado at Denver

Up to twenty-five students per year from the Commonwealth of Independent States and the People's Republic of China, who are enrolled in a master's program at the graduate school of public affairs at the University of Colorado at Denver ("UCD"), may be classified as an in-state student for

tuition purposes at UCD. To qualify, the student must meet the academic requirements of such program; must be enrolled as a full-time student; and must maintain a full-time principal residence in this state during the time student is enrolled. Eligibility for in-state classification for each student shall terminate when the student receives a degree from the program in which the student was enrolled at the time in-state classification was first received.

The dean and faculty council of the graduate school of public affairs at UCD shall determine the in-state tuition qualification on an annual basis.

This section, 107, was added in 1993 and contains two limiting provisions. No student shall be admitted in lieu of a qualified Colorado resident who is applying at the graduate school of public affairs at UCD. No student classified as an in-state student pursuant to this section shall be counted as a resident student for any purpose other than tuition classification.

Section 5.4 -- Prisoners and other inmates

It is possible for a person to establish a Colorado domicile for tuition classification purposes while she/he is an inmate in a Colorado institution. As to the element of "place of habitation," a prison or other institution can qualify under the statute as a "true, fixed and permanent home and place of habitation." The fact that the inmate is to be released at some future time does not destroy the "permanence" of the place of residence any more than the fact that a lease of an apartment may expire on some future date. The fact that an inmate may maintain another "home and place of habitation" in another state does not prevent recognition of his/her Colorado place of habitation although it may be found to have a bearing on the question of intent.

As to the element of intent, it is not possible to say that the mere fact that the inmate is legally and perhaps physically incapable of leaving Colorado means that she/he "intends to remain" here. The legal and physical incapacity is involuntary and furthermore, in most cases, is for a limited time. However, while incarceration itself is not tantamount to domiciliary intent, neither does it negate such intent.

Proof of intent is more difficult since the factors commonly relied upon as evidence of domiciliary intent such as car registration, voting registration, income tax payment, etc. are frequently unavailable. Often the only evidence of intent to remain in Colorado is the inmate's own statement of that intent. Unless there is evidence to contradict such a statement, it should be credited by the registering authority.

The one year waiting requirement and the principles of derivative domicile apply where the person seeking in-state status is under the age of 22.

Section 5.5 -- Olympic athletes.

Every athlete who is either in residence and in training at the U.S. Olympic Training Center at Colorado Springs; in residence in Colorado Springs and in training at the U.S. Olympic Training

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Center at Colorado Springs in a program approved by the governing body for the athlete's Olympic sport; or in residence in Colorado Springs and in training in a program and at a facility in Colorado Springs approved by the governing body for the athlete's Olympic sport can automatically be classified as an in-state student for tuition purposes at any state-supported institution of higher education.

A student classified as an in-state student pursuant to this section is not entitled to receive state financial aid. The student may be counted as a resident student for any purpose.

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