

3110 INSURANCE CONTRACT: DEFINITION OF “RESIDENT” OR “MEMBER OF A HOUSEHOLD”

Question No. ____ asks was _____ a resident of _____’s household at the time of the (accident) (injury).

A resident of a household is one, who, in a manner consistent with the closeness of a family or household, lives under the same roof.

However, a person may be a resident of more than one household for insurance purposes. Residents of a household are not required to live under the same roof to be considered part of the same household for insurance purposes provided they have the intent to return to live under the same roof.

Factors you may consider in determining residency include:

- The subjective or declared intent to return, if any, and actions evidencing this intent;
- Whether the parties live in a close, intimate, and informal relationship;
- Whether the intended duration of the relationship is likely to be substantial;
- Whether it is reasonable to conclude that the parties would consider the relationship when contracting for insurance;
- The age of the respective parties;
- Whether a separate residence is established;
- The self-sufficiency of the person;

- The frequency and duration of stays in the residence;
- Whether personal possessions remain in the home;
- Whether a person is driving or has the opportunity to drive cars interchangeably rather than by merely causal use; and,
- Whether the residence continues to be the mailing address of the parties.

A determination of residency is based upon the facts of each individual case. Consider all of the relevant facts and circumstances in determining whether _____ was a resident of _____'s household at the time of the (accident) (injury). No single factor is controlling, but all of the elements must combine to a greater or lesser degree to establish the relationship.

The burden of proof on the issue of whether _____ was a resident of _____'s household is upon (plaintiff).

If, after review of all the facts and circumstances in this case you find that (plaintiff) was a resident of _____'s household at the time of the (accident) (injury), you should answer question _____ on the Special Verdict "yes." If not, you should answer that question "no."

COMMENT

This instruction and comment were approved in 2002 and revised in 2012. The comment was also updated in 2003. This revision was approved by the Committee in October 2021; it added to the comment.

Muskevitch-Otto v. Otto, 2001 WI App 242, 248 Wis.2d 1, 635 N.W.2d 611 (Ct. App. 2001); Seichter v. McDonald, 228 Wis.2d 838, 845, 599 N.W.2d 71, 74 (Ct. App. 1999); Ross v. Martini, 204 Wis.2d 354, 555 N.W.2d 381, (Ct. App. 1996); Londre v. Continental Western Ins. Co., 117 Wis.2d 54, 58, 343 N.W.2d

128 (Ct. App. 1983); Belling v. Harn, 65 Wis.2d 108, 112-114 (1974); Pamperin v. Milwaukee Mutual Ins., 55 Wis.2d 27, 35-37, 197 N.W.2d 783 (1972); Doern v. Crawford, 30 Wis.2d 206, 140 N.W.2d 193 (1966); National Farmers Union Property & Casualty v. Maca, 26 Wis.2d 399, 407-408 (1965).

Resident; Member. Although not explicitly stated, the terms “resident” or “member” of a household appear to be equivalent. The Supreme Court has used them interchangeably. Belling, pp. 109, 111; Pamperin, pp. 33-34.

The term “resident or member of the same household” as used in policies of automobile liability insurance is not ambiguous. It should be given its plain and common meaning regardless of whether it is used to define exclusion or inclusion from coverage or whether the question is one of creating or terminating the relationship. Pamperin, p. 37.

Factors. No single factor is the sole or controlling test of whether a person is a resident of a household. Londre, p. 54. The issue of residency for insurance purposes “is fact specific to each case.” Seichter, p. 845. The Seichter court approved use of considerations from a Minnesota case, Schoer v. West Bend Mutual Ins. Co., 473 N.W.2d 73, 76 (Minn. App. 1991) which had been cited with approval in Ross v. Martini, *supra*. The list of factors in paragraph 4 is not exhaustive.

Unmarried persons can be residents of the same household, but whether they are depends on the facts in each case. Quinlan v. Coombs, 105 Wis.2d 330, 333, 314 N.W.2d 125, (Ct. App. 1981).

Residence Distinguished from Domicile. “It might be said that ‘domicile’ includes residence, but ‘residence’ does not necessarily include domicile. Domicile is generally regarded as the place where a man has his fixed and permanent home or residence to which he intends to return whenever he is absent therefrom.” Estate of Daniels, 53 Wis.2d 611, 614-5 (1971).

The length of time necessary to establish residency for insurance purposes is sufficient if “the intended duration is likely to be substantial.” Pamperin, p. 37 “[W]hile the intended duration does not require the permanency generally associated with the establishment of a legal domicile, something more is required than a mere temporary sojourn.” Pamperin, p. 35.

Thus, a person may have only one domicile but may have more than one household for insurance purposes. Londre, p. 58.

Children. A child placed in a family-operated foster home pursuant to a court dispositional order under sec. 48.34 Stats. is considered a resident of that household for insurance purposes. A.G. v. Travelers Ins. Co., 112 Wis.2d 18, 24 (Ct. App. 1983).

The intent of minor children of divorced parents is discussed in Ross v. Martini, *supra*, pp. 358-9. Where the child is of tender years, the finder of fact would look to the intent of the child’s parent or custodian. Muskevitch-Otto v. Otto, par. 9 p. 8. Generally, the issue of residence for minor children of divorced parents is “inexorably linked” to custody provided in the divorce decree. Ross, p. 359. It is possible in joint custody situations for children to be members of both parents’ households for insurance purposes. Londre, *supra*, p. 59.

Divorce. As a matter of public policy, removal from a household following commencement of divorce proceedings and during the pendency of the action is not a factor to be given weight in determining residency in a family household. Language to the contrary in the Doern case is withdrawn. Belling v. Harn, 65 Wis.2d 108, 115-116, 221 N.W.2d 888 (1974). However, this modification of Doern appears to be limited to divorce proceedings. Seichter, p. 843, fn. 1.

Legal separation. Wisconsin law plainly distinguishes between a divorce and a legal separation. Pursuant to Wis. Stat. § 767.001(1f), “divorce” is defined as “the dissolution of the marriage relationship.” In contrast, a judgment of legal separation does not terminate a marriage. As the Wisconsin Supreme Court has noted, “there are ... rights and obligations remaining in the marriage after a legal separation.” Kemper Independence Insurance Company v. Islami, 2021 WI 53, ¶18, 397 Wis.2d 394, 959 N.W.2d 912, citing Herbst v. Hansen, 46 Wis. 2d 697, 706, 176N.W.2d 380 (1970). A legal separation does not alter the status of two individuals as spouses under the law, and therefore a named insured’s spouse remains covered under a policy. Kemper, *supra*, at ¶18. The fact that a named insured and their spouse may commence living separate and apart while legal separation is pending “is not a factor to be given weight in determining whether or not such spouses are members of the same household.” Belling, *supra*, at 118.

Intent. While Pamperin, pp. 35, 37, Seichter, pp. 843-844, and other cases hold that no one element is controlling on the question of household membership, and an individual's subjective or declared intent, while a fact to be considered, is also not controlling, the Court of Appeals in Muskevitsch-Otto v. Otto *supra*, approved an instruction which made intent “the key element.” The instruction provided that “In deciding whether a person is a resident of a particular household, the key element is the intent of that person to be a resident of the household in question and to live under the same roof . . .” (emphasis supplied). In harmonizing these decisions, the Committee believes that because of the fact-driven nature of these cases, intent might assume more importance in a particular situation. However, none of the Pamperin elements (including intent) predominates as a matter of law. Until further guidance on this issue is received from the appellate courts, the Committee believes the more prudent course is to follow Pamperin and Seichter.

“In Your Care” Policy Language. For cases involving policy language dealing with the term “in your care,” see also, Cierzan v. Kriegal, 2002 WI App 317, 259 Wis.2d 264, 655 N.W.2d 217. In this decision, the court of appeals listed the relevant considerations in determining whether a person is in the care of the insured.