

## **RESIDENCY ISSUES: IS HOME WHERE THE HEART IS?**

“Home is the place where, when you have to go there, they have to take you in.” -- Robert Frost, *The Death of the Hired Man* (1914)

In order to recover benefits under an automobile liability insurance policy, including an uninsured motorist or supplementary uninsured/underinsured motorist policy, the claimant must, of course, demonstrate his or her status as an “insured” under the applicable endorsement. It is not just the “named insured” who may qualify for benefits, but also any other person that falls within the definition of the term “insured” as contained in the policy. For example, under both the mandatory uninsured motorist endorsement and Regulation 35-D’s SUM endorsement, as well as most standard liability policies, the definition of an “insured” includes occupants of the insured vehicle or any other vehicle being operated by the named insured or spouse; derivative claimants, *i.e.*, persons claiming damages as a result of bodily injury to another who qualified as an “insured;” and, as pertinent hereto, the named insured’s spouse, and relatives of the named insured and/or spouse who are residents of the same household as the named insured. See also 11 NYCRR §60-1.1(c) (setting forth mandatory provisions for defining “insured.”)

Generally speaking, in the context of determining whether an individual is a “resident” of the named insured’s household for determining issues of coverage, “residency” requires “something more than temporary or physical presence and requires at least some degree of permanence and intent to remain.” See *New York Cent. Mut. Ins. Co. v. Kowalski*, 195 AD2d 940 (3d Dept. 1993), *affd. after remand*, 222 AD2d 859 (3d Dept. 1995); *Kradjian v. American Manufacturers Mut. Ins. Co.*, 206 AD2d 801 (3d Dept.

1994). As aptly stated by one court, “If mere physical presence is sufficient to establish a residence, without more, one could change his residence by taking a vacation.” Appleton v. Merchants Mut. Ins. Co., 16 AD2d 361, 364 (4<sup>th</sup> Dept. 1962); see also Lamonsoff v. Hertz Corp., NYLJ, 3/12/91, p. 26, col. 3 (Sup. Ct. Queens Co.). If, on the other hand, the physical presence element is missing, it must be established that such an absence does not manifest an intent not to return.

### **Temporary Absence**

It has been held that, as a matter of law, an individual remains a resident of a relative's household even while temporarily absent to attend an educational institution or to serve in the military.

Thus, in Appleton v. Merchants Mut. Ins. Co., *supra*, the insured's stepson, who was injured while a passenger in an uninsured automobile while on a three-year tour of military duty in Hawaii, was held to be entitled to the benefits of his stepfather's uninsured motorist coverage because his legal residence prior to the accident and, indeed, thereafter, upon his return from service, was the insured's household. In so holding, the court expressly rejected the insurer's contention that in order to qualify as a “resident of the household” within the meaning of the policy “a person must at least dwell under the same roof as the named insured at the time of the accident.” As noted by the court, “[i]n the present state of world affairs, there are few families which do not at some time have children temporarily absent serving their country. Many families also have children temporarily away at college or on vacation trips. These are everyday facts of life of which insurance companies are, or should be, cognizant when writing policies.”

Similarly, in *Alstata Ins. Co. v. Jahrling*, 16 AD2d 501 (3d Dept. 1962), app. dismissed, 12 NY2d 943 (1963), the seventeen-year-old son of the insured had enlisted in the Navy for an almost four-year term, but left his personal possessions at the home of the insured, his mother, where he had resided prior to enlisting. He also frequently visited his mother at her home. Indeed, he was on his way to such a visit while on leave, when he was killed in an accident. On the basis of those facts (and the precedent of *Appleton, supra*), the court held that the decedent was an “insured” under his mother’s policy.

More recently, in *Ledwith v. Sears Roebuck Co., Inc.*, 231 AD2d 17 (1<sup>st</sup> Dept. 1997), the trial court held that a man who had lived in New York before leaving for college in Colorado, and periodically returned to New York to visit his father, did not abandon his New York residency and was still a resident of New York.

Accordingly, it is clear that a child who attends school away from home or serves in the military can benefit from the coverage afforded by his or her parent's policy. And, indeed, such coverage works both ways -- protection may also extend to parents who borrow an automobile that is registered and insured in a child's name, while that child is away at school or in the military.

### **Temporary Presence**

On the other hand, one whose legal residence is elsewhere, does not become a resident of the policyholder's household simply by virtue of an extended stay. A temporary presence will not suffice to establish residence and a temporary absence will not, without more, negate it.

Thus, for example, in *Allstate Ins. Co. v. Chia-I Lung*, 131 Misc. 2d 586 (Sup. Ct. Nassau County 1986), the insured's 80-year-old father was visiting from Taiwan, having arrived in February with a single suitcase containing some warm clothes for winter. He had been living in a separate bedroom in his son's home for five months and had prepared, but not yet signed, an application for a six month visa extension at the time he was injured and subsequently died from the injuries he sustained in a fire at his son's home. He had no bank account in the United States, and no driver's license, and he still owned an apartment in Taiwan. The court (Justice Winick) held that although the father's stay with the son was an extended one, rather than a short visit, the father was not a resident of the son's household. Controlling in the view of the court were "the lack of any attribute of an intention to remain -- no bank account, no loosening of his tie to his homeland, no immigration status other than a temporary one, a retention of his home in Taiwan -- these are indications of a mind to return . . . ."

Similarly, in *State Farm Mut. Ins. Co. v. Leonardo*, 166 AD2d 601 (2d Dept. 1990), the court held that the claimant's decedent, a citizen of Portugal who was visiting his daughter, the insured, and whose immigration status required him to return to his homeland before a specified date, was not a resident of his daughter's household.

### **Multiple Residences**

Most insurance policies do not contain a requirement that the residence or household of the named insured be the principal, primary, or sole residence of a family member in order for that family member to obtain benefits under the policy. Case law has held that an individual can have more than one residence for the purpose of coverage as an additional insured. Indeed, the question of whether the claimant was a resident of one

or more of the households with which he or she was connected is one of the major topics of litigation in this area.

It should also be noted that the term “residence” is often construed differently by the courts, depending upon the context in which it is presented. Courts generally tend to interpret insurance policy provisions so as to provide, wherever possible, a source of indemnification to an injured person. Thus, such terms will be construed narrowly where the policy provision at issue specifically excludes them. On the other hand, such terms will be construed broadly where the policy extends coverage to such individuals. See *McGuinness v. MVAIC*, 35 Misc.2d 827 (Sup. Ct. Queens Co. 1962), affd. 18 AD2d 1100 (2d Dept. 1963). Thus, when citing cases on this issue, the practitioner should be aware of the context of the particular term being interpreted.

In *Hollander v. Nationwide Mut. Ins. Co.*, 60 AD2d 380 (4<sup>th</sup> Dept. 1978), in order to bring the claimant within an exclusion for excess coverage of non-owned vehicles when owned by a “member of the same household,” the insurer contended that the claimant had been living at her parents’ home with her sister prior to the accident; that at the time of the accident she had not established a new residence; and that she indicated in a motor vehicle accident report and in a conversation with the insurer’s adjuster that her home address was that of her parents. The record, however, established that except for a period of a few months, the claimant had not been a member of her parents’ household for at least two years prior to the accident. While she stayed with her parents, she continually sought another apartment. Indeed, a few days prior to the accident, she had signed a lease for an apartment and had obtained permission to move in earlier than the date provided in the lease. On the morning of the accident, she had paid her first month’s rent,

obtained the keys to her new apartment and commenced moving in. On the basis of these facts, the court determined that the claimant was not a member of her parents' household and had established a different legal residence.

In *D'Amico v. Pennsylvania Millers Mut. Ins. Co.*, 72 AD2d 783 (2d Dept. 1979), affd. 52 NY2d 1000 (1981), the proof established that the purported insured moved out of his parents' residence and moved into the plaintiff's home, taking most of his clothes with him. He returned to his parents' residence for visits which lasted only a few hours. There was testimony that he advised the unemployment insurance office of his change of address when he moved out of his parents' house. Moreover, after he moved into the plaintiff's house, he used that address on his driver's license and on military papers. Under these facts, the court concluded that the purported insured clearly indicated an intention to abandon his residence and, thus, "he no longer fell within the definition of an 'insured' under the terms of his parents' homeowners policy."

In *Lamonsoff v. Hertz Corp.*, supra, the claimant was found to be a resident of his parents' house, even after he had moved out of that house and into his aunt's house. He continued to list his parents' address as his mailing address and on his driver's license, credit cards and voter registration, as well as on the police report of the accident, and he kept his clothes in a bedroom at his parents' house. The court stated, ""although he may not have been physically present in his parents' house on a full-time basis, there is no evidence that [he] did not intend to continue living with his parents."

In *Aetna Life & Casualty Co. v. Schurr*, 149 Misc. 2d 717 (Sup. Ct. Erie Co. 1991), a daughter who temporarily moved back in with her parents was held to be a "family member" and "resident" within the meaning of the underinsured motorist endorsement in

the parents' policy. Although she did not plan to live in her parents' house indefinitely, she lived there at the time of the accident, in her own separate bedroom, and nowhere else. She had no other legal address and the fact that she had only lived in her parents' house for one week was not considered probative because the policy put no parameters on the length of time a person must reside in the household before coverage became effective.

By contrast, in Aetna Casualty & Sur. Ins. Co. v. Fein, N.Y.L.J., 12/3/92, p. 33, col. 1 (Sup. Ct. Nassau Co.), an 80-year-old widow who resided in Brooklyn, New York, but who relocated to her son's residence in New Jersey for three weeks to recuperate from an injury was held not to be a resident of the son's household. The evidence established that while staying with her son, the claimant continued to pay rent, receive mail and otherwise maintain her Brooklyn apartment, to which she eventually returned. Although the son's policy contained no express temporal residency requirement, the court held that "a specific indicia [sic] of permanency or constancy is required."

In Aetna Casualty & Sur. Co. v. Gutstein, 169 AD2d 718 (2d Dept. 1991), rev'd. 80 NY2d 773 (1992), the claimant rented an apartment in New York City, but also spent "a substantial amount of time" at his father's home. He maintained his own room at his father's house, kept his own clothes, books and records there, was free to come and go as he wished, had his own key to the house, listed his father's home as his own residence address on his voter registration and driver's license, as well as on his Federal and State income tax returns, and received mail at that address. The Court of Appeals reversed the holding of the Appellate Division to the effect that the claimant was a covered person under the policy because he was "a blood relative who is a resident of the named insured's

household,” and held that, under the facts and circumstances of this case, the claimant was not a resident of his father's household.

Similarly, in *Aetna Casualty & Sur. Co. v. Panetta*, 202 AD2d 682 (2d Dept. 1994), although the evidence established that the claimant stored some belongings in her father's house and would visit there approximately once a month, the court held that she was not a resident of his household.

In *New York Cent. Mut. Ins. Co. v. Kowalski*, 195 AD2d 940 (3d Dept. 1993), the undisputed proof established that claimant was 17- years-old at the time of the accident and was "staying" with his parents. However, some time after he turned 16, he dropped out of high school and moved into a trailer with his girlfriend, where he resided for the next year to year and a half. Claimant contended that he reestablished residency with his parents shortly before the accident. There was evidence pointing to both possible conclusions. Thus, summary judgment was denied to the insurer.

On remand, the court held that the evidence supported a finding that the claimant was not a "resident" of the insureds' household at the time of the accident and was, therefore, not a covered "family member." The court held that the claimant's stay at the insured's residence was temporary in nature, lacking both the degree of permanence and the intention to remain that are required to establish one as a "resident" under the policy. Critical to that determination was evidence that the claimant's residence with his girlfriend had been periodically interrupted by "domestic disputes," following which he would move out of the trailer and back in with his parents until he and his girlfriend reconciled. At the time of the accident, such a dispute had resulted in his moving into his parents' house, where he had been living for over three weeks prior to the accident. However, the trial

testimony disclosed that at no time did the claimant intend to make this living arrangement permanent, it always being his expectation to return to his girlfriend as soon as they reconciled. On appeal from that judgment, the Appellate Division affirmed. 222 AD2d 859 (3d Dept. 1995).

In Walburn v. State Farm Fire & Cas. Co., 215 AD2d 837 (3d Dept. 1995), the evidence established that the claimant was an adult who had his own residence. When he and his family left the insured's residence to move to another rental property of theirs, he intended to do so permanently. All of his clothing and furniture were moved with him, he received his mail at the new address, his motorcycle and hunting licenses reflected the new address and he actually resided there for the 14 months prior to the accident. On those facts, the court held that the claimant did not reside at the insured's residence at the time of the accident, because "physical presence in the home alone is insufficient to establish a residence, particularly where, as here, [defendant] had previously established other legal residences."

See also Sekulow v. Nationwide Mut. Ins. Co., N.Y.L.J., 11/15/91, p. 21, col. 5 (Sup. Ct. N.Y. Co.), modified, 193 AD2d 395 (1<sup>st</sup> Dept. 1993) and Kradjian v. American Mfrs. Mut. Ins. Co., 206 AD2d 801 (3d Dept. 1994), wherein the courts found that the evidence of contacts with multiple residences permitted conflicting inferences to be drawn and, therefore, precluded summary judgment on the issue of coverage.

### **Divorce and Separation**

Special residency issues arise in the context of divorce and separation and the often unusual living arrangements that arise therefrom.

In Allstate Ins. Co. v. Luna, 36 AD2d 622 (2d Dept. 1971), the court held that the wife of an insured, who voluntarily abandoned the household, waived any rights that she may have had as an additional ""insured" under her husband's policy. In Highsmith v. MVAIC, 31 AD2d 424 (4<sup>th</sup> Dept. 1969), the court held that a question of fact existed as to whether the wife was a member of the insured husband's household at the time of an accident, where the wife lived in a separate residence but was receiving support from her husband.

With respect to the status of children of divorced or separated parents, the issue of legal custody is not necessarily determinative. In this context, the term ""household" has been characterized as ambiguous or devoid of any fixed meaning. The interpretation of that term requires an inquiry into the intent of the parties and the circumstances of each particular case. See Hollander v. Nationwide, supra; Schaut v. Firemen's Ins. Co., 130 AD2d 477 (2d Dept. 1987). Thus, where children reside sometimes with one parent and sometimes with the other, they may, under appropriate circumstances, be deemed residents of both parents' households and may look to either parent's policy for coverage.

In Schaut, supra, a personal liability policy that was secured by the claimant's father covered the premises where the claimant resided with his mother. The father/policyholder and the mother were separated. The court held that the policy afforded coverage to the claimant because the father, "in purchasing insurance specifically for the home in which his former wife and three sons resided, reasonably anticipated that his children would be afforded coverage thereunder as residents of his household."

In Nationwide v. Allstate Ins. Co., 181 AD2d 1022 (4th Dept. 1992), a child was held to be a resident of the households of both of her divorced parents, where the divorce decree awarded joint custody, both parents maintained a room for the child, the child stayed with both parents, and continued a close relationship with her mother while living at her father's home, continued to receive her mail at her mother's home and to use her mother's address or her driver's license, registration and school records, and there was no indication that she intended to permanently abandon residency at either household.

In Mellish v. Central Mut. Ins. Co., N.Y.L.J., 5/18/91, p. 28, col. 5 (Sup. Ct. Nassau Co., Winick, J.), the court held that a child of divorce intended to make both his grandmother's house in Plainview and his father's house in Amityville his permanent residences.

In Pellegrino v. State Farm Ins. Co., 167 Misc.2d 617 (Sup. Ct. Nassau Co. 1996), custody of a child was granted to the mother, with visitation rights to the father. The child's principal residence was with his mother, in New Jersey and then in Pennsylvania, but he visited his father in Brooklyn at least twice a month for a year and thereafter on every third weekend. Summertime visitation usually lasted two to three consecutive weeks for several years. When the father remarried, he moved into a new house in Staten Island, at which he converted the garage to a bedroom for the child, who kept his clothing, baseball card and matchbox car collections, toiletries and jewelry there. The child had his own key to that house and received some mail there. On one occasion, after an argument with his mother and stepfather, the child took a bus to New York and resided with his father until matters calmed down in Pennsylvania. While visiting his father, he obtained a New York State Department of Environmental Conservation Hunter Education Certificate of

Qualification. However, his driver's license was from Pennsylvania. At the time of the accident, he attended high school in Pennsylvania and later attended the University of Pennsylvania at a Pennsylvania resident tuition rate.

Under these facts and circumstances, the court held that the son was covered under his father's homeowner's insurance policy as a "resident" of his father's household. There was no indication of an intent to abandon his father's home. As noted by the court, the son's principal residency with his mother stemmed from his parents' divorce "and the resultant impossibility of living with both parents full time." The father, however, maintained regular and meaningful contact with his son.

The decision in *Pellegrino, supra*, was consistent with the earlier decision of the Second Department in *Allstate Ins. Co. v. Luna, supra*. Therein, an unemancipated child unilaterally removed by his mother from the formerly intact marital home was found entitled to coverage under the provisions of the father's uninsured motorist endorsement. The fact that the child had been removed from his father's household without his consent was found incapable of abrogating the child's status as a covered member of said household. As the *Pellegrino* court noted, "No less protection should be afforded to the plaintiff herein given the significant presence of this child in his father's household notwithstanding his parents' marital circumstances."

Most recently, in *GEICO v. Troisi*, \_\_ AD2d \_\_, 671 NYS2d 111 (2d Dept. 1998), a high school graduate was held not to become a "resident" of her divorced father's household by irregularly visiting his apartment, occasionally sleeping there overnight, and keeping a few items of clothing there, especially considering the fact that she had been in her mother's custody and had lived with her mother before graduation. Thus, she was not

deemed an insured entitled to liability coverage under her father's homeowners' and excess policies.

### **Conclusion**

As can be seen from the foregoing, the issue of residence is not necessarily decided solely on the basis of where the purported insured's heart, i.e., intention, is claimed to be. Although that may indeed be a factor, other factors and indicia of permanence, including the existence of other legal residences, the quantity and quality of contacts, and where the purported insured's belongs are located, are taken into account by the courts in rendering their case by case analyses of this complex issue.