

**OPINION
69-270**

June 2, 1969 (OPINION)

Mr. Thomas E. Rutten

Assistant State's Attorney

Ramsey County

RE: Public Welfare - Funeral Expenses - Indians

This is in reply to your letter with regard to payment of funeral expenses involving Indians living off the Reservation. You inform us that in the particular matter with which you are concerned, a 2 1/2 year old Indian boy died in a home within the City of Devils Lake. He lived in this home with his mother and several brothers and sisters. The boy is known to be an illegitimate child but the father is known to be an enrolled Indian of the Turtle Mountain Reservation and the mother is an enrolled member of the Fort Totten Reservation. The mother is receiving welfare benefits from Benson County and the basic question is as follows: "Who is responsible for the burial expenses for this child, Ramsey County, Benson County or the Bureau of Indian Affairs?"

You inform us further that: Apparently the Bureau of Indian Affairs has a regulation providing that they are not responsible for the burial expenses of Indians who have been off the Reservation for at least ninety days and where the death does not occur on such Reservation. In view of these regulations, the Bureau of Indian Affairs has denied liability for the burial expenses involved herein. Benson County Welfare officials have also denied liability for the burial expenses of this child and you are not sure what the basis for their denial is, unless they are relying on the recent Supreme Court decision which you believe held the welfare recipients are entitled to assistance from the county wherein they are physically present, regardless of the time of such presence in that particular county.

The welfare officials of Ramsey County have also denied liability for the burial expenses of this child and apparently the reason for their denial is that they feel that the mother is still a resident of Benson County since Benson County is the county of her former residence and still contributes to the relief of the mother, even though she now lives in Ramsey County. They feel that she has not been "voluntarily" absent from Benson County for one year and Benson County was where her residency was originally obtained. This is pursuant to Section 50-02-06 of the North Dakota Century Code.

The mother has "resided" in Ramsey County for more than a year and, therefore, it would appear that the legal residence of the mother is one of the main issues to be resolved, since this will determine which of the two counties, Ramsey or Benson, is liable for the burial expenses involved in this case.

You state that the issue involved in this case is very important since if it is determined that Ramsey County is responsible for the

welfare payments in this case pursuant to the recent Supreme Court decision mentioned herein above, then Ramsey County will be responsible for the relief of several other persons who are presently living in Ramsey County and have been for more than a year, but who are receiving relief at this time from Benson County.

You state that the issue appears to you to revolve around the question of whether or not the recent Supreme Court decision mentioned herein is to be applied retroactively or not. If it is not to be applied retroactively, then it would seem that Benson County should be liable for the burial expenses involved herein. If, on the other hand, this decision should be retroactive in its effect, then it would appear that Ramsey County would be liable for the burial expenses involved.

You state that you will appreciate very much an opinion from this office relating to your interpretation of Section 23-06-03 of the North Dakota Century Code and the Sections under Chapter 5-02 of the North Dakota Century Code as they would relate to the situation described herein above.

In addition to the facts herein stated above from your letter, we have discussed this matter with individuals from the Governor's Office, the undertaker who at the time of the conversation had possession of the body, yourself, etc. In addition to the facts outlined above, it would appear that the mother of this child had been living off the Reservation for roughly twelve years, that the child was born off the Reservation, that on several prior occasions the undertaker had buried some of these children and due to residency and other problems had not been able to collect for his services, and on this occasion was not going to have the funeral until he had received payment for the service.

We have examined carefully the decision of the United States Supreme Court in *Shapiro v. Thompson*, (*Washington v. Legrant*, *Reynolds v. Smith*), decided April 21, 1969, which we assume is the Supreme Court decision to which you make reference. We have previously considered this decision of the United States Supreme Court in an opinion to the Executive Director of the Public Welfare Board of North Dakota, issued May 22, 1969. In that opinion we stated as follows:

"It is, therefore, our opinion that the residential requirements set forth in the North Dakota Code as an eligibility test for welfare assistance, such as Aid to Families with Dependent Children, Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled in North Dakota, are invalid and unconstitutional."

The statutes considered in that opinion of this office are Section 50-09 05, Subsections 7, 8, and 9 of Section 50-24-03 of the North Dakota Century Code. Said statutory sections are substantially similar to the statutes of other states considered by the United States Supreme Court in the previously cited decision of that Court in that they, in effect, require North Dakota residence and/or a waiting period as a prerequisite to eligibility for public assistance from the State of North Dakota. We note, however, that each of the cited Subsections of said Section 50-24-03 contain the provision: "A

county in which an applicant has residence for poor relief purposes will be financially responsible for the county's share of any assistance provided under this chapter."

The body of the Supreme Court opinion makes no reference to county residence requirements though we note some material in this regard in the footnotes thereto, such as Footnote No. 7, stating:

"The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, Perspectives in Public Welfare: The English Heritage, March, 1966, Welfare in Review 1. The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were 'warned out' or 'passed on' to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States - first alone and then with federal grants - assumed the major responsibility, the contest of nonresponsibility became interstate."

We note also Footnote No. 25, providing in part:

"Section 402 (b) required the repeal of 30 state statutes which imposed too long a waiting period and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, Social Security in America 235-236 (1937). * * *."

Looking more specifically to the problem with which your county is here involved, it does not appear that the responsibility of burial of a pauper is necessarily of such ancient origin. 22 Am. Jur.2d. 560, DEAD BODIES, Section 8, states:

"It would seem, at common law, that if the poor person of no estate dies and there is no other person bound to perform such function, it is the duty of him under whose roof the body lies to carry it, decently covered, to the place of burial. In England at common law, the overseers of a parish were not bound to bury the body of a pauper lying in the parish, but not in a parochial house, although such pauper was a married woman whose husband was settled in the parish and receiving relief there."

citing as authority for the last proposition "Reg. v. Stewart, 12 Ad & El 733, 113 Eng. Reprint 1007."

Our statute, however, is quite specific in this regard. Section 23-06-03, Subsection 5 of the North Dakota Century Code, provides:

"23-06-03. DUTY OF BURIAL. The duty of burying the body of a deceased person devolves upon the following persons:

* * *

5. If the deceased left no husband, wife, or kindred answering the foregoing description and did not leave means sufficiently to defray his funeral expenses, including the cost of a casket, the county welfare board of the county in which the deceased had residence for poor relief purposes or if such residence cannot be established, then the county in which the death occurs, shall employ some person to arrange for and supervise the burial. The necessary and reasonable expense thereof, not exceeding two hundred fifty dollars, shall be borne by the county. The county also shall pay reasonable costs of transporting the body to the place of burial when burial is made in a cemetery out of the county in which death occurred, but not exceeding one hundred dollars."

As to the residence of the deceased child, we note that Section 50-02-03 of the North Dakota Century Code, provides, insofar as here applicable:

"50-02-03. RESIDENCE OF LEGITIMATE OR ILLEGITIMATE CHILDREN. The residence of children for the purposes of this title shall be as follows:

* * *

2. That of an illegitimate child follows that of the mother if at the time of the birth she had any residence within the state.

The residence of a child shall not be in the place where he was born unless his parent or parents had a residence therein at the time of such birth."

We do not feel that this question turns on whether the Shapiro decision is or is not retrospective in operation. That decision was rendered as of April 21, 1969. While your letter does not disclose the date of death, the information received by us was to the effect that as of the date of your letter, May 16, 1969, there had been no funeral and presumably no funeral expenses.

We would assume from the facts you forward that the deceased left no kindred meeting the qualification of "of sufficient means to defray the necessary expenses" (pursuant to Subsection 2 of Section 23-06-03), and that therefore the county welfare board of the county in which the deceased had residence for poor relief purposes, or if such residence cannot be established then the county in which the death occurs would be responsible for the statutory funeral expenses.

From the information submitted, we assume Ramsey County was the county in which the death occurred. Benson County was, according to the information you submit, the county in which his mother had established her residence for poor relief, and pursuant to the

provisions of Section 50-02-03, Subsection 2, his residence followed her residence. Apparently there was no prior question by Benson County as to her eligibility for welfare assistance as a Benson County resident. As of the current date, however, your letter indicates that Benson County will question the eligibility of the deceased son for statutory funeral expenses.

We note with great interest the United States Supreme Court's quotation of a statement by Chief Justice Taney in the Passenger Cases 7 How. 283, 492 (1849):

"For all the great purposes for which the Federal Government was formed, we are one people with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The United States Supreme Court in the Shapiro decision did not specifically consider whether or not the states presently before it regulated travel for poor relief purposes within their states between counties. We would assume, however, that there is no substantive distinction on this point between the statutes of the states involved and this state as to establishing county residence for poor relief purposes.

While the United States Supreme Court in the Shapiro decision does not necessarily limit its conclusions to any particular constitutional right, it would appear to base it primarily with regard to the states involved upon the equal protection clause of the Fourteenth Amendment to the United States Constitution and, with regard to the District of Columbia, upon the due process clause of the Fifth Amendment to the United States Constitution.

We note in 16 Am. Jur.2d. 958, 959, CONSTITUTIONAL LAW, Section 555, the following:

"A state may not by any of its agencies, legislative, judicial, or executive, disregard the constitutional prohibition. Every state official, high and low, is bound by the Fourteenth Amendment. The inhibition includes all functionaries of state government, judicial as well as political. Indeed, the Fourteenth Amendment is a restraint on the legislative, executive, and judicial departments of the state. The act of a public official of a state is the act of the state in depriving an individual of property, life or liberty without due process of law. The action of prosecuting officers on behalf of the state may constitute state action within the purview of the due process clause of the Fourteenth Amendment.

* * *

The ultimate result of the Supreme Court ruling in Shapiro would appear to be "instant residence" as between states that might be liable for poor relief charges.

While as previously indicated, the Shapiro decision deals with state

as opposed to county "waiting periods" for establishing "residence" for poor relief purposes. Looking to the criteria by which they determine such "waiting periods" on the state level to be in violation of equal protection and due process clauses, it might well be very difficult to draw a valid factual distinction between the "waiting period" on the state and on the county level. However, the fact remains we are familiar with no judicial decision determining such "waiting periods" on the county level to be in violation of any constitutional provision, state or federal. If a judicial determination of the validity or invalidity of these statutes is desired by your county, it would appear that Section 50-02-08 of the North Dakota Century Code outlines a very simple procedure to make such determination, at least as to the welfare benefits that may be claimed by the mother.

Looking back to Section 23-06-03, quoted herein, we note that same indicates that the county will take positive action, not that it will wait for an undertaker to undertake the project, and then let him worry about where he can collect the fees for his services. The case is not directly parallel with the factual situation described in Adams County v. Burleigh County, 69 N.D. 780, 291 N.W. 281, though the concept of leaving the claimant in a "no-man's land" does seem on a parallel with the situation here.

In the interim period it would seem that your county is the county where the death occurred. It would also appear that Benson County does not intend to "volunteer" to accept these funeral charges. It would also appear that if there is a health problem caused by the non-burial of the decedent, the situs of that problem would be Ramsey County. Under all of these circumstances we feel there is no question that Ramsey County can accept the responsibility under the heretofore quoted provisions of Section 23-06-03. If they subsequently wish to attempt to "establish" that Benson County is his county of residence, we are sure that the Courts would be open for that purpose and the statutes as presently constituted would be in their favor. It does seem very possible that the Shapiro decision or other authorities might have an effect on the validity of such statutes in support of a Ramsey County claim against Benson County though your letter does not indicate that it is yet established that Benson County would definitely rely on that or any other decision.

In final conclusion, we would at least tentatively assume that the subsistence welfare of the mother, or other welfare claimants over a period of years, would be much larger in amount than the funeral charges in this instance. If a test case is planned, it might well be preferable to let this one go by Ramsey County as the county where the death occurred, paying for the funeral expenses and bring the action in a chase where larger sums for long-term welfare care are involved.

HELGI JOHANNESON

Attorney General