STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM O'MALLEY,

Petitioner,

vs. Case No. 17-3011MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, on December 5, 2017, a final hearing was held in this case before Administrative Law Judge Yolonda Y. Green of the Florida Division of Administrative Hearings ("Division"), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
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For Respondent: Elizabeth A. Teegen, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this case is the amount to be paid to Respondent, Agency for Health Care Administration ("Respondent" or "AHCA"), to reimburse Medicaid for medical

expenses paid on behalf of Petitioner from proceeds of a personal injury settlement received by Petitioner.

PRELIMINARY STATEMENT

On November 16, 2017, Petitioner, William O'Malley, filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien. On May 25, 2017, Respondent filed a Notice of Conflict and Motion for Stay. The motion asserted that the Honorable Mark E. Walker enjoined AHCA from enforcing section 409.910, Florida Statutes, in the case of Gallardo v. Senior, 4:16-cv-116-MW-CAS (N.D. Fla. 2017).[1/] AHCA asserted that it was seeking clarification of the federal injunction, and requested that this matter be stayed until the resolution of the federal proceeding. On May 30, 2017, the undersigned issued an Order placing the case in abeyance and requiring a joint status report no later than June 30, 2017, notifying the Division of the status of the federal court proceeding and the parties' positions regarding viability of this proceeding.

On June 30, 2017, Respondent filed a status report. AHCA asserted that the stay should be extended because of the conflict between the federal proceeding in Gallardo and the precedent of Giraldo v. Agency for Health Care Administration, 208 So. 3d 244 (Fla. 1st DCA 2016)(rev. granted by Giraldo v. Agency for Health Care Administration, 2017 Fla. Lexis 1826

(Fla. Sept. 6, 2017)(No. SC17-297)). On the other hand, Petitioner filed a motion for hearing on the undersigned's Order placing this case in abeyance. Petitioner asserted that the federal court decision did not need clarification, and that there has been conflict both at the Division and the state appellate courts. The undersigned conducted a status conference with the parties on July 10, 2017, to discuss Petitioner's motion for rehearing and the status of this case. The undersigned entered an Order continuing the abeyance and requiring a status report by August 10, 2017. The parties filed unilateral status reports that indicated no change in their respective positions. The parties did advise of the status of the Gallardo case, and the undersigned entered an Order on September 14, 2017, directing Respondent to file copies of AHCA's post-judgment motions, supplemental briefing, and the Second Amended Judgment in Gallardo and deferred a determination regarding whether the case should remain in abeyance.

On September 15, 2017, AHCA filed the requested documents, as well as copies of an Order Granting in Part and Denying in Part Motion to Alter or Amend Judgment, 2017 U.S. Dist. LEXIS 112448 (Second Order), filed in the Gallardo case on July 18, 2017. After review of the documents received, a status conference was held to discuss the materials and possible

hearing dates. On September 19, 2017, the undersigned issued a Notice of Hearing scheduling this matter for a hearing on December 5, 2017.

On November 30, 2017, the parties filed a Joint Prehearing Stipulation that contained a statement of admitted and stipulated facts for which no further proof would be necessary. The stipulated facts have been incorporated into the Findings of Fact below, to the extent they are relevant.

The final hearing commenced as scheduled. At hearing, Petitioner's Exhibits 1 through 11 were admitted. Petitioner presented the testimony of two expert witnesses: Steven Browning, Esquire, and R. Vinson Barrett, Esquire. Respondent offered no exhibits at the hearing, but called Steve Carter, Esquire (expert), as a witness.

The official Transcript of the hearing was filed with the Division on December 21, 2017. The parties filed a Joint Motion for Extension of Time for Filing Proposed Final Orders ("PFOs"). The undersigned granted that motion and the parties were directed to file the PFOs by January 16, 2018. The parties filed a second motion for extension of time until January 17, 2018, which was granted. The parties timely filed their PFOs and each has been considered in preparation of this Final Order.

Unless stated otherwise, all statutory references are to the 2016 version of Florida Statutes.[2/]

FINDINGS OF FACT

The following findings of fact are based on exhibits admitted into evidence, testimony offered by witnesses, and admitted facts set forth in the prehearing stipulation.

1. Petitioner, William O'Malley, is the recipient of Medicaid for injuries he sustained in an automobile accident.

2. Respondent is the state agency charged with administering the Florida Medicaid program, pursuant to chapter 409.

3. On September 9, 2009, Petitioner, William O'Malley, lost control of his vehicle when it hydroplaned across three lanes of traffic. Mr. O'Malley's vehicle left the roadway and struck a tree. While he was restrained with a seat belt, Mr. O'Malley suffered a severe brain injury, fractured skull, injury to his neck at the C6-C7 level, numerous fractured ribs, shattered spleen, lacerated liver, abdominal bleeding, a fractured ankle and other serious injuries. He remained in a coma for a number of weeks undergoing extensive surgical procedures to save his life. As a result of his severe and permanent injuries, Mr. O'Malley now suffers from cognitive deficits, is disfigured, and is unable to work. He receives disability payments due to his injuries.

4. A portion of Mr. O'Malley's past medical expenses related to his injuries was paid by Medicaid, in the amount of $196,125.72.

5. Mr. O'Malley initiated a personal injury civil action to recover all his damages associated with his injuries against the construction companies who allegedly designed and constructed the roadway in a defective manner ("Defendants").

6. During the pendency of Mr. O'Malley's personal injury action, AHCA was notified of the action, and asserted a $196,125.72 Medicaid lien against any damages received by Mr. O'Malley. AHCA was not otherwise involved in the personal injury action or settlement.

7. In October 2016, Mr. O'Malley's personal injury action settled for the gross amount of $1,750,000.

8. The General Release memorializing the settlement agreement provides as follows:

> Although it is acknowledged that this settlement does not fully compensate William O'Malley for all of the damages he has allegedly suffered, this settlement shall operate as a full and complete Release as to Releasees without regard to this settlement only compensating William O'Malley for a fraction of the total monetary value of his alleged damages. The parties agree that William O'Malley's alleged damages have a value in excess of $20,000,000.00, of which $379,874.27 represents William O'Malley's claim for past medical expenses. Given the facts, circumstances, and nature of William O'Malley's injuries and this settlement, the

> parties have agreed to allocate $33,239.00 of this settlement to William O'Malley's claim for past medical expenses and allocate the remainder of the settlement toward the satisfaction of claims other than past medical expenses. This allocation is a reasonable and proportionate allocation based on the same ratio this settlement bears to the total monetary value of all William O'Malley's damages. Further, the parties acknowledge that William O'Malley may need future medical care related to his injuries, and some portion of this settlement may represent compensation for future medical expenses William O'Malley will incur in the future. However, the parties acknowledge that William O'Malley, or others on his behalf, have not made payments in the past or in advance for the First Party's future medical care and William O'Malley has not made a claim for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care. Accordingly, no portion of this settlement represents reimbursement for future medical expenses.

9. By letter of October 13, 2016, Mr. O'Malley's attorney notified AHCA of the settlement and provided AHCA with a copy of the executed Release and itemization of $123,699.86 in litigation costs. This letter explained that Mr. O'Malley's damages had a value in excess of $20 million and the settlement represented only 8.75 percent of the recovery of Mr. O'Malley's $379,874.27 claim for past medical expenses. This letter requested AHCA to advise as to the amount AHCA would accept in satisfaction of the $196,125.72 Medicaid lien.

10. AHCA responded to Mr. O'Malley's attorney's letter and demanded full payment of the entire $196,125.72 Medicaid lien from the settlement.

11. AHCA, through the Medicaid program, spent $196,125.72 on behalf of Mr. O'Malley, all of which represents expenditures paid for Mr. O'Malley's past medical expenses. No portion of the $196,125.72 paid by AHCA represented expenditures for future medical expenses.

12. Application of the formula at section 409.910(11)(f) to Mr. O'Malley's settlement requires payment to AHCA of $196,125.72, the actual amount of the medical expenses paid by Medicaid.

13. Petitioner disputes that $196,125.72 is the amount of recovered medical expenses payable to Respondent, and instead asserts that $33,239.00 in medical expenses are payable to Respondent.

14. Notwithstanding Petitioner's dispute, Petitioner has deposited the full Medicaid lien amount in an interest-bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

15. In support of his position, Mr. O'Malley presented the testimony of two experts, Steven Browning, Esquire, and Vinson Barrett, Esquire.

16. Mr. Browning represented Mr. O'Malley in the personal injury action. He testified as an expert regarding the valuation of Mr. O'Malley's personal injury claim.

17. Mr. Browning has practiced law for 31 years, primarily representing plaintiffs. He is a partner of his law firm and handles serious personal injury, wrongful death, and catastrophic injury cases.

18. Mr. Browning handles cases that result in jury trials and, thus, he routinely researches jury verdicts to determine potential value of cases. In the litigation of civil actions, he also prepares mediation statements regarding the value of cases.

19. He reviews life care plans, economic reports, and past jury verdicts to determine the value of a case.

20. Mr. Browning opined that $20 million constituted a very conservative valuation of damages suffered by Mr. O'Malley. He based this opinion on having represented Mr. O'Malley in the underlying personal injury action and on his knowledge of jury verdicts and settlements in recent Florida cases involving awards of damages to individuals with similar injuries as

Mr. O'Malley. He emphasized that his valuation was far more conservative than many comparable cases that resulted in substantially higher verdicts or settlements.

21. Mr. Browning concluded that the $1,750,000 settlement amount represented 8.75 percent of the damages suffered by Mr. O'Malley. He also opined that only 8.75 percent of the $196,125.72, the past medical expenses paid by Respondent, was recovered. Mr. Browning was accepted as an expert in this matter and his testimony was found to be persuasive.

22. Mr. O'Malley also presented the testimony of Mr. Barrett regarding the valuation of Petitioner's claim.

23. Mr. Barrett has practiced law for approximately 35 years. He primarily practices in the areas of medical malpractice, pharmaceutical liability, and catastrophic injuries resulting from automobile accidents.

24. Mr. Barrett routinely handles jury trials. Thus, he routinely monitors jury verdicts and determines the value of damages suffered in personal injury actions. He reviewed recent jury verdicts and the life care plan for Mr. O'Malley to formulate his opinion regarding the valuation of Mr. O'Malley's claim.

25. Mr. Barrett testified that $20 million to $25 million was the estimated value of Mr. O'Malley's claim. He testified

that the amount was a very conservative estimate of damages suffered by Mr. O'Malley.

26. Similar to Mr. Browning, Mr. Barrett opined that allocating 8.75 percent to past medical expenses in the amount of $196,125.72 was a reasonable allocation of past medical expenses and reflected the amount recovered by Mr. O'Malley for past medical expenses.

27. Respondent also presented an expert regarding the valuation of Mr. O' Malley's claim, Steven Carter. Mr. Carter has been licensed to practice law for 23 years. He is the managing shareholder of his law firm.

28. He has handled catastrophic injury cases in which he determined the value of the claim. He has conducted 35 to 40 jury or bench trials.

29. Mr. Carter was accepted as an expert regarding valuation of Mr. O'Malley's claim.

30. Mr. Carter testified that the value of Mr. O'Malley's damages was the actual settlement amount of $1,757,000.

Ultimate Finding of Fact

31. The undersigned finds that the testimony of Mr. Browning and Mr. Barrett was more persuasive regarding valuation of Mr. O'Malley's claim than the testimony of Respondent's expert witness. Mr. Browning and Mr. Barrett's number of years of experience with handling catastrophic

personal injury cases, and the fact that they had the benefit of the life care plan when evaluating the case, make their testimony more persuasive regarding the valuation of damages suffered by Mr. O'Malley in this case.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1) and 409.910(17), Florida Statutes (2016).

33. AHCA is the agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

34. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." Harris v. McRae, 448 U.S. 297, 301 (1980).

35. "The Medicaid program is a cooperative one. The Federal Government pays between 50 percent and 83 percent of the costs a state incurs for patient care. In return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program." Estate of Hernandez v. Ag. for Health Care Admin., 190 So. 3d 139, 141-42 (Fla. 3rd DCA 2016)(internal citations omitted).

36. Though participation is optional, once a state elects to participate in the Medicaid program, it must comply with federal requirements. Harris, 448 U.S. at 301.

37. One condition for receipt of federal Medicaid funds requires states to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients, who later recover from legally-liable third parties. See Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006); see also Estate of Hernandez, 190 So. 3d at 142 (noting that one such requirement is that "each participating state implement a third party liability provision which requires the state to seek reimbursement for Medicaid expenditures from third parties who are liable for medical treatment provided to a Medicaid recipient").

38. Consistent with this federal requirement, the Florida Legislature enacted section 409.910, designated as the "Medicaid Third-Party Liability Act," which authorizes and requires the state to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment, award, or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009); see also Davis v. Roberts, 130 So. 3d 264, 266 (Fla. 5th DCA 2013)(stating that in order "[t]o comply with federal directives the Florida legislature enacted section 409.910,

Florida Statutes, which authorizes the State to recover from a personal injury settlement money that the State paid for the plaintiff's medical care prior to recovery.").

39. Section 409.910(1) sets forth the Florida Legislature's clear intent that Medicaid be repaid in full for medical care furnished to Medicaid recipients by providing that:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

40. In addition, the Florida Legislature has authorized AHCA to recover the monies paid from any third party, the recipient, the provider of the recipient's medical services, and any person who received the third-party benefits. Specifically, section 409.910(7) provides the following:

> The agency shall recover the full amount of all medical assistance provided by Medicaid on behalf of the recipient to the full extent of third-party benefits.
>
> (a) Recovery of such benefits shall be collected directly from:
>
> 1. Any third party;
>
> 2. The recipient or legal representative, if he or she has received third-party benefits;
>
> 3. The provider of a recipient's medical services if third-party benefits have been recovered by the provider; notwithstanding any provision of this section, to the contrary, however, no provider shall be required to refund or pay to the agency any amount in excess of the actual third-party benefits received by the provider from a third-party payor for medical services provided to the recipient; or
>
> 4. Any person who has received the third-party benefits.

41. AHCA's efforts to recover the full amount paid for medical assistance is facilitated by section 409.910(6)(a), which provides that AHCA:

> [I]s automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits. Equities of a recipient, his or her legal representative, a recipient's creditors, or health care

> providers shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights granted under this paragraph.

42. AHCA's efforts are also facilitated by the fact that AHCA has "an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness by which a third party is or may be liable, upon the collateral, as defined in s. 409.901." § 409.910(6)(c), Fla. Stat.

43. This Medicaid lien is iron-clad. For example, section 409.901(13) provides that no settlement impairs the lien:

> No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights. However, in a structured settlement, no settlement agreement by the parties shall be effective or binding against the agency for benefits accrued without the express written consent of the agency or an appropriate order of a court having personal jurisdiction over the agency.

44. The amount to be recovered by AHCA from a judgment, award, or settlement from a third party is determined by the

formula in section 409.910(11)(f). Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

45. Section 409.910(11)(f) provides:

> (f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.
>
> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.
>
> 4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

46. In this matter, applying the formula in section 409.910(11)(f) to the $1,750,000 settlement results in AHCA being owed $196,125.72 in order to satisfy the lien.

47. When AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b) serves as a means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f).

48. Section 409.910(17)(b) provides, in pertinent part, that:

> (b) A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a). The petition shall be filed with the Division of Administrative Hearings. For purposes of chapter 120, the payment of funds to the agency or the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in [1]this subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party

> benefits payable to the agency. In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

49. Section 409.910(17)(b), thus, makes clear that the formula set forth in subsection (11) constitutes a default allocation of the amount of a settlement that is attributable to medical costs and sets forth an administrative procedure for adversarial testing of that allocation. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(stating that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

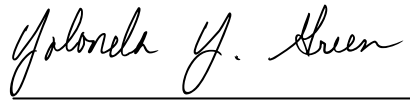
50. The section provides a burden of proof[3/] and the ultimate conclusion to be reached when challenging the amount of the lien. However, it does not provide the method to be used to establish that a lesser amount is more reasonable. In this case, Petitioner presented sufficient evidence to establish the reasonable amount of the settlement proceeds that should be allocated to past medical expenses.

51. Based on the foregoing, Mr. O'Malley established by a preponderance of the evidence through the testimony of Mr. Browning and Mr. Vinson, that $33,239.00, which is 8.75 percent of Petitioner's claim for medical expenses, is a reasonable allocation of the portion of Petitioner's past medical expenses recovered through the settlement agreement.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to $33,239.00 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 16th day of February, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1/] Originally styled Gallardo v. Dudek, the case was restyled after Justin Senior replaced AHCA's former secretary, Elizabeth Dudek.

[2/] The 2016 version of Florida Statutes is applicable to this case. In Suarez v. Port Charlotte HMA, LLC, 171 So. 3d 740 (Fla. 2d DCA 2015), the court determined that AHCA's right under section 409.910 to be reimbursed from third-party benefits recovered by the Medicaid recipient vests at the time of the recipient's recovery of those benefits, not when the lien itself attaches, so the version of section 409.910 in effect at the time of the recovery of third-party benefits applies to challenges brought under section 409.910(17)(b). As noted in paragraph 7, Petitioner's settlement agreements with the third parties in this case were executed in October 2016. While there were substantive amendments to section 409.910 in 2017 (effective July 1, 2017), those amendments are not retroactive.

[3/] As discussed in Judge Walker's Gallardo Order, the clear and convincing burden of proof can no longer be applied in proceedings such as these. However, section 120.57(1)(j) contains a default provision regarding the burden of proof and provides that "findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute." Museguez v. Ag. for Health Care Admin., Case No. 16-7379MTR (Fla. DOAH Sept. 19, 2017). A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not tends to prove a certain proposition." S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 871 (Fla. 2014).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.