



COMMONWEALTH of VIRGINIA

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The Honorable Frank D. Hargrove, Sr.
Member, House of Delegates
10321 Washington Highway
Glen Allen, Virginia 23059

Dear Delegate Hargrove:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire concerning the authority of juvenile and domestic relations courts related to custody decisions and the standard of evidence applied thereto. You also inquire regarding the availability of free education for a child who is in the legal custody of someone other than a parent.

Response

It is my opinion that juvenile and domestic relations district courts have original, exclusive jurisdiction to determine custody matters. While there is a presumption in favor of parents, a court may award custody to a nonparent when clear and convincing evidence shows that such determination is in the best interests of the child. Further, it is my opinion that the categories in § 22.1-3 regarding a determination of residence in a school district are not exclusive. Therefore, a school district may not refuse to provide free education to a *bona fide* resident of the school division based solely on the categories in § 22.1-3.¹

Background

You present a situation where a juvenile and domestic relations district court ("Juvenile Court(s)") has entered an order granting custody of a minor child ("Child") to family members other than a parent ("Custodians"). The Child resides with the Custodians. The school division where the Custodians reside has advised them that the Child is not entitled to attend public schools free of charge. You relate that the school division based its decision on the fact that there has not been a determination that the Child's parents are unable to care for him.

¹Although your request sets forth a specific fact situation, for many years Attorneys General have declined to render opinions on matters of purely local concern or procedure. See, e.g., 2004 Op. Va. Att'y Gen. 159, 160 and opinions cited therein. Therefore, I will address the issue you present in a general manner.

Applicable Law and Discussion

You first inquire concerning the discretion or authority given to Juvenile Court judges to grant petitions for legal custody. Section 16.1-228 defines “legal custody.” in pertinent part, as

a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and *to provide him with* food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities[.] [Emphasis added.]

Section 16.1-241 outlines the jurisdiction and authority of Juvenile Courts and provides that each Court

shall have ... exclusive original jurisdiction ... over all cases, matters and proceedings involving:

A. The custody, visitation, support, control or disposition of a child:

....

3. Whose custody, visitation or support is a subject of controversy or requires determination.^[2]

Thus, Juvenile Courts clearly are authorized to determine custody matters and may award custody to any party with a legitimate interest when such decision is in the best interests of the child.

Title 16.1 refers the juvenile court to Title 20 to examine the factors involved in determining the child’s best interests in regard to custody.³ Courts, whether circuit or district, must promptly adjudicate custody matters, including support and maintenance, prior to other issues in the matter.⁴ These procedures must “insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members.”⁵ Most importantly, the court is required to give primary consideration to the best interests of the child.⁶ All other considerations are subordinate.⁷ One factor in deciding the best interests of the child for custody purposes is the nature of the child’s relationship with each parent, which includes

²See *Peple v. Peple*, 5 Va. App. 414, 418, 364 S.E.2d 232, 235 (1988) (noting that Juvenile Courts have original jurisdiction in custody cases).

³Section 16.1-278.15(F) (Supp. 2006) (directing Juvenile Court to consider factors in Chapter 6.1 of Title 20 related to custody and visitation).

⁴VA. CODE ANN. § 20-124.2(A) (Supp. 2006).

⁵*Id.*

⁶Section 20-124.2(B); *see also* *Vissicchio v. Vissicchio*, 27 Va. App. 240, 246, 498 S.E.2d 425, 428 (1998) (quoting *Farley v. Farley*, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 795 (1990) (“In issues of child custody, ‘the court’s paramount concern is always the best interests of the child.’”).

⁷*See* *Mullen v. Mullen*, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948).

the parents' positive involvement in the child's life and their ability to assess and meet the emotional, intellectual, and physical needs of the child.⁸

You next inquire concerning the standard of evidence to be applied by Juvenile Court judges in making decisions concerning legal custody. While the primacy of the parent-child relationship must be regarded, the court may award custody to any other person with a legitimate interest when the clear and convincing evidence establishes that the child's best interests would be served by such an arrangement.⁹ "Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence."¹⁰ These factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; (4) abandonment; and (5) a finding of specific facts and circumstances that constitutes an extraordinary reason for taking a child from his parents.¹¹ The nonparent bears the initial burden to provide clear and convincing evidence that it is in the child's best interest for the nonparent to have custody.¹² When such initial burden is met, there is no longer a parental presumption, and the determination of the best interests of the child is made according to a preponderance of the evidence.¹³

Finally, you inquire regarding the availability of free education for a child who is in the legal custody of someone other than a parent. The Constitution of Virginia charges the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."¹⁴ In § 22.1-3(A), the legislature directs local school divisions to provide this free education "to each person of school age who resides within the school division." Persons who are within certain categories are "deemed to reside in a school division."¹⁵ These enumerated categories create "presumptions of residency"¹⁶ and, therefore, entitlement to the free education offered by that school division. Prior opinions of the Attorney General have concluded that the list of categories is not

⁸ See § 20-124.3 (2004) (enumerating factors court must consider in determining child's best interests). The court must consider several factors, including the age and physical and mental condition of the child and each parent; the child's developmental needs; the parent-child relationship, especially any positive involvement with the child; the ability to accurately assess and meet the child's emotional, intellectual, and physical needs; important other relationships, including siblings, peers, and extended family members; the past and future role of each parent in the child's upbringing and care; the propensity of each parent to support the child's contact and relationship with the other parent; each parent's relative willingness and ability to maintain a relationship with the child; the reasonable preference of the child, if appropriate; and any history of family abuse as defined in § 16.1-228. *Id.* The court may also use such other factors as it deems necessary and proper to the determination. *Id.* The judge shall communicate to the parties the basis of the decision either orally or in writing. *Id.*

⁹ Section 20-124.2(B).

¹⁰ *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986).

¹¹ *Id.*

¹² *Mason v. Moon*, 9 Va. App. 217, 223, 385 S.E.2d 242, 246 (1989).

¹³ *Walker v. Fagg*, 11 Va. App. 581, 586, 400 S.E.2d 208, 211 (1991).

¹⁴ VA. CONST. art. VIII, § 1.

¹⁵ VA. CODE ANN. § 22.1-3 (A) (2006).

¹⁶ 1983-1984 Op. Va. Att'y Gen. 318, 319.

exclusive.¹⁷ The statutory categories merely are factors for school divisions to consider in determining the residence of a child.¹⁸ Situations in addition to those listed in § 22.1-3 may entitle persons residing in a locality to free admission to public schools in the locality.¹⁹ Local school divisions must provide the opportunity to demonstrate a *bona fide* residence and make a determination based on all pertinent facts.²⁰

In the situation you present, the Child lives with the Custodians who were awarded custody by a Juvenile Court. The Custodians and the Child seek a free education in the school division in which they reside; however, the division has concluded that the Child fails to satisfy the terms of § 22.1-3(A)(4), which provides that:

When the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who resides in the school division and is either (i) the court-appointed guardian, or has legal custody, of the person or (ii) acting in loco parentis pursuant to placement of the person for adoption by a person or entity authorized to do so under § 63.2-1200[.] [Emphasis added.]

You note that the school division has determined that neither parent of the Child was found to be unable to care for him. The division reasons that because the Child does not meet all the terms of § 22.1-3(A)(4), he does not qualify for a free education. Such conclusion fails to recognize that the categories listed in § 22.1-3 are not exclusive and that a child may otherwise have a *bona fide* residence in the school division.

A 1987 opinion of the Attorney General previously has examined the responsibilities of Juvenile Courts in handling a custody petition that appears to be filed solely for school placement purposes.²¹ A presumption exists that the best interests of a child are served when the child is in the custody of his natural parent, and a factual showing that a parent is unwilling or unable to care of the child may be required to overcome that presumption.²² Further, the court may consider the child's schooling and whether the change in custody is in the child's best interests or solely for the purpose of obtaining a free public education in a different school district.²³ Additionally, the entry of a custody order does not necessarily mean that a child is eligible for free schooling in the school division where the court-appointed custodian resides.²⁴ A local school board is authorized by statute to make an independent inquiry to determine whether a child is living with the custodian solely for school purposes.²⁵

¹⁷See Op. Va. Att'y Gen. 1987-1988 at 374, 375; 1983-1984, *supra* note 16, at 319; 1974-1975 at 378, 379 (interpreting § 22-218, predecessor to § 22.1-3).

¹⁸*Id.*

¹⁹*See id.*

²⁰1983-1984 Op. Va. Att'y Gen., *supra* note 16, at 319.

²¹1987-1988 Op. Va. Att'y Gen. 342.

²²*Id.* at 343.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

Thus, a school division examining a person's claim of entitlement to a free education must determine whether the person resides within the school division. Persons falling within the enumerated categories in § 22.1-3 are deemed to reside in the school division. Other persons may be found to reside within the school division based upon the particular facts. If a person is found to reside within the school division, the inquiry is not necessarily at an end. A school division also is authorized to examine whether the child resides within the school division solely for school purposes.²⁶

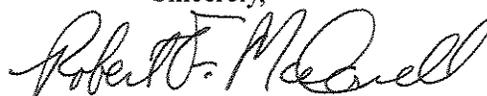
It appears that the school division about which you inquire erred in regarding the categories of § 22.1-3 to be exclusive. This does not mean that the school division must necessarily reach a different outcome; however, the division must consider all relevant facts in determining whether the Child is a *bona fide* resident of the school district and not residing there solely for school purposes.

Conclusion

Accordingly, it is my opinion that juvenile and domestic relations district courts have original, exclusive jurisdiction to determine custody matters. While there is a presumption in favor of parents, a court may award custody to a nonparent when clear and convincing evidence shows that such determination is in the best interests of the child. Further, it is my opinion that the categories in § 22.1-3 regarding a determination of residence in a school district are not exclusive. Therefore, a school district may not refuse to provide free education to a *bona fide* resident of the school division based solely on the categories in § 22.1-3.²⁷

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

²⁶ *Id.*

²⁷ *See supra* note 1.