

AG Op. GUARDIAN AND WARD: APPOINTMENT OF, 87-88 Va. AG 374

GUARDIAN AND WARD: APPOINTMENT OF GUARDIAN OR CURATOR BY COURT OR CLERK — CUSTODY AND CARE OF WARD AND ESTATE.

EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

Issuance of guardianship orders for public school attendance purposes.

The Honorable Edward Semonian
Clerk, Circuit Court for the City of Alexandria

December 18, 1987

You ask three questions concerning the issuance of guardianship orders for public school attendance purposes. Specifically, you ask:

1. May public school officials require a guardianship order for a child who is not a citizen or resident of the school district in order to be enrolled in school and receive a free public education?

2. Should the clerk of the circuit court grant a guardianship order solely for school attendance purposes?

3. How is the clerk to determine the suitability of the proposed guardian for school purposes in appointments made under § 31-4 of the Code of Virginia?

You state that children who are not citizens of this country but who are living with relatives in Alexandria have sought tuition-free public schooling in Alexandria. Public school officials will not enroll the children until the relative who is a resident of Alexandria becomes the court-appointed guardian. You also state that children who are citizens of the Commonwealth, but reside outside Alexandria, sometimes seek enrollment in Alexandria through a friend or relative who has been appointed their guardian. In most cases, however, the parties do not deny that the primary purpose for the guardianship application is to have the child enrolled tuition free in the Alexandria public schools.

I. Applicable Law

A. Basic Constitutional Requirements

Although education is not a fundamental constitutional right, education clearly has a "fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Children who are illegal aliens may not be presumptively excluded from the free public schools. *Id.* They may be required, however, as others are required, to establish that they are bona fide residents of a jurisdiction before qualifying for free public schooling in that jurisdiction. *Martinez v. Bynum*, 461 U.S. 321 (1983). It is constitutionally permissible to presume that residence which is established solely for the purpose of obtaining

tuition-free schooling is not bona fide residence, provided such presumption is consistently, not selectively, applied. *Id.*

B. Applicable Virginia Statutes

Section 31-4 vests in the circuit court clerk the authority to appoint guardians for minors. Guardians generally are required to give bond as prescribed by the court. *See* § 31-6. Guardians, once appointed, may be required to provide for the maintenance and education of the minor. *See* § 31-8. A guardian also may be required by the court to pay tuition for the child's education. *See* § 31-14.

Section 22.1-3 provides: [Page 375]

The public schools in each school division shall be free to each person of school age who resides within the school division Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption, or when the parents of such person are dead, a person in loco parentis, who actually resides within the school division, or 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 (i) resides in the school division and (ii) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the school division not solely for school purposes, as an emancipated minor. [Emphasis added.]

The categories enumerated in § 22.1-3 are not exclusive; they are merely factors to be considered by school officials to determine the residence of a child. There may be situations in addition to those listed in § 22.1-3 in which a person who resides in a locality is entitled to free admission to the public schools in the locality. *See* Att'y Gen. Ann. Rep.: 1983-1984 at 318, 83-84 Va. AG 318; 1972-1973 at 348, 72-73 Va. AG 348.

It is fundamental, however, that residence in a school division must be bona fide in order to entitle a child to tuition-free schooling. Residence solely for school purposes is not bona fide residence under § 22.1-3. *See* Att'y Gen. Ann. Rep.: 1982-1983 at 416, 82-83 Va. AG 416; 1974-1975 at 378, 74-75 Va. AG 378.

II. Guardianship Order Is One Factor in Determining Bona Fide Residence of Child

Your first question, concerning a requirement by school officials that a guardianship order be entered for an alien or nonresident child to be enrolled in school tuition free, is governed by § 22.1-3. This statute requires that public schools "be free to each person of school age who resides within the school division." Residence of a child is determined by the child's residence with a legal guardian, such as a natural or adoptive parent, a court-appointed guardian or, in the case of parental death, a person *in loco parentis*. *Id.* *See also* 1980-1981 Att'y Gen. Ann. Rep. 306, 80-81 Va. AG 306. Absent such residence in the

division, the child has no statutory right under § 22.1-3 to free public schooling in the division. *See also* § 22.1-5. A guardianship order is one method by which school officials may determine whether a child is a resident of the local school division. This order is not, however, the exclusive means by which residency may be established. School officials, therefore, may consider a guardianship order as evidence of residence of the child, but may not require that guardianship orders be produced for children who can establish bona fide residence by other means.

*III. Best Interests of Child Determine Guardianship
Qualification; Appointment of
Guardian Does Not Automatically Entitle Student to Free
Public Schooling*

It is fundamental that the best interests of the child should be the primary factor in any determination concerning guardianship. *See* Opinion to the Honorable Michael J. Valentine, Chief Judge, Juvenile and Domestic Relations District Court, Nineteenth Judicial District, dated November 23, 1987, 87-88 Va. AG 342. The clerk is not bound by parental preferences or requests. *See* § 31-2, § 31-4. Neither is the child's request binding, even though the child is above the age of 14. *See* § 31-6. The child's best interests must be first, foremost and controlling. *Falco v. Grills*, 209 Va. 115, 120, 161 S.E.2d 713, 717 (1968). A factual showing of parental inability or unwillingness to care for the child may be necessary before a determination is made that these interests are best served by removal from parental custody. If the purpose of a guardianship transfer is solely to avoid school tuition charges or there is no indication that the guardianship transfer serves the best interests of the child, the clerk may disapprove the guardianship.

Further, the appointment of a guardian does not automatically entitle the student to free public schooling. Section 22.1-3 provides that the student must be a resident in [Page 376] the division "not solely for school purposes." When a school board determines, based on the facts of each case, that a student is residing with a guardian "not solely for school purposes," the child then becomes entitled to free public schooling in the division.

IV. Conclusion

Based on the above, it is my opinion, that

(1) school officials may consider a guardianship order as evidence of bona fide residence for a child to be enrolled without tuition in the public schools, but may not require a guardianship order as the only evidence acceptable for such purposes;

(2) a clerk of the circuit court may deny a guardianship order which is sought solely for school attendance purposes; and

(3) a circuit court clerk may ascertain the suitability of the proposed guardians and appointments made pursuant to § 31-4 by reviewing all the evidence presented in the petition with the ultimate determination based on the best interests of the child.

FOOTNOTES

1 I assume that your question does not refer to those "unaccompanied minors" who are refugees admitted to this country by the Attorney General of the United States pursuant to 8 U.S.C.A. § 1522 (West Supp. 1987).