

VOLUME NO. 43

OPINION NO. 36

CHILD CUSTODY AND SUPPORT - School district of residence for special education student in temporary or permanent custody of Department of Family Services;

COURTS, DISTRICT - School district of residence for special education student in temporary or permanent custody of Department of Family Services;

EDUCATION - School district of residence for special education student in temporary or permanent custody of Department of Family Services;

FAMILY SERVICES, DEPARTMENT OF - School district of residence for special education student in temporary or permanent custody of Department of Family Services;

RESIDENCE - School district of residence for special education student in temporary or permanent custody of Department of Family Services;

SCHOOL DISTRICTS - School district of residence for special education student in temporary or permanent custody of Department of Family Services; MONTANA CODE ANNOTATED - Sections 1-1-215, 20-7-420; OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 35 (1989), 40 Op. Att'y Gen. No. 69 (1984).

- HELD: 1. The school district of residence for special education purposes of a child for whom the Department of Family Services has temporary legal custody is the district of residence of the child's parents, regardless of whether the child is placed in a foster home in a separate school district.
2. The school district of residence for special education purposes of a child for whom the Department of Family Services has legal custody following termination of parental rights and before a permanent placement is accomplished is the same as that of the physical location of the district court that ordered the termination. 40 Op. Att'y Gen. No. 69 (1984) is overruled insofar as it conflicts with the holding of this opinion.

September 19, 1989

Robert L. Mullen, Director
Department of Family Services
P.O. Box 8005
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Dear Mr. Mullen:

You have requested my opinion concerning the following questions:

For the purpose of obtaining funding for special education, how is the school district of residence determined for a child:

- (1) for whom the Department of Family Services has temporary legal custody and who is placed in a foster home in one county when the child's parents reside in another county; and
- (2) for whom the Department of Family Services has legal custody pending permanent placement of the child after the parent's parental rights have been terminated?

Regarding your first question, I understand that the Department of Family Services (hereinafter "the department") is often given temporary custody of a child in abused, dependent and neglected child proceedings initiated under chapter 3 of Title 41, MCA. In most cases where the department has

temporary custody, the parental rights of the natural parents have not been terminated. The district of residence for special education purposes of a child for whom the department has temporary legal custody is the district of residence of the child's parents or guardian, unless otherwise determined by a district court, and that district is responsible for special education costs, as is more fully discussed in 43 Op. Att'y Gen. No. 35 (1989). See also § 20-7-420, MCA; Minutes, Senate Committee on Education, March 14, 1979.

Regarding your second question, you have indicated that in the usual case the local office of the Department of Family Services is given custody of a child whose parent's rights have been terminated under the Parent-Child Legal Relationship Termination Act of 1981, §§ 41-3-601 to 612, MCA (hereinafter "the Act"). Generally, the department's local office will retain custody until the child is permanently placed, usually by means of adoption. It is also my understanding that in the interim period between termination and permanent placement, a child in the custody of the department may undergo several temporary placements, often in several different school districts.

Although Montana statutes do not directly address the issue you raise, they do provide guidance in determining residence. The primary rules for determining a person's residence in Montana are set forth in section 1-1-215, MCA:

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

- (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.
- (2) There can only be one residence.
- (3) A residence cannot be lost until another is gained.
- (4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor child.
- (5) The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

- (6) The residence can be changed only by the union of act and intent.

These rules have been amplified for the purpose of determining the school district of residence of special education students by section 20-7-420, MCA:

- (1) In accordance with the provisions of 1-1-215, a child's district of residence for special education purposes is the residence of his parents or of his guardian unless otherwise determined by the court. This applies to a child living at home, in an institution, or under foster care. If the parent has left the state, the parent's last known district of residence is the child's district of residence.

Section 20-7-420(2), MCA, provides that the "district of residence is financially responsible for tuition ... for special education students."

The quoted statutes clearly indicate that in general a child's residence follows that of his parents. However, when parental rights have been legally terminated by court order under the Act, the parent/child relationship is extinguished, and as a matter of law the child no longer has parents. § 41-3-611, MCA. Application of section 20-7-420(1), MCA, becomes unclear in such a case, since the child has no legal parents and no guardian has been formally appointed for the child. Determination of the child's district of residence thus requires some discussion of applicable common law rules. It should be noted parenthetically that, although the words "residence" and "domicile" are not synonymous in the common law, the word "residence" is often used instead of "domicile" in statutory law, and is used in that sense in Montana's residency statute quoted above. See State ex rel. Duckworth v. District Court, 107 Mont. 97, 101, 80 P.2d 367, 368-69 (1938); Restatement (Second) of Conflict of Laws § 11, comment k (1971); 28 C.J.S. Domicile § 2 (1941). Thus, "decisions with reference to the rules for determining domicile are clearly in point." Duckworth, 107 Mont. at 101, 80 P.2d at 369. In this opinion, the terms "domicile" and "residence" will be used interchangeably.

Two important policy considerations underlie the issue presented: the first is that a "person's domicile should usually be in the place to which he is most closely related," and the second is that a child who is a ward of the court "should not acquire a domicile in a place where that court does not wish him to." Restatement (Second) of Conflict of Laws § 22, comment h (1971).

The specific issue you raise has not been addressed by the Montana Supreme Court. However, most courts that have considered the problem have ruled that the residence of a child who has been made a ward of a court is the same as that of the court itself. In the Matter of the Appeal in Maricopa County Juvenile Action No. A-27789, 680 P.2d 143, 144 (Ariz. 1984) (en banc); In re Eleanor A., 148 Cal. Rptr. 315, 318-19 (Cal. Ct. App. 1978);

Matter of Adoption of Buehl, 555 P.2d 1334, 1340-41 (Wash. 1976) (en banc); Betts v. Betts, 473 P.2d 403, 406 (Wash. Ct. App. 1970); In re Adoption of Johnson, 161 F.2d 358, 362 (Pa. 1960). A minority view holds that the residence of the ward follows that of the social service agency entrusted with the ward's custody. Matter of Cathy C., 391 N.Y.S.2d 971, 973 (N.Y. Fam. Ct. 1977).

In the case of a child whose custody has been entrusted to the department pending a permanent placement after parental rights have been terminated, I conclude that the majority view is most consistent with the provisions of the Act, Montana residency law, and the common law of domicile. It is the district court which orders the termination of parental rights (§ 41-3-609, MCA), and which is responsible for assigning custody of the child to the department. §§ 41-3-607(1), 41-3-406(3)(a), MCA; see Matter of C.A.R., 214 Mont. 174, 182, 693 P.2d 1214, 1219 (1984). Most importantly, it is the district court that continues to monitor the efforts of the department to permanently place the child, and the district court that ultimately controls "disposition meeting the best interests of the child." § 41-3-610, MCA; see also §§ 41-3-607(1), 41-3-406(3), MCA. Thus, the district court exercises a considerable degree of control over the affected child, and maintains significant contacts with that child on a continuing basis until a permanent placement is accomplished.

If the residence of the child were to follow the location of the department, it can be argued that the result would be that all such children in the state would legally reside in the school district where the department's main office is located in Helena. Again, the majority rule seems more consistent with actual practice in Montana, since caseworkers employed by the Department work with and before local district courts in termination proceedings. If residency of the child were to follow the locus of temporary placements of the child by the department pending permanent placement, the child's district of residence would change with each temporary placement, a situation that would generate unnecessary difficulty and widespread uncertainty regarding financial responsibility for the child's education. Because it appears that temporary placements may last for only a matter of days, such a resolution also contravenes the policy that a child's domicile should be that place to which he is most closely related.

It is my opinion that the logical resolution of this issue therefore requires that, for a child whose parent's rights have been terminated and who is in the custody of the department pending permanent placement, the child's residence is the same as the physical location of the district court which ordered the termination and which maintains jurisdiction of the case until permanent disposition. In the case of a special education student, the child's school district of residence would therefore be the physical location of the district court, and the school district for that location would be financially responsible for the child's tuition under section 20-7-420(2), MCA. It must be observed

that pursuant to section 20-7-420(1), MCA, the district court always has the option of making an independent determination of the child's district of residence. See also § 1-1-215(4), MCA.

Finally, I note that the following language from 40 Op. Att'y Gen. No. 69 (1984) may be construed as conflicting with my holding here:

[A] child's residence is the residence of the natural parents in almost all cases. The only exceptions would be for a child who was married, emancipated, or subject to a final decree of adoption. [Citations omitted.] It is my opinion that legal custody in a local welfare department by either temporary or permanent order does not change the child's residence from that of his or her natural parents.

40 Op. Att'y Gen. No. 69 at 277 (1984).

It is clear that, once parental rights are terminated, a child's legal residence cannot logically follow that of his natural parents, since under the law they are no longer the child's parents.

To the extent that the quoted language conflicts with the holding of this opinion, it is overruled.

THEREFORE, IT IS MY OPINION:

1. The school district of residence for special education purposes of a child for whom the Department of Family Services has temporary legal custody is the district of residence of the child's parents, regardless of whether the child is placed in a foster home in a separate school district.
2. The school district of residence for special education purposes of a child for whom the Department of Family Services has legal custody following termination of parental rights and before a permanent placement is accomplished is the same as that of the physical location of the district court that ordered the termination. 40 Op. Att'y Gen. No. 69 (1984) is overruled insofar as it conflicts with the holding of this opinion.

Sincerely,

MARC RACICOT
Attorney General