CO-COUNSEL BULLETIN

Schools and Custody

The admission and assignment of students to public schools is governed by Article 25 of Chapter 115C of the North Carolina General Statutes and the policies of local boards of education. This Bulletin will focus on issues of enrollment of children in North Carolina schools, the impact of divorce and separation on school enrollment, and under what circumstances a SM (servicemember) can obtain such enrollment for a child who is not his or hers.

I. Enrollment in the School District –The Domicile Requirement

In North Carolina, students who meet the statutory age requirements,[1] who have not yet received a high school diploma, and who have not been removed from school or denied admission for cause are entitled to admission to the public schools of a given school district. But this is based on a domicile requirement; the children must be "domiciled" within that district or fall within one of the statutory exceptions to the domicile requirement. N.C. Gen. Stat. § 115C-366.[2] Legal assistance attorneys need to have a working understanding of the concept of "domicile" in North Carolina law.

II. "Domicile 101"

A. "Domicile" is a legal term of art that must be distinguished from mere "residence." For purposes of school admissions, "[r]esidence simply means a person's actual place of abode, whether permanent or temporary." Craven County Bd. of Educ. v. Willoughby, 121 N.C. App. 495, 497, 466 S.E.2d 334, 335 (1996).

B. Domicile, on the other hand, refers to "'one's permanent, established home as distinguished from a temporary, although actual, place of residence.'" Graham v. Mock, 143 N.C. App. 315, 318, 545 S.E.2d 263, 265 (2001) (quoting Hall v. Bd. of Elections, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972)). A residence is sufficiently permanent to constitute a "domicile" if one intends to remain there "indefinitely"; that is, if there is a "present intention to make that place [one's] home" and "no intention presently to leave that place." Lloyd v. Babb, 296 N.C. 416, 449, 251 S.E.2d 843, 864 (1979).

C. By law, a person may have more than one "residence" but only one "domicile." Attasi v. Attasi, 117 N.C. App. 506, 511, 451 S.E.2d 371, 374 (1995); see also 17 N.C.A.C. 06B .3901 (referring to the "long standing principle in tax administration, repeatedly upheld by the courts… that an individual can have but one domicile").

D. Thus, a person cannot establish a new domicile unless there has been an "actual abandonment" of the prior domicile. Id. While "a plan to leave upon the happening of a future

[1] The age requirements for admission to North Carolina public schools are set out in N.C. Gen. Stat. § 115C-364, § 115C-366(a), and North Carolina State Board of Education Policy HSP-J-001, 16 N.C.A.C. 6E .0105(b).

event does not preclude one from acquiring [a new] domicile," a "temporary move" to a new residence with the intent to return to one's former home does not establish a new domicile, since there has been no "abandonment" of the previous domicile. Lloyd, 296 at 448, 251 S.E.2d at 864.

E. Once a domicile has been established, it is presumed to continue until a new domicile is established. Attasi, 117 N.C. at 511, 451 S.E.2d at 375.

F. "To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home." Hall, 280 N.C. 600, 608-609, 187 S.E.2d at 57.

G. Domicile is a factual issue that can be proved by direct evidence and circumstantial evidence. Expressions of intent are competent evidence of domicile but not conclusive proof; courts will examine all relevant evidence, including objective indicia, when making domicile determinations. Attasi, 117 N.C. at 511, 451 S.E.2d at 375. A person asserting a change in domicile bears the burden of proving that the old domicile was abandoned and a new one established. Id.

III. Domicile of Un-emancipated Minors

A. At birth, "a person takes the domicile of the person upon whom he is legally dependent." Hall, 280 N.C. at 608, 187 S.E.2d at 57. Because an unemancipated minor "cannot of his own volition select, acquire, or change his domicile," his domicile remains that of his parents until he reaches the age of majority or is emancipated.[2] Graham, 143 N.C. App. at 318, 545 S.E.2d at 265 (internal citations omitted). The domicile of an unemancipated minor, in other words, is the same as that of his parents, regardless of where the minor actually lives. See id. (holding that although a minor "may have a *residence* different from that of his parent(s)," he may not "establish a *domicile* different from his parents") (emphases added).

B. This means that when parents send their children to live with friends or family in another school district, the children do *not* have a right to attend school in that district unless they complete affidavits demonstrating that one of the exceptions to the domicile requirement applies. See id. (holding that minor did not have a right to attend Davidson County schools where minor lived with her uncle in Davidson County but her mother lived in Illinois and none of the domicile exceptions in N.C. Gen. Stat. § 115C-366 applied). See below as to parental and non-parental affidavits for admission of non-domiciliary students).

IV. Domicile of Eighteen-Year-Old Students or Emancipated Minors

The rules described immediately above apply only to unemancipated minors. A student may establish a domicile that is different from that of his or her parents upon turning eighteen or becoming emancipated. As with any adult, the burden is on the emancipated or eighteen-year-old student to show an abandonment of the prior domicile (i.e. the parent's house) and establishment of a new

[2] A minor may be emancipated by marriage or by a judicial decree of emancipation. N.C. Gen. Stat. §§ 7B-3507; 7B-3509.

domicile. In other words, the student must rebut the presumption that his or her domicile remains with his parents and must prove, in light of all the evidence, that he has abandoned his parent's domicile, has no intent to return there, and has established a new residence where he intends to remain permanently or indefinitely. Hall, 296 N.C. at 442-43, 251 S.E.2d at 860; Attasi, 117 N.C. at 511, 451 S.E.2d at 375.

V. Domicile of Students Who Live with Divorced or Separated Parents

A. Interpretive difficulties arise under the school assignment statute when parents are divorced and separated. It seems clear that if one parent's parental rights are terminated, the domicile of an unemancipated minor is simply the domicile of the other parent.

B. But what happens when parents are separated or divorced, share legal and physical custody of a child, and establish separate domiciles in different school districts? This scenario is not directly addressed in the school assignment statute or in case law interpreting the statute. Arguably, a student in this situation could be deemed a domiciliary of *both* school districts. On the other hand, such a result would conflict with the principle that every person has one, and only one, domicile. See, e.g., Attasi, 117 N.C. App. at 511, 451 S.E.2d at 374.

C. Courts have not addressed this issue, and school districts may take different positions when confronted with it. For example, a school district could reasonably argue that, in light of the fact that every person has only one domicile, and domicile pertains to where a person actually lives, the student's domicile must be the same as that of *primary physical custodian*.

D. Alternatively, a school district could reasonably argue that the student is entitled to attend school in the district only if the parent who is domiciled there has final decision-making authority over educational matters. At a bare minimum, it seems reasonable to assume that the parent whose domicile is to be the basis for school assignment must have at least an equal right to make educational decisions on behalf of the child and must exercise substantial physical custody of the child throughout the school year. Otherwise, a school district could be forced to enroll students who live outside the district during the school year or who do not have a parent living within the district who can make decisions about the child's education. It seems highly doubtful that, in giving students "who are domiciled in a local school administrative unit" the right to attend school there, the General Assembly intended to create such anomalies. Under such circumstances, the logical solution is for the minor to attend school in the district where the custodial parent is domiciled.

VI. Domicile of Students Who Live with Non-Parental Legal Custodians

A. The school assignment statute provides that "[a] student is considered domiciled in a local school administrative unit . . . if the student resides . . . with a legal custodian who is not the child's parent or guardian and the legal custodian is domiciled in the local school administrative unit." N.C. Gen. Stat. § 115C-366(a8). For purposes of this statute, "legal custodian" is defined as "[t]he person or agency that has been *awarded legal custody* of the student by a court." N.C. Gen. Stat. § 115C-366(h)(6) (emphasis added).

B. This provision was added to the statute in 1989. Prior to this amendment, the statute provided that students had the right to attend school in the districts where their "parents" or "guardians" were domiciled. A 1970 Attorney General Opinion clarified that for purposes of

the school assignment statute, "guardian" meant "general guardian" or "guardian of the person" appointed under Chapter 33 (now Chapter 35A) of the general statutes. See 41 N.C.A.G. 5, 10-11 (1970).[3]

C. The 1989 amendment broadened the domicile requirement by allowing claims of domicile to be made by legal custodians who are not parents or legal guardians. At the same time, however, the 1989 amendment made clear that students residing with non-parental caregivers are not deemed domiciled in the district unless the caregivers are domiciled in the district and have been "awarded legal custody of the student by a court." N.C. Gen. Stat. § 115C-366(h)(6).

D. Thus, students do not share the domicile of their non-parental caregivers based on powers of attorney, "guardianship affidavits," or similar documents that purport to give the caregiver custodial rights but do not constitute official custody orders.

E. Furthermore, the requirement that the minor must "reside" with the legal custodian presumably means that the student must actually live with the legal custodian throughout the school year and that limited visitation rights may not support a claim of domicile. In short, an unemancipated minor is deemed domiciled in the school district only if the minor actually lives with a parent, legal guardian, or non-parental legal custodian who is domiciled in the district.

VII. Exceptions to the Domicile Requirement - The "(a3)" Affidavits

A. There are some exceptions to the requirement of domicile. Under subsection (a3) of the school assignment statute, students who are not domiciled in a school district may nevertheless attend school there without paying tuition if all three of the following conditions are met: (1) the child is living with an adult caregiver who is a domiciliary of the district for one of the reasons specifically enumerated in the statute; (2) the student is not currently under a suspension or expulsion from any school that could have led to suspension or expulsion in that school district[4]; and (3) the caregiver adult and the child's parent, guardian, or legal custodian have each completed separate affidavits confirming that (a) the student is living with the caregiver for one of the statutorily-recognized reasons, (b) the student's claim of residency in the district is "not primarily related to attendance at a particular school within the unit," and (c) the caregiver has been given and accepted "responsibility for educational decisions for the student." N.C. Gen. Stat. § 115C-366(a3).

B. Be careful. This is not a "free ride." If it is found that any information in the parental or caregiver affidavit is false, the school system may remove the student from school. Id. In addition, a person who "willfully and knowingly" provides false information in an affidavit commits a class 1 misdemeanor and is required by law to reimburse the school system for the cost of educating the student during the period of enrollment. Id.

[3] Hence, a student does not share the domicile of a guardian of the estate or guardian ad litem.

[4] There is an exception to this requirement if the child is eligible for special education and related services under the Individuals with Disabilities Education Act ("IDEA"). N.C. Gen. Stat. § 115C366(a3)(2)(b). Such children must be provided some educational services even if they have been suspended from school, although they do not necessarily have the right to attend school with their peers. See N.C. Gen. Stat. § 115C-366(a5); § 115C-107.1(a)(3). As a general matter, school placement decisions for a student identified as student with a disability under the IDEA are made by the student's Individualized Education Plan ("IEP") team.

C. Students who are not otherwise domiciled in a school district are entitled to admission based on the domicile of a non-parental caregiver only if the student is living with caregiver for one of the following statutorily-recognized reasons:

1. The death, serious illness, or incarceration of a parent or legal guardian,

2. The abandonment by a parent or legal guardian of the complete control of the student evidenced by the failure to provide substantial financial support and parental guidance,

3. Abuse or neglect by the parent or legal guardian,

4. The physical or mental condition of the parent or legal guardian is such that he or she cannot provide adequate care and supervision of the student,

5. The relinquishment of physical custody and control of the student by the student's parent or legal guardian upon the recommendation of the department of social services or the Division of Mental Health,

6. The loss or uninhabitability of the student's home as the result of a natural disaster, or

7. The parent or legal guardian is one of the following:

   a. On active military duty and is deployed out of the local school administrative unit in which the student resides;

   b. A member or veteran of the uniformed services who is severely injured and medically discharged or retired, but only for a period of one year after the medical discharge or retirement of the parent or guardian; or

   c. A member of the uniformed services who dies on active duty or as a result of injuries sustained on active duty, but only for a period of one year after death.

D. For purposes of this sub-subdivision, the term “active duty” does not include periods of active duty for training for less than 30 days. Assignment under this sub-subdivision is only available if some evidence of the deployment is tendered with the affidavits required under subdivision (3) of this subsection. N.C. Gen. Stat. § 115C-366(a3).

E. Typically, school systems list these criteria on form affidavits that are provided to parents or caregivers who inquire about enrollment based on the caregiver’s domicile. If the student’s parent, guardian, or legal custodian is unable or unwilling to sign the parental affidavit, the caregiver may attest to that fact on the caregiver affidavit, and the requirement of a parental affidavit is waived pending verification of enrollment eligibility. Id. Many school districts address this contingency by providing a check box next to an attestation on the caregiver affidavit that the parent cannot be located or has refused to sign the parental affidavit.

F. Upon receipt of the parental and caregiver affidavits (or upon receipt of a caregiver affidavit including an attestation that the parent is unwilling or unable to sign the parental affidavit), the school system will admit and assign the child to an appropriate school "as soon as practicable" pending "the results of any further procedures for verifying eligibility for attendance and assignment" within the school district. Id. Most school districts routinely interview caregivers and parents and request documentation to support claims made in the enrollment affidavits.

G. Logically, and notwithstanding the provision that students are to be admitted "as soon as practicable" upon submission of the affidavit(s), school officials could deny enrollment at the time the affidavits are submitted, or any time thereafter, if they possess sufficient information to determine that the student does not fall within one the recognized domicile exceptions.

H. What happens if a caregiver seeks to enroll a child over the parents' express objection? Although the statute contemplates that students may be enrolled without a parental affidavit if the parent "refuses" to submit one, this should not be read to give non-custodial caregivers the right to overrule the wishes of parents or legal guardians. Id. Indeed, one of the attestations that must be made in both affidavits is that "the caregiver adult *has been given and accepts responsibility for educational decisions for the student*." N.C. Gen. Stat. § 115C-366(a3)(3)(c) (emphasis added). Leaving aside the question of what is legally required to "give" decision-making authority over a child to a third party,[5] a caregiver may not enroll a student unless he or she has been expressly authorized to make educational decisions for the student. Id. In other words, although a parent's refusal to sign an affidavit is not, in itself, a sufficient basis for denying enrollment, her failure to authorize the caregiver to make educational decisions on behalf of a student is. In essence, this means that parents may always trump a caregiver's efforts to enroll a student — if the parent denies that she has authorized the caregiver to make educational decisions for the child and/or revokes that authorization, the child does not have a right to enroll.

I. Put differently, the provision waiving the requirement of a parental affidavit when the parent "refuses" to submit one does not also waive the requirement that the parent has "given" the responsibility for making educational decisions to the caregiver. Rather, the waiver of the requirement of the non-parental affidavit was likely intended to address situations where parents have agreed to let others care for their children and make educational decisions on their behalf but for whatever reason are unwilling or unable to sign an affidavit to that effect.[6]

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[5] Because the affidavits are intended for caregivers who are not the child's "parent, guardian, or legal custodian," N.C. Gen. Stat. § 115C-366(a3)(3), it is clear that subsection (a3) contemplates the transfer of at least some responsibility for a child to a third party without a court order.

[6] School officials may be hesitant to enroll a child over the parents' objection for other reasons as well — particularly when the parent's refusal to sign the parental affidavit calls into question the reasons the caregiver has offered to explain why the child is living with him or her. For example, a caregiver's claim that the parents have "abandoned" the child is certainly weaker if the parents refuse to stipulate to that fact, even if the parents confirm that they have given the caregiver the authority to make educational decisions for the child. The claim becomes unsupportable if school officials learn that the parents are willing to house and care for the child but would prefer for the child to live with the caregiver. At a minimum, a parent's refusal to stipulate to the facts asserted in the caregiver's affidavit may cast doubt on the caregiver's assertions and cause the school system to investigate closely before verifying enrollment eligibility. In addition, a parent's objection to a child's admission to the district may have a

J. Does subsection (a3) create a means to modify or transfer legal custody of a child without a court order? Here is what the statute has to say about the authority of caregiver adults who enroll their charges under 115C-366(a3): "If the student is a minor, the caregiver adult must make educational decisions concerning the student *and have the same legal authority and responsibility regarding the student* as a part or legal custodian would have even if the parent, guardian, or legal custodian does not sign the affidavit. The minor student's parent, legal guardian, or legal custodian retains liability for the student's acts." Id. (emphasis added).

K. At first blush, it may appear that this provision purports to confer full legal custody on third parties without the need for a court order. Such a construction is untenable. Leaving aside whether the law allows legal custody to be modified or conferred by affidavit under any circumstances,[8] the overall context of the student assignment statute strongly suggests that this was not the General Assembly's intent.

1. First, the specific reference to the caregiver's duty to "make educational decisions concerning the student" suggests that this provision is intended only to ensure that the caregivers will be able to act *in loco parentis* with regard to all *educational* decisions on behalf of the child. A broader rule would go beyond what is necessary for caregivers to interact with school officials in the same manner as natural parents.
2. Second, the affidavit attestation that "the caregiver adult has been given and accepts responsibility for educational decisions for the student" supports the view that the main purpose of this provision is to relieve school districts of fear of liability for allowing certain non-parental caregivers to make educational decisions on behalf of minors under their care. It was intended to protect school districts that reasonably rely on the parental and caregiver affidavits, not to radically undermine bedrock principles of family law.
3. Finally, it is important to note that the affidavits specifically require parents and caregivers to attest that the student's claim of residency is "not primarily related to attendance at a particular school within the district." Id. This provision likely serves at least three purposes. First, it helps preserve the "full and complete" authority of school boards to determine appropriate school placements for all students entitled to admission. N.C. Gen. Stat. § 115C366(b). See generally infra § II. Second, it confines the (a3) affidavits to cases where the student's change in residence is driven by harsh exigencies (e.g. the "death" of a parent, "abandonment" by a parent, or "loss or uninhabitability" of a student's home). And third, it prevents parents from colluding with others to game their way to particular schools.

VIII. **Enrolling and Withdrawing from School**

A. The school assignment statute is silent as to who may complete the paperwork to enroll a child in school. Many school districts, however, have adopted formal or informal policies requiring

students to be enrolled by their parents, guardians, or legal custodians.[7] One reason for this requirement is to ensure that the parent, guardian, or legal custodian is domiciled in the school district and the student is therefore entitled to admission. For this reason, many school districts require adults seeking to enroll students in school to do so in person and to provide evidence of their domicile. Another reason is to ensure that important educational decisions are being made by a responsible adult with legal authority to make those decisions. Unless a school is made aware of a valid custody order restricting the parental rights of one or both parents, both parents will be presumed to have an equal right to present a child for enrollment, so long as the parent is domiciled in the school district.

B. The question of who has a right to *withdraw* a student from school requires a different analysis. There is no requirement that a parent be domiciled within a school district in order to *remove* the child from school. Thus, if two parents have equal rights to make educational decisions on behalf of a child, the non-domiciliary parent ordinarily has the right to withdraw the child from the school system. This result could be avoided by language in the custody order that expressly addresses withdrawal from school. For example, an order could provide that one parent has final decision-making authority over whether to enroll or withdraw the child from school. Alternatively, an order could prohibit either parent from withdrawing a child from school unless the other parent consents or certain conditions are met.

C. If a third party seeks to enroll or withdraw a child from school, the school will probably request a copy of the court order giving the third party that right. Such cases are often referred to school attorneys and/or central office administrators with experience reading custody orders. If the custody order clearly and unambiguously gives the third party final decision-making authority over educational matters, and the child actually lives with the third party and shares his or her domicile, the district is likely to recognize the third party's authority to enroll and withdraw the child. If, however, the order could be read to leave final decision-making authority over educational matters in the hands of one or both parents, the school could be reluctant to act at the request of the third party without the parent's consent. Similarly, the school may be hesitant to allow a third party to enroll a child in school if the third party shares legal custody with a parent but does not actually live with and care for the child throughout the school year. Such a person may have too attenuated a relationship with the student to serve effectively as an educational decision-maker, and the child may not be deemed "domiciled" in district for the reasons stated above in section I.E. Finally, a school could potentially refuse to recognize an order if it appears to be invalid or inconsistent with the overarching intent of the school assignment statute. For example, if there is no true controversy regarding custody over the child and the parties have entered a consent order solely for the purpose of facilitating the child's admission to a particular school, a school district could take the position that only the parent has the right to enroll the child in school.

IX. **Requesting School Transfers**

[7] The only clear exception to this requirement is that "unaccompanied youth" who qualify as "homeless" under the McKinney-Vento Homeless Education Assistance Improvements Act must be allowed to enroll without the presence of a parent or other legal custodian.

Under N.C. Gen. Stat. § 115C-369(a), the right to request a school transfer belongs to the "parent or legal guardian" of each student. Most school districts will also permit transfer requests to be filed by non-parental legal custodians, at least when the student is living with the legal custodian and the legal custodian has final decision-making authority over educational matters. If, however, the parent or legal guardian retains equal rights to make educational decisions on behalf of the child, a school district could insist that transfer requests be filed by the "parent or legal guardian," and not the third-party legal custodian. School districts may take different approaches to this issue.

X. **Practice Pointers**

These tips may assist legal assistance attorneys and family law practitioners in drafting custody orders that will address school assignment issues in a clear and enforceable way:

- Remember that provisions in custody orders placing children in particular schools are unenforceable if they contradict state law or board policy on school assignment.
- Remember that while the right to attend a given school district is governed by statute, the right to attend particular schools within the district is purely a matter of school board policy.
- Review the policies of the local board of education where the student will attend to be sure that your order reflects the reality of that school district's student assign policies.
- Call the lawyer for the school board if you have questions about these policies.
- Draft orders in recognition of the fact that the parties may move and that this may have an effect on their children's school assignments.
- As a general matter, avoid references to specific schools in your custody orders. Such provisions may be unenforceable if they are inconsistent with board policy or if the parents move to difference attendance areas. A better approach (at least in school districts that assign students to "base schools" based on their domiciles) is to provide that a student will attend school "within the mother's attendance zone" or "as provided by school board policy based on the mother's address." Take care, however, to assure that the student does indeed have a right to enroll based on that parent's address under state law and the applicable board policies.
- Consider including clear language on the rights to "make educational decisions" on behalf of the minor children. Absent a specific provision to the contrary, schools will assume that both parents have equal rights to withdraw children from school, apply for magnet schools or request school transfers, or take other actions that could affect school assignment.
- If you anticipate that disputes over schooling will be a major issue for the parties in the future, consider including more detailed provisions on the parties' respective rights to make educational decisions. Topics that could be addressed include physical access to a child at school, attendance at parent-teacher conferences and IEP meetings, access to student records, and the authority to make decisions about curricular, special education, disciplinary, and school assignment questions.
- Understand that schools will be extremely skeptical of consent orders whose primary purpose is to secure a child's admission to a particular school district or particular school. In an extreme case, a school system may even seek to intervene in the custody action. Alternatively, a school system could elect to deny enrollment and defend any resulting

litigation by challenging the effectiveness of the custody order as a basis for school assignment.

Encourage your clients to maintain a non-adversarial relationship with school officials. Remind them that custody orders are binding on the parties to the litigation and that it is the other parent, not the school district, who may be violating the order. Encourage them to keep school officials informed of the terms of any custody orders, but remind them that it is not the school system's job to monitor and enforce the other parent's compliance with those orders.

Editor's Notes:
In addition to the above obstacles, the legal assistance attorney should remember the following –

For a custody order to be entered, a lawsuit for custody must first be initiated. This means that there is a genuine dispute between the litigants. Someone must be the plaintiff, and someone must be the defendant. Sometimes there are two or more plaintiffs or defendants, but in any scenario the essence of a lawsuit is a controversy or dispute. Do you have one? If everyone is in agreement, is a party guilty of collusion is setting up a friendly lawsuit to attain an end other than a successful resolution of the legal action?

Second, the lawsuit must be filed in compliance with the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), found at N.C. Gen. Stat. Chapter 50A, Article 2. This generally means that one must file suit where the child has been living for the last six months. If Johnny, the minor child, has been in Montana for over six months, then the suit must be initiated there, not in North Carolina.

Finally, third-party custody means more than "We all agree that Jane Doe and her husband, SGT John Doe, can have custody of little Johnny so as to enroll him in school in Cumberland County." The North Carolina Supreme Court has held that third-party custody is not appropriate unless there is a finding that the parents of the child are unfit or have neglected the child's welfare. Without such a finding, the constitutionally-protected paramount rights of the parents to custody, care, and control of their children must prevail. Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994).

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