#281-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu10879-06_1.html)

V.S.-L., on behalf of minor child Z.M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent Board's determination that her daugher, Z.M.M., is ineligible to receive a free public education in its district schools because she is not domiciled in the City of Garfield. By virtue of a court order, residential custody of Z.M.M. is shared by petitioner and her mother, S.S. – the child's grandmother – who is legally domiciled in Garfield. The Board sought reimbursement for tuition for the period of Z.M.M.'s alleged ineligible attendance.

The ALJ found, *inter alia*, that: despite Z.M.M.'s residency with her grandmother during the week, the child is taken frequently to the Clifton home of her mother and stepfather; Z.M.M.'s parents pay property taxes on the home in Clifton, and claimed her as a dependent on their income tax return; there is no evidence to suggest that legal and physical custody of Z.M.M. has been relinquished by her parents. The ALJ distinguished between legal custody and legal guardianship; found that S.S. has shared custody but not legal guardianship of Z.M.M.; and concluded that Z.M.M. is domiciled in the City of Clifton and therefore not eligible to receive a free public education in Garfield schools. He ordered petitioner to pay tuition to the Board for the period of ineligible attendance.

Upon an independent and thorough review of the record, the Commissioner rejected the Initial Decision, finding that: under the circumstances of this case, there is no legitimate basis for distinguishing between "legal guardianship" and "legal custody"; as a result of S.S.'s legal and residential custody of Z.M.M., Z.M.M.'s domicile follows the domicile of her grandmother during the week, which is in Garfield; no competent evidence was presented disputing the child's residency with the grandmother during the week; however, there was evidence – in the form of a court order – that V.S.-L. relinquished legal and physical custody of Z.M.M. during the week. Additionally, for the purposes of this controversy, V.S.-L.'s husband has no legal relationship to Z.M.M, and V.S.-L. was entitled to claim Z.M.M. as a dependent for tax purposes because the child lived with her mother for more than six months. Accordingly, the Commissioner granted petitioner's appeal, noting that while the possibility exists that Z.M.M.'s custody arrangement could have been implemented to take advantage of Garfield's preschool program, speculation cannot serve as the basis for legal determinations.

July 9, 2007

OAL DKT. NO. EDU 10879-06
AGENCY DKT. NO. 199-5/06

V.S.-L., on behalf of minor child Z.M.M.,	:	
PETITIONER,	:	
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BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
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The record of this matter - including the transcript and the three exhibits from the hearing at the Office of Administrative Law (OAL), the Initial Decision, and the exceptions submitted by petitioner have been reviewed.[1] For the reasons that follow, the Initial Decision is rejected.

BACKGROUND

A review of the evidence submitted to the Commissioner reveals the following facts:

1. Petitioner's daughter, Z.M.M., was born on September 17, 2002. At that time, petitioner and Z.M.M. lived in Garfield in the home of petitioner's parents, E.S. and S.S. Z.M.M.'s father, C. M., had no involvement in Z.M.M.'s life.

2. For the first couple of years of Z.M.M.'s life, petitioner was unemployed. She began teaching in the 2004-2005 school year.

3. In or about the Spring of 2005, petitioner applied for sole legal, physical and residential custody of Z.M.M., *vis a vis* C.M., and on June 1, 2005, she was granted same.

[1] No exceptions were received from respondent.

4. Petitioner married A.L. in August, 2005. On the day of the marriage, the couple closed on a house in Clifton. The seller did not move out until the end of August.

5. According to petitioner's testimony, which was unrebutted by respondent, the couple began having marital problems during the honeymoon. When they returned from the honeymoon, they lived in Garfield with petitioner's parents. About a month later, A.L. left to stay with his parents in Long Island, where he had resided before getting married. At the end of October, 2005, A.L. moved into the home the couple had purchased in Clifton. Petitioner and Z.M.M. stayed in Garfield with petitioner's parents and sister, D.S.

6. Petitioner became pregnant, and the couple resolved – in the Spring of 2006 – to participate in marital counseling and attempt to reconcile. Petitioner decided to join A.L. in their Clifton house, but leave Z.M.M. with her family in Garfield. Accordingly, she and her mother, S.S., applied to the court for joint custody of Z.M.M.

7. On June 15, 2006, the Honorable Deborah Ustas of Bergen County Superior Court, Chancery Division – Family Court, entered a consent order which modified petitioner's sole custody of Z.M.M., as follows:

> joint legal custody to be shared by parties [maternal grandmother and mother]. Residential custody of m/c [minor child] with grandmother during the week and w/ [with] mother on weekends.

8. Both D.S., petitioner's sister – who has always lived with the parents – and petitioner testified that in July 2006, petitioner went to live with A.L., and that Z.M.M. stayed in Garfield with the maternal grandparents and D.S. Petitioner further testified that during the summer of 2006, Z.M.M. stayed with her on weekends and some weekdays.

9. The reasons petitioner gave for leaving her daughter with the grandparents and D.S. were that she did not want to subject Z.M.M. to the conflicts between her and A.L., and did

not want to remove Z.M.M. from the home she had always lived in until she and her husband had worked things out and achieved a better relationship.

10. It is undisputed that Garfield has a preschool program available to all children of preschool age who are domiciled in Garfield. It was argued by respondent that Clifton does not have such a program.

11. There appears to be no dispute that Z.M.M. was enrolled in Garfield's preschool program for the 2005-2006 school year. The evidence suggests that Z.M.M. also participated in the Garfield summer preschool program in 2006 (T32-33). And it is undisputed that Z.M.M. has attended the Garfield preschool program during the 2006-2007 school year.

12. Both petitioner and her sister, D.S., testified that S.S. and D.S. take Z.M.M. to pre-school in the morning. When pre-school ends at 6. p.m., Z.M.M. is picked up by D.S., A.L., or petitioner. If A.L. or petitioner picks up Z.M.M., they either take her to S.S.'s home in Garfield or take her to their home in Clifton to wait for D.S. to arrive from work. D.S. then takes Z.M.M. to Garfield, where she is fed, bathed and put to bed.

13. D.S. and petitioner also both testified that Z.M.M. stays with petitioner and A.L. from Friday evening until Sunday after church.

14. According to petitioner, for 2006, petitioner and A.L. filed separate tax returns. Z.M.M. was listed as a dependent on petitioner's return because petitioner and Z.M.M. lived together for over half of 2006. (T29, 52-53)

15. On May 22, 2006, respondent issued to petitioner a Notice of Initial Determination of Ineligibility of Z.M.M. to attend school in respondent's district. Petitioner appealed this by filing a petition with the Commissioner of Education (Commissioner) on May 31, 2006. The parties were advised that the matter was not ripe for adjudication before the

Commissioner, and would be held in abeyance until respondent issued a Notice of Final Determination of Ineligibility.

16. The Final Notice of Ineligibility issued by respondent bears a date of August 29, 2006. Although there is a letter dated August 30, 2006 in the file from respondent's counsel purporting to transmit the Notice of Final Determination of Ineligibility to petitioner, petitioner alleged that she did not receive the notice until October 3, 2006. On October 6, 2006, the Commissioner received a request from petitioner to reactivate the appeal she had instituted on May 31, 2006. The matter was then transmitted to the OAL.

The Administrative Law Judge (ALJ) concluded that "Z.M.M. is domiciled in the City of Clifton and is not eligible to receive a free public education from the [Garfield] Board [of Education]." His conclusion about domicile was based upon the following assumptions:

1. "There is no specific evidence on the record before [him] that would indicate that either Z.M.M.'s mother or father has affirmatively relinquished physical and legal custody of Z.M.M. or her younger brother."
2. "There is also no evidence presented that any guardianship proceeding and/or order has been entertained by a court."
3. "It is undisputed that Z.M.M. is 'frequently' taken to the Clifton home by her father after school and that she returns to the Clifton home on weekends.
4. "Z.M.M.s parents . . . pay property taxes on the Clifton home and include Z.M.M. as a dependent on their income tax return."

(Initial Decision at 6-7.)

The ALJ also assumed, citing no authority, the existence of a distinction between legal custody and legal guardianship: "While the maternal grandmother shares legal custody and

not legal guardianship with V.S.-L. as a result of a court order, legal and physical control and responsibility remain with Z.M.M.'s parents, both of whom are domiciled in the City of Clifton." (Initial Decision at 7-8)

No credibility determinations were made by the ALJ.

DISCUSSION

The Initial Decision deviates from a long line of decisions of the Commissioner, State Board of Education and Superior Court. The holdings in these cases establish that when a court order is entered awarding custody of a minor to an individual, the minor's domicile is determined by the domicile of that individual. Accordingly, the minor child becomes entitled to a free public education in the district of domicile of the custodial individual.

For example, in *L.D.M., on behalf of minor child, T.D. v. Board of Education of the Township of West Orange, Essex County,* OAL Dkt. No. EDU 3590-00, Agency Dkt. No. 60-2/00, decided by the Commissioner May 11, 2001, L.D.M. had applied for custody of her younger brother, T.D., due to family circumstances. She was granted custody by way of an order of the Superior Court. The West Orange district maintained that it was not required to provide T.D. with a free public education. In determining, to the contrary, that T.D. was entitled to a free public education in West Orange, the Commissioner reasoned as follows:

> As was determined by the Commissioner and affirmed by the State Board of Education in *L.A. v. Board of Education of the Town of West Orange,* 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton,* 97 *N.J.A.R.*2d (EDU) 124 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d 554 (1997),[2] as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of

[2] In *V.H.*, when custody of a child was transferred from his parents to a great grandmother, the child's domicile was changed to the district in which the great grandmother resided and he was deemed to be entitled to a free education in that district as of the effective date of the custody transfer.

> charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision.
>
> Once L.D.M. assumed legal custody of T.D., the only appropriate inquiry for respondent was whether L.D.M. and T.D. were domiciled in the District pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as respondent does not dispute that L.D.M. is domiciled in West Orange, and the domicile of the child follows that of the parent or guardian having legal custody over him or her, *Mansfield Twp. Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that T.D. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a), as of the effective date that L.D.M. acquired legal custody of T.D. *See also Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997. Further, as was held in *L.A.*, and affirmed by the State Board, the motives of the party obtaining a custody order are not determinative. A custody order must be accepted on its face. *See L.A.* at 269. *See also Y.L., supra*

Similarly, in *Board of Education of the City of Absecon, Atlantic County v. M.L.G. and L.G.-P. on behalf of minor child, B.G.*, OAL Dkt. No. EDU 10944-99, Agency Dkt. No. 339-11/99, decided by the Commissioner July 13, 2000, it was determined that once the respondent, M.L.G., assumed legal and physical custody of her grand nephew, B.G., the only appropriate inquiry for the petitioning board of education was to ascertain whether M.L.G. and B.G. were domiciled in the district. The Commissioner concluded that inasmuch as the petitioner did not dispute that M.L.G. was domiciled in Absecon, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, it followed that B.G. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) as of the date M.L.G. acquired legal custody of him.

It should be noted that the above referenced cases refer to “custody” (as opposed to legal guardianship) and “custody orders” in describing the legal bases for the domicile of minors and, in turn, the bases for their entitlements to free public educations. Similarly, in

P.B.K. on behalf of minor child E.Y. v. Board of Education of the Borough of Tenafly, 343 *N.J. Super*. 419, 427 (App. Div. 2001), the Superior Court of New Jersey, Appellate Division, explained that "for purposes of subsection (a) [of *N.J.S.A.* 18A:38-1] the domicile of an unemancipated child is the domicile of the parent, custodian or guardian." (Emphasis added.)[3]

For purposes of determining domicile and entitlement to a public education, the Commissioner can find no distinction in the case law between "guardianship," and "custody." Indeed, as a practical matter, the terms "guardianship" and "custody" both clearly signify positions of authority created to allow legal control of another human being who, because of age, physical or mental condition, cannot take responsibility for him or herself. Accordingly, the Commissioner rejects the ALJ's implication (see Initial Decision at 6,8) that the legal authority bestowed upon an individual by way of a court order granting custody is inferior to a legal guardianship.

A Superior Court order bestowed upon S.S. joint legal custody of Z.M.M. and residential custody of Z.M.M. during the week (as opposed to the weekends). Thus, pursuant to established precedent, Z.M.M.'s domicile follows the domicile of S.S. during the week, and that domicile is indisputably in Garfield. It would serve no constructive purpose, in the context of the present controversy, to attempt to make a distinction between legal custody and legal guardianship.

The Commissioner is aware that there have been cases in which it has been determined that minors were not domiciled in the districts of residence of individuals who had

[3] Since a June 1, 2005 court order gave petitioner sole custody of Z.M.M., and since A.L. has no legal relationship to Z.M.M., petitioner's actions regarding Z.M.M. are the actions germane to the legal analysis of Z.M.M.'s status. Petitioner agreed to share her custodial authority with S.S., and a judge of the Superior Court – by virtue of her execution of the order – determined that it was in Z.M.M.'s best interest to approve that custody modification. In light of the resulting court order giving S.S. legal and residential custody of Z.M.M. on weekdays, the Commissioner cannot accept the ALJ's conclusion that there was no evidence that petitioner relinquished physical and legal custody of Z.M.M.

been granted custody of them. *See, e.g., I.B. on behalf of minor child, M.A., III v. Board of Education of the Township of Belleville, Essex County,* State Board Dkt. No. 51-05, decided December 6, 2006; *D.M. on behalf of minor child, B.N. v. Board of Education of the Township of Ewing, Mercer County,* State Board Dkt. No. 20-02, decided November 5, 2003. However, in those cases, the school districts presented overwhelming evidence that the respective children were not actually living with the individual who had been granted custody. By way of contrast, the respondent in this case presented no such evidence. Nor did petitioner's testimony about the evening pick-up arrangements for Z.M.M. establish that the child was not actually living in Garfield during the week.

Applying the above articulated legal principles to the evidence presented in this case, the Commissioner finds that Z.M.M. was eligible for a public education in Garfield. The Commissioner acknowledges that the possibility exists that Z.M.M.'s custody arrangement could have been implemented to take advantage of Garfield's preschool program. However, petitioner presented evidence to the contrary and respondent did not rebut it. Speculation cannot serve as the basis for legal determinations.

In light of the foregoing determination concerning eligibility, the Commissioner need not make any findings concerning tuition.

Petitioner's appeal is granted.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: July 9, 2007

Date of Mailing: July 9, 2007

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq*. and *N.J.A.C.* 6A:4-1.1 *et seq.*