



ILLINOIS STATE BAR ASSOCIATION

# FAMILY LAW

*The newsletter of the Illinois State Bar Association's Section on Family Law*

## Will someone please think about the children: Where can divorced parents with joint custody send their children to school?

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Divorce is a fact of life for many Illinois families. Indeed, the last data on the divorce rates in Illinois show that for the past 10 years, nearly 44% of marriages will end in divorce. As families endure the traumatic process of separating assets and living arrangements, they often strive to maintain a sense of normalcy and routine for their children. A significant portion of a child's routine is their school, but where, legally, can divorced parents with joint custody send their children to school? This issue typically may not arise if both parents continue to reside in the original school district their children attended during the marriage. However, this is not typically the case. There remains the lingering question of which is the appropriate school district.

The law is not clear on this subject. Section 10-20.12b of the *Illinois School Code* ("School Code") provides that "the residence of a person who has legal custody of a pupil is deemed to be the residence of the pupil." 105 ILCS 5/10-20.12b(1). Where this gets murky is that there are multiple definitions of "legal custody." The *School Code*, in relevant part, defines "legal custody" to include both "custody exercised by a natural or adoptive parent with whom the pupil resides" and "custody granted by order of a court of competent jurisdiction to a person with whom the pupil resides for reasons other than to have access to the educational programs of the district." 105 ILCS 5/10-20.12b(2)(i-ii).

The first definition of "legal custody" encompasses children who exclusively live with both parents, typically because the parents

are married or otherwise reside together, as well as children who live exclusively with one parent. The second definition encompasses children who live with a parent that has been granted sole custody pursuant to court order. These definitions fail to address where a child resides when his or her divorced parents have joint custody. In fact, while the generally applicable provisions in Article 10 of the *School Code* have kept up with some modern concepts, such as threats delivered by electronic means (see 105 ILCS 5/10-22.6), they do not recognize joint custody arrangements at all.

In contrast to the *School Code*, Section 602.1 of the *Illinois Marriage and Dissolution of Marriage Act* ("Act") not only recognizes that divorcing parents can be awarded joint custody of their children, but it also recognizes that joint custody does not necessarily mean equal parenting time. 750 ICLS 5/602.1(d). In particular, the *Act* provides that "the physical residence of the child in joint custodial situations shall be determined by: (1) express agreement of the parties; or (2) order of the court." *Id.* These provisions, however, do not help divorced parents determine where their children reside for school district residency purposes.

Like all statutory questions, we need to look at the legislature's intent. In order to discern what the *School Code's* intent would be in regard to joint custodial arrangements, the best answer is found in Article 14 of the *School Code, Children with Disabilities*. This section delves a bit deeper into the concept of residency and directly addresses divorced or separated parents with joint custody ar-

rangements.

Section 14-1.11(4) provides that "in cases of divorced or separated parents, ...when both parents retain legal guardianship or custody, the resident district is the district in which either parent who provides the student's primary regular fixed night-time abode resides; provided that the election may be made only one time per school year." 105 ILCS 5/14-1.11(4). While this helps, it does not solve the problem because this particular section only applies to children with disabilities. However, the logic behind the reasoning that the location of a child's "regular fixed night-time abode" constitutes their resident district cannot be ignored. When applied to a typical joint custodial arrangement of divorced parents, this reasoning aligns with the *Act's* recognition that joint custody does not result in equal parenting time.

The end result is that for school district residency purposes, children of divorced parents with joint custody are considered residents of the school district in which they spend most of their school nights. Although not statutorily defined, a "school night" is considered to be the night before a school attendance day, generally Sunday through Thursday nights.

Let's say Homer and Marge get divorced and enter into a joint custody agreement over their three children—Bart, Lisa, and Maggie. We need to figure out which school district is the children's resident school district. Homer moves to Shelbyville's school district and Marge stays in Springfield's school district. For our purposes, we will presume that Article 14 is used as the controlling

law for residency determination.

### Scenario No. 1: Weekend Homer

Pursuant to the joint custody agreement, the children live with Marge in Springfield nearly all the time, with the exception of every other weekend, which they spend with Homer in Shelbyville. This is a typical custody agreement that is very easy to resolve. Verdict: Springfield is the children's resident school district because they spend every Sunday through Thursday evening (all school nights) with Marge.

### Scenario No. 2: Tiger Marge

Prior to the divorce, Marge scheduled so many after school activities for the children that they have to split the week amongst both parents. Pursuant to the joint custody agreement, the children live with Marge in Springfield every Sunday, Monday, and Tuesday night. The children live with Homer in Shelbyville every Wednesday and Thursday night. While confusing, the children have hockey practice on Monday and saxophone lessons on Tuesday which are both closer to Marge's home. The children have scouts on Wednesday and religious school on Thursdays, which are both closer to Homer's home. Marge and Homer swap weekends, so every other Friday and Saturday night the children are with Marge and the opposite Friday and Saturday night they are with Homer.

This scenario is much more complicated.

To keep things easy, let's assume the children's schedules are constant. Verdict: Springfield is the children's resident school district because they spend three of every five school nights (the majority of school nights) with Marge. However, Homer has a strong argument in favor of Shelbyville because he picks up the children from school on Wednesday and has to take them to school every Friday morning and pick them up every other Friday as well. Homer can argue that he is involved in three out of the five school days per week, which makes him responsible for the majority of the school time responsibility. While Article 14 is useful in providing some guidance, this scenario shows how both the measurement of "regular fixed night-time abode" might not be fair.

Another complication is that the children's schedules are bound to change. In fact, what happens when hockey season is over? What happens when the children stop playing the saxophone? What happens when the scouts move to another location? The basis for this joint custody agreement was to do what was best for the children. The real question now is do Marge and Homer have to re-do their joint custody agreement every year? If so, divorce attorney Lionel Hutz is the only winner.

### Scenario No. 3: Too Much Love

In an effort to achieve extreme equity, Marge and Homer's joint custody agreement calls for the children to switch off each week.

Accordingly, the children live with Marge from Sunday through Saturday night one week, and then live with Homer from Sunday through Saturday night the following week. Since the children's time is split equally between houses, technically they do not spend the majority of their school nights in either Springfield or Shelbyville. Therefore even when adopting the "regular fixed night-time abode" language from Article 14, the *School Code* does not provide an answer to this scenario.

When it comes to determining the appropriate school district for children of divorced parents, the answer may not be so clear cut. Residences change, jobs change, and activities change. Even if the *School Code* was ever amended to shed light on this problem, it will certainly not be able to provide an answer for each individual divorced family's needs. Although there are many factors to sort out in a divorce proceeding, it would be wise for divorcing parents and divorce attorneys to seek advice from an experienced school law attorney so as to avoid potential complications down the road. ■

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ILLINOIS STATE BAR ASSOCIATION'S  
FAMILY LAW NEWSLETTER,  
VOL. 56 #5, NOVEMBER 2012.  
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