December 15, 1964

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School Residence; Boarding House.

FACTS:

A husband and wife resided in the Town of Berwick with their three children. By mutual agreement, the husband and wife separated. There has been no divorce. The husband left the State of Maine to take up residence in New Hampshire. The wife and children (ages 13, 11, 4) occupied an apartment in Berwick for about eight weeks following the husband's departure. On October 19, 1964, the wife gave up the apartment in Berwick and boarded the children in the Town of Wells. At that time, the wife took up employment and residence in New Hampshire. None of the children are living with relatives in Wells. Instead, each of the children are being boarded (in different homes) for a full calendar year at a charge of ten dollars per week. The father has made one trip to Wells to see the children. Both parents contribute moneys for the cost of the board.

State subsidy moneys paid to administrative units are based upon school membership, inter alia. R. S., c. 41, § 237.

QUESTION:

In such a situation, do the children have a legal right to attend the public schools in the Town of Wells?

ANSWER:

No, except upon payment of tuition.

REASON:

Applicable legislative authority regarding the right to attend public schools is as follows:

" * * *

"Subject to the provisions of this section and subject to such reasonable regulations as the superintending school committee or school directors shall from time to time prescribe, every person between the ages of 5 and 21 shall have the right to attend the public schools

> in the administrative unit in which his parent or guardian has residence. Residence as used in this section shall mean the administrative unit where the father maintains a home for his family. If the parents of the child are separated, residency shall be considered to be the administrative unit where the person having custody of the child maintains his or her home." R. S., c. 41, § 44.

It is generally held that a minor, whose parents are living, has no capacity to select his own place of residence.

> "Generally, a minor whose parents are living has no capacity to select his own place of residence with respect to his right to attend school. * * * " 79 C.J.S., Schools and School Districts, § 449, a.

The determination of residence for school purposes does not often admit of a facile disposition.

> "What constitutes residence for school purposes is not easy to determine in many cases, and the problem has been litigated frequently. The rule is that the legal residence of a minor child is that of his father and he is legally incapable of establishing another in the absence of special circumstances, such as the death of the father, the case of separation of the parents when the mother is given custody of the child, or a situation where other persons have the child in legal charge. * * * " The Law and Public Education, 2nd Edition, Chapter 12, page 508.

Do these children qualify for school privileges in Wells under Section 44? Unless their parent or guardian has residence in Wells, the question must be answered in the negative.

> " * * * every person between the ages of 5 and 21 shall have the right to attend the public schools in the administrative unit in which his parent or guardian has residence. * * * " R. S., c. 41, § 44.

> "The Legislature doubtless intends that each child in the State shall have the legal right to attend some free public school. In some States the residence of the child is made the determining factor. Here it depends upon the residence of parent or guardian." Shaw v. Small, 124 Me. 36, 38.

Under the given facts, it is difficult to conclude that "the father ... maintains a home for his family" in Wells. When he absented himself from the home, the family resided in Berwick, not in Wells. Presently, the children neither reside with either parent nor do they reside with each other. The family unit no longer exists; it is not being maintained in Wells by the father. Too, the given facts do not admit of the legal conclusion that the wife maintains her home in Wells.

> " * * * If the parents of the child are separated, residency shall be considered to be the administrative unit where the person having custody of the child maintains his or her home." R. S., c. 41, § 44.

The wife never has lived in Wells. If it can be said that she maintains a home, she must be doing so in New Hampshire.

A reading of Section 44, as it is first quoted above, establishes the right of attendance upon the residence of the parent or guardian. The language following thereafter exists not for the purpose of enlarging the basis for the right of attendance, but only servesthe purpose of defining the same. We conclude that the children do not satisfy the applicable statutory pre-requisites for tuition-free school attendance. Such a conclusion necessitates a finding that the children are not residing with guardians. The present facts are certainly not synonymous with those presented to the Supreme Judicial Court in Shaw v. Small, supra. There, the child was a ward of the State; and placed by the State in the home of a legal resident of a town. The Court determined that the child was entitled to school privileges in the town. The Court gave the following statement upon the subject of guardian:

> "Every dictionary defines 'guardian' either precisely or in substance thus: 'A person who legally has the care of the person or property or both of another, incompetent to act for himself.' This

> definition applies to Mrs. Whalen. The care of the relator was given her by the State. As against his parents, as against all the world, except the State, she is entitled to his custody. By decree of court the rights of the natural guardians have been extinguished. To their rights of care, custody and protection, Mrs. Whalen has succeeded and for the time being possesses and exercises. She stands toward the relator in loco parentis." Shaw v. Small, supra, page 39.

In the present case, the State has exercised no such control over the children. We note that the Court, in Shaw v. Small, supra, mentioned that the person in control of the child could be made subject to a fine or imprisonment for failure of the child to attend school.

> " * * * Mrs. Whalen having control of the relator is made by the literal language of the statute subject to a fine or imprisonment if she does not cause him to attend school. R. S., Chap. 16, Sec. 66." Shaw v. Small, supra, page 40.

The given facts present some doubt whether the families which board the children are invested with that duty which makes them subject to such fine or imprisonment upon the failure of the children to attend school.

> " * * * All persons having children under their control shall cause them to attend school as provided in this section, and any person having control of a child who is an habitual truant as defined in section 95 and being in any way responsible for such truancy, and any person who induces a child to absent himself from school, or harbors or conceals such child when he is absent shall be punished by a fine of not more than $25 or by imprisonment for not more than 30 days for each offense." R. S., c. 41, § 92.

Of course, if it is determined that these children are not entitled to school privileges in Wells, the persons boarding the children cannot (in law) be subject to such punishment as is noted above. Upon a showing that the children are not invested with school privileges, those persons

who may have control of the children cannot be subject to the statutory penalty due to the child's absence from school.

Any reference to cases decided in other states is not helpful for the reason that the applicable state statutes differ from the reference statute; and each case has been decided upon its own set of facts. However, it has been determined in at least one case that the boarding of children in a school district does not, of itself, entitle the children to school privileges in that district.

> " * * * 'Boarding children in a district does not, of itself, entitle them to the benefits of the free school in said district. * * * '" People v. Board of Education, 206 Ill. 381, 385.

A statute must be enforced according to its terms, if the meaning is plain.

> "It is never permissible to substitute legislative for judicial functions." Lewis v. Holden, -- Utah --, 99 A. 2d 758, 762.

John W. Benoit

JWB/eh

The following authorities may be of assistance regarding future opinions in this area:

146 A.L.R. 1292

Sulzen v. School District, 140 Kan. 648, 62 P. 2d 880

Logan City v. Kowallis, 94 Utah 342, 77 P. 2d 348

Cline v. Knight, 111 Colo. 8, 137 P. 2d 680

Fangman v. Moyers, 90 Colo. 308, 8 P. 2d 762 (a leading case in this area)

Lewis v. Holden, 118 Vt. 59, 99 A. 2d 758 (rejected holding in Cline v. Knight, supra.)