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School must enroll child despite custody schedule

Town's 'pillow count' rule rejected by judge

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The town of Wayland could be required to enroll a divorced man's son in its public schools, even though on most school nights the child slept at his mother's home in another community pursuant to the terms of a shared custody agreement, a Superior Court judge has decided in a case of first impression.

The defendant town argued that, because the boy slept seven out of 10 school nights at his mother's home in Framingham, he did not "actually reside" in Wayland for purposes of G.L.c. 76, §5, the state's residency law governing public school enrollment. In implementing the statute, the town's school district adopted a guideline requiring a student to reside in Wayland for at least three out of five weekly school nights.

Deciding that Wayland could not rely on its so-called "pillow count" rule in making a residency determination for a child subject to a shared custody arrangement, Judge Douglas A. Wilkins granted the plaintiff father's request for a preliminary injunction requiring the town to enroll the boy for the 2014-2015 school year.

"The Town advances nothing beyond supposition to suggest that the center of the child's social and civic life is Framingham," the judge wrote.

The nine-page decision is *Ames v. Town of Wayland*, Lawyers Weekly No. 12-087-14. The full text of the ruling can be ordered at masslawyersweekly.com.

Counting pillows

The plaintiff was represented by Adam A. Rowe of Crowe & Dunn in Boston. Rowe said the ruling means that public school districts must consider a broader range of factors in making residency determinations.

"The decision stands for the proposition that merely counting the nights that a child spends or sleeps at a particular home is just inadequate to determine where the child should be enrolled in school," he said.

Rowe said he argued that, in shared custody situations, a child should be considered an actual resident of both parents' communities under G.L.c. 76, §5.

"In the context of shared custody, to suggest that a child has one and only one actual residence ignores the reality on the ground," he said.

The town was represented by Regina Williams Tate of Murphy, Hesse, Toomey & Lehane in Quincy. Tate did not respond to requests for comment prior to deadline.

But Catherine L. Lyons of Rockland, an education lawyer who represents public school districts, said the decision is significant in that many districts use guidelines similar to Wayland's pillow count rule in making residency determinations.

"The first thing that most school districts look at is where the student is spending the majority of his or her time — where the student is resting his or her head — during the school week," Lyons said. "Now we're going to have to be asking more in-depth questions about the child's interests and activities outside of school."

Lyons pointed out that school districts are often at a disadvantage in making residency determinations.

"Parents and other interested parties, such as the [Department of Children and Families,] are not always fully forthcoming with all the facts that the school needs to make a fully informed decision on whether the residency requirements are fully satisfied," she said.

CATHERINE L. LYONS

Saugus attorney Pamela S. Milman represents parents and students in disputes with schools, including suits over the fulfillment of special education needs.

Milman applauded the judge for ruling against Wayland's attempt to strictly enforce one of its rules.

"It's about time the schools look at more than the black and white of issues surrounding kids," Milman said.

In order to understand the town's enrollment stance, Milman said, it is important to consider that the plaintiff's son is a special needs child with learning issues related to dyslexia.

"I am certain that the fear behind [the town's position] was what this kid could cost the school district," she said.

Milman noted a 2006 state Department of Education administrative advisory providing that if a student's parents live in two different school districts, the districts are jointly responsible for fulfilling special education requirements.

She applauded Wilkins for refusing to require the plaintiff first to go through the lengthy process of obtaining a residency ruling from Massachusetts Bureau of Special Education Appeals.

"The one lesson I take from this case is to do whatever it takes to get a kid into a stable place at the start of a school year," Milman said. "I think that the court looked at that as well and that is commendable."

Robert F. Peck of Salem represented the mother in the case. Peck did not respond to requests for an interview.

Rejected enrollment request

Plaintiff John S. Ames' son was due to begin the eighth grade. The plaintiff and his wife lived in Wayland until their divorce in 2006, when his ex-wife, Lisa A. Mello, moved to Framingham.

Under the terms of a shared custody agreement entered in Essex Probate & Family Court, the boy spent Thursday evening through Monday morning with his father on alternating weeks, and Thursday evening through Friday morning with his father on "off" weeks.

The boy attended Wayland public schools until fourth grade when, in order to accommodate issues related to a dyslexic learning style, he transferred to a private school with facilities in both Lincoln and Waltham.

Earlier this year, the parenting coordinator in the divorce case recommended to the Family Court that it would be in the child's best interest that he return to the Wayland public schools for the eighth grade. The plaintiff filed a motion to implement the parenting coordinator's recommendation.

To bolster his case, the plaintiff retained an education expert to evaluate the best academic setting for his son. The expert also recommended that the boy return to the Wayland public schools, concluding "this could also be an opportunity to re-engage with friends and peers before heading off to high school."

In June, the Family Court accepted the parenting coordinator's recommendation and ordered that the boy be enrolled in school in Wayland.

The Wayland school district rejected the enrollment request the following month on the ground that the boy did not meet the residency requirement in accordance with state law.

When the plaintiff requested clarification, the school district issued a new residency guideline — the pillow count rule — indicating that children subject to joint physical custody agreements must reside in Wayland a minimum of three of five school nights.

The plaintiff responded by filing a complaint for a preliminary injunction requiring Wayland to enroll his son. Although not a party to the lawsuit, Mello was permitted to intervene in opposition to her ex-husband's action.

Statutory interpretation

Subject to certain limitations, G.L.c. 76, §5 guarantees every person the right to attend the public schools of the town "where he actually resides." The law also states that "[n]o school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee."

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>
> **— Catherine L. Lyons, Rockland**

CASE: *Ames v. Town of Wayland,* Lawyers Weekly No. 12-087-14

COURT: Middlesex Superior Court

ISSUE: Could a town refuse to enroll the son of a divorced resident in its public schools solely on the ground that on most school nights the child slept at his mother's home in another community pursuant to the terms of a joint custody agreement?

DECISION: No

Wilkins observed that there was no controlling authority for interpreting the statute in the context of shared custody arrangements and concluded that there were two plausible constructions of the law.

"The natural, but perhaps simplistic, conclusion is that a child is 'residing with' both parents and therefore is a resident of both towns where the parents live for purposes of G.L.c. 76, §5," he wrote.

Wilkins recognized that such a construction had the benefit of "easy administration and predictability" and added that "[i]f this construction prevails, the plaintiff will win."

In the alternative, the judge said, the statute could be read to require identifying a single town of residence. In that regard, Wilkins wrote that the cases under G.L.c. 76, §5 "may suggest a more searching inquiry into a number of factors, including both the frequency of actual presence in one town or the other (e.g., a pillow count) and the principal location of the child's domestic, social and [civic] life."

Under the test suggested by the case law, the judge concluded that "the town's pillow count policy fails to account for all the factors that determine whether a child is 'actually residing in' Wayland."

Fundamentally, the pillow count rule "fails to allow consideration of the child's educational history and potential for re-establishing some continuity for a child with learning disabilities who re-enters the mainstream in his town," Wilkins wrote.

In deciding to grant the preliminary injunction, he found that three key facts demonstrated the likelihood of the plaintiff succeeding on the merits on the issue of which town was the center of his son's domestic, social and civic life.

First, Wilkins underscored the fact that the boy went to Wayland schools through the fourth grade. Second, he found it weighed heavily that the child actually resided with his father in Wayland pursuant to an adjudicated joint custody arrangement.

"The fact that his nighttime presence in Wayland occurs less than 50 percent of the time does not change the fact that he does actually reside in Wayland (although he also resides in Framingham)," Wilkins wrote.

The third and final factor, the judge said, was evidence in the record that Wayland was the focal point of the child's social and civic life.

Wilkins suggested scheduling a trial on the merits for late spring or early summer in order to have a final order in place before the 2015-2016 school year. MLW