May 15, 2008

The Honorable John M. Knotts, Jr.
Senator, District No. 23
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:

In a letter to this office you referenced a constituent who lives in the Batesburg-Leesville area who has attempted to have her minor nephew enrolled in the Lexington District Three schools. She has been provided a document signed by the parent of the child appointing the constituent and her husband as temporary guardians. The document is referred to as a power of attorney and, according to my review and information, the custody arrangement was not ordered by a court. The school district refused to register the nephew pursuant to that document.

S.C. Code Ann. § 59-63-30 states that

> [c]hildren within the ages prescribed by § 59-63-20 shall be entitled to attend the public schools of any school district, without charge, only if qualified under the following provisions of this section:
>
> (a) Such child resides with its parent or legal guardian;
>
> (b) The parent or legal guardian, with whom the child resides, is a resident of such school district; or
>
> (c) The child owns real estate in the district having an assessed value of three hundred dollars or more; and
>
> (d) The child has maintained a satisfactory scholastic record in accordance with scholastic standards of achievement prescribed by the trustees pursuant to § 59-19-90; and

> (e) The child has not been guilty of infraction of the rules of conduct promulgated by the trustees of such school district pursuant to § 59-19-90. (emphasis added).

S.C. Code Ann. § 59-63-31 provides

> (A) Children within the ages prescribed in Section 59-63-20 also are entitled to attend the public schools of a school district, without charge, if:
>
> > (1) the child resides with one of the following who is a resident of the school district:
> >
> > (a) a person who is not the child's parent or legal guardian to whom the child's custody has been awarded by a court of competent jurisdiction;
> >
> > (b) a foster parent or in a residential community-based care facility licensed by the Department of Social Services or operated by the Department of Social Services or the Department of Juvenile Justice; or
> >
> > (c) the child resides with an adult resident of the school district as a result of:
> >
> > > (i) the death, serious illness, or incarceration of a parent or legal guardian;
> > >
> > > (ii) the relinquishment by a parent or legal guardian of the complete control of the child as evidenced by the failure to provide substantial financial support and parental guidance;
> > >
> > > (iii) abuse or neglect by a parent or legal guardian;
> > >
> > > (iv) the physical or mental condition of a parent or legal guardian is such that he or she cannot provide adequate care and supervision of the child; or

> (v) a parent's or legal guardian's homelessness, as that term is defined by Public Law 100-77;
>
> (2) the child is emancipated and resides in the school district;
>
> (3) the child is homeless or is a child of a homeless individual, as defined in Public Law 100-77, as amended; or
>
> (4) the child resides in an emergency shelter located in the district.
>
> In addition to the above requirements of this subsection, the child shall also satisfy the requirements of Section 59-63-30(d) and (e).

A prior opinion of this office dated May 24, 1972 dealt with the question of the meaning of the term "legal guardian" referred to the in the predecessor statute to Section 59-63-30. That opinion stated that this office was of the opinion that the referenced term "...means either a testamentary guardian or a guardian by judicial appointment." Another opinion of this office dated October 12, 1979 similarly stated that the term "legal guardian" is defined as

> ...one who, by operation of law, e.g., by court order or by will, has the care and management of the estate or the person or both of a child during the latter's minority.

The opinion commented further that the use of the term indicates that "...the legislature intended that Section 59-63-30 guardians should have broad powers for the care and management of the child."

Consistent with these prior opinions, in the opinion of this office inasmuch as the appointment of the constituent and her husband as guardian was not made by a judge of a court, it would not qualify as a judicial appointment. Therefore, it would not meet the requirements of Section 59-63-30 or 59-63-31. As a result, the school district would not be authorized to accept the child for attendance in its schools. The appointment must come from a judge. Furthermore, inasmuch as any order would pertain to a child, it must be issued by a family court judge. See S.C. Code Ann. §§ 20-7-390 et seq. As to the further question of whether a judicial appointment by a family court judge of another state of an individual as a legal guardian would qualify, in the opinion of this office, it would. I am unaware of any requirement that the appointment be limited to one made by a family court judge in this State.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General