

OPINION NO. 95-032**Syllabus:**

1. For purposes of R.C. 3313.64, "legal or permanent custody" may be established by a court order, or by evidence of the transfer of temporary custody without a court order in accordance with R.C. 5103.15. The temporary placement of a child with persons related by blood or marriage in accordance with R.C. 5103.16(A) does not affect the legal custody of the child for purposes of R.C. 3313.64(B)(2)(a). A notarized statement that is prepared by the court-designated custodial parent and purports to grant temporary custody of a child to a relative is not an "agreement for temporary custody," as that term is defined in R.C. 2151.011(B)(17), and does not operate to transfer legal custody for purposes of R.C. 3313.64(B)(2)(a). (1994 Op. Att'y Gen. No. 94-033 (syllabus, paragraph 2), overruled in part.)
2. When a minor child of divorced parents is in the legal custody of the father pursuant to court order and resides with an aunt in a school district

in which neither parent resides, the child is not entitled pursuant to R.C. 3313.64(B)(2)(a) to be admitted to the schools of the school district in which the child and aunt reside, even if the father prepares a notarized statement that purports to give the aunt temporary custody of the child. If no other statutory provision entitles the child to be admitted to the schools of that school district, the board of education is permitted to admit the child to its schools only upon the payment of tuition for the child.

3. When the minor child of divorced parents is in the legal custody of the father pursuant to court order, the mother is not named by the court as legal custodian or residential parent, there is no shared parenting order, and pursuant to agreement with the father the child resides with the mother in a school district that is different from the school district in which the father resides, the child is not entitled pursuant to R.C. 3313.64(B)(1) or R.C. 3313.64(B)(2)(a) to be admitted to the schools of the school district in which the child and mother reside, even if the father prepares a notarized statement that purports to give the mother temporary custody of the child. If no other statutory provision entitles the child to be admitted to the schools of that school district, the board of education is permitted to admit the child to its schools only upon the payment of tuition for the child.

To: W. Duncan Whitney, Delaware County Prosecuting Attorney, Delaware, Ohio
By: Betty D. Montgomery, Attorney General, October 5, 1995

You have requested an opinion concerning instances in which a school district must admit a child to its schools without receiving tuition for that child. Your specific questions are:

1. When a minor child, whose parents have divorced and do not live within a given school district, resides within that school district with a maternal aunt pursuant to a notarized statement from the child's father giving the aunt temporary custody of the child, even though the child's father is the child's court-ordered legal custodian, is the school district required to provide tuition-free education to the child?
2. When a minor child, whose parents have divorced and whose father has been awarded legal custody of the child by court order, resides in a given school district with her mother, while her father lives outside that school district, is the school district required to provide tuition-free education to the child once the child's father provides a notarized statement giving the child's mother temporary custody of the child?

School Attendance and Tuition

R.C. 3313.64 prescribes the school district in which a child is entitled to attend school. R.C. 3313.64(B) states:

(B) Except as otherwise provided in section 3321.01 of the Revised Code for admittance to kindergarten and first grade, a child who is at least five but

under twenty-two years of age and any handicapped preschool child shall be admitted to school as provided in this division.

(1) A child shall be admitted to the schools of the school district in which his parent resides.

(2) *A child who does not reside in the district where his parent resides shall be admitted to the schools of the district in which he resides if any of the following applies:*

(a) *He is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent.*

(b) He resides in a home.

(c) He requires special education.

(3) A child who is not entitled under division (B)(2) of this section to be admitted to the schools of the district where he resides and who is residing with a resident of this state with whom he has been placed for adoption shall be admitted to the schools of the district where the child resides unless either of the following applies:

(a) The placement for adoption has been terminated.

(b) Another school district is required to admit the child under division (B)(1) of this section.

Division (B) of this section does not prohibit the board of education of a school district from placing a handicapped child who resides in the district in a special education program outside of the district or its schools in compliance with Chapter 3323. of the Revised Code. (Emphasis added.)

The payment of tuition is governed generally by R.C. 3313.64(C),¹ which states:

(C) *A district shall not charge tuition for children admitted under division (B)(1) or (3) of this section. If the district admits a child under division (B)(2) of this section, tuition shall be paid to the district that admits the child as follows:*

(1) If the child receives *special education* in accordance with Chapter 3323. of the Revised Code, tuition shall be paid in accordance with section 3323.091, 3323.13, 3323.14, or 3323.141 of the Revised Code regardless of who has custody of the child or whether he resides in a home.

(2) Except as otherwise provided in division (C)(2)(d) of this section, *if the child is in the permanent or legal custody of a government agency or person other than the child's parent, tuition shall be paid by:*

(a) *The district in which the child's parent resided at the time the court removed the child from his home or at the time the court vested legal or*

¹ Various other provisions also address the payment of tuition or the admission of a pupil without the payment of tuition. See R.C. 3313.64(E) (admission free of tuition obligation for sixty days when an adult resident of the school district has initiated custody proceedings); R.C. 3313.64(F) (various circumstances in which no tuition is required to be paid); R.C. 3313.645 (admission pursuant to criteria established by the State Board of Education or to vocational education programs); R.C. 3313.65 (children of institutionalized or incarcerated parents). These provisions are not relevant to your question and are not discussed in this opinion.

permanent custody of the child in the person or government agency, whichever occurred first; or

(b) If the parent's residence at the time the court removed the child from his home or placed him in the legal or permanent custody of the person or government agency is unknown, tuition shall be paid by the *district in which the child resided* at the time he was removed from his home or placed in legal or permanent custody, whichever occurred first; or

(c) If a school district cannot be established under division (C)(2)(a) or (b) of this section, tuition shall be paid by the *district determined as required by section 2151.357 of the Revised Code*² by the court at the time it vests custody of the child in the person or government agency.

(d) If at the time the court removed the child from his home or vested legal or permanent custody of the child in the person or government agency, whichever occurred first, one parent was in a residential or correctional facility or a juvenile residential placement and the other parent, if living and not in such a facility or placement, was not known to reside in this state, tuition shall be paid by the *district determined under division (D) of section 3313.65 of the Revised Code* as the district required to pay any tuition while the parent was in such facility or placement.

(3) If the child is not in the permanent or legal custody of a government agency or person other than his parent and *he resides in a home*, tuition shall be paid by one of the following:

(a) The *school district* in which the child's parent resides;

(b) If the child's parent is not a resident of this state, *the home in which the child resides*. (Emphasis and footnote added.)

Thus, no tuition may be charged for a child who, pursuant to R.C. 3313.64(B)(1), is admitted to the schools of the school district in which his parent resides or for a child who has been placed for adoption and comes under R.C. 3313.64(B)(3). If a child is admitted under R.C. 3313.64(B)(2), tuition is paid by another school district as provided by statute, or by the home³ in which the child resides.

² R.C. 2151.357 states, in part:

In the manner prescribed by division (C)(2) of section 3313.64 of the Revised Code, *the court*, at the time of making *any order that removes a child from the child's own home or that vests legal or permanent custody of the child in a person other than the child's parent or a government agency*, shall determine the school district that is to bear the cost of educating the child. The court shall make the determination a part of the order that provides for the child's placement or commitment. (Emphasis added.)

³ For purposes of R.C. 3313.64 and R.C. 3313.65:

Except as used in division (C)(2) of this section, "home" means a home, institution, family foster home, group home, or other residential facility in this state that receives and cares for children, to which any of the following applies:

(a) The home is licensed, certified, or approved for such purpose by the state or is maintained by the department of youth services.

(b) The home is operated by a person who is licensed, certified, or approved by the state to operate the home for such purpose.

(c) The home accepted the child through a placement by a person

A board of education may admit to its schools a child who is not entitled by statute to attend the schools of that district, "if tuition is paid for the child." R.C. 3317.08. Whenever the pupil is not entitled by statute to attend the schools of a particular district and the tuition is not the obligation of another school district, the board of education "shall collect tuition for the attendance of such pupil from the parents or guardian of the pupil." R.C. 3327.06(B). Thus, if the child in question has no statutory right to attend the schools of a particular school district, the board of education of that school district is permitted to admit the child to its schools only upon the payment of tuition for the child.

Reconsideration of 1994 Op. Att'y Gen. No. 94-033

Your questions concern situations in which a minor child, whose parents have divorced, lives with the child's mother or aunt in a school district other than the one in which the father resides. The child does not require special education⁴ and does not reside in a "home" as that term is used in R.C. 3313.64(B)(2)(b). See note 3, *supra*. The child's father, who is the court-ordered legal custodian, has prepared a notarized statement giving temporary custody of the child to the mother or aunt. The question is whether the school district is required to provide the child with an education without receiving tuition payments.

As your letter notes, 1994 Op. Att'y Gen. No. 94-033 considered R.C. 3313.64(B) and found that legal custody or permanent custody of a child could be established either by a court order or by evidence of the transfer of custody without a court order in accordance with R.C. 5103.15 or R.C. 5103.16. Under the analysis set forth in Op. No. 94-033, a notarized statement of the sort described in your letter might be sufficient to alter the legal custody of the child, so that school admission could be permitted under R.C. 3313.64(B)(2)(a).

Upon considering your questions and reviewing all relevant statutes, however, I have concluded that the analysis contained in Op. No. 94-033 does not fairly reflect the intent of the General Assembly as expressed in existing provisions of the Revised Code, and that it should be modified in certain respects. In particular, it is inappropriate to conclude that a notarized statement prepared by a custodial parent has the effect of changing legal custody for purposes of R.C. 3313.64(B)(2)(a).

The determination as to whether a person other than a child's natural or adoptive parent has legal or permanent custody of the child turns upon the definitions of "legal custody" and

licensed, certified, or approved to place a child in such a home by the state.

(d) The home is a children's home created under section 5153.21 or 5153.36 of the Revised Code.

R.C. 3313.64(A)(4).

⁴ School attendance of a child who requires special education is governed by R.C. 3313.64(B)(2)(c) and by other provisions that differ in various respects from those governing children who do not require special education. See, e.g., R.C. Chapter 3323; 1993 Op. Att'y Gen. No. 93-023; 1991 Op. Att'y Gen. No. 91-025; 1991 Op. Att'y Gen. No. 91-024. This opinion does not address the school attendance of a child who requires special education.

"permanent custody" appearing in R.C. 2151.011 that are, by R.C. 3313.64(A)(2), made applicable to R.C. 3313.64. Those definitions state:

(9) *"Legal custody" means a legal status which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.*

....

(11) *"Permanent custody" means a legal status which vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.*

R.C. 2151.011(B) (emphasis added); *see also* R.C. 2151.011(B)(26) (defining "[c]ustodian").

Also of interest is the definition of "temporary custody," which includes temporary custody as a type of legal custody. That definition states:

"Temporary custody" means legal custody of a child who is removed from his home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person who executed the agreement.

R.C. 2151.011(B)(12) (emphasis added).

Op. No. 94-033 relied on these definitions in concluding that legal custody or permanent custody could be transferred without a court order, in accordance with the provisions of R.C. 5103.15 or R.C. 5103.16. In reaching that conclusion, however, Op. No. 94-033 failed to consider the statutory definition of "agreement for temporary custody," which states:

"Agreement for temporary custody" means a voluntary agreement that is authorized by section 5103.15 of the Revised Code and that transfers the temporary custody of a child to a public children services agency or a private child placing agency.

R.C. 2151.011(B)(17) (emphasis added); *see also* 13 Ohio Admin. Code 5101:2-42-02(B).

The statutory definition thus expressly includes as a means for modifying temporary custody "a voluntary agreement that is authorized by [R.C. 5103.15]." R.C. 2151.011(B)(17). It does not, however, include any sort of agreement coming within the provisions of R.C. 5103.16, thereby suggesting that agreements executed pursuant to R.C. 5103.16 should not be found to affect temporary custody for purposes of R.C. 2151.011 or R.C. 3313.64(B)(2)(a).

The conclusion that agreements under R.C. 5103.15 may affect the temporary custody, and thus the legal custody, of a child for purposes of R.C. 2151.011 and R.C. 3313.64(B)(2)(a), but that agreements under R.C. 5103.16 may not affect such custody, is consistent with the

language of those two statutes. As discussed in Op. No. 94-033, R.C. 5103.15(A)(1) allows parents, guardians, or other persons with custody of a child to enter into an agreement with a public children services agency or private child placing agency to place the child in the temporary custody of the agency for a limited time, without the approval of the juvenile court. Extensions of the temporary custody agreements may be granted by the court. R.C. 5103.15(A)(2), (3). R.C. 5103.15(B) permits the surrender of the permanent custody of a child to a private child placing agency without court approval, if the agreement is for the purpose of obtaining an adoption of a child under six months of age. In other instances, court approval is required for the transfer of permanent custody to a public children services agency or private child placing agency. R.C. 5103.15(B). See 13 Ohio Admin. Code 5101:2-42-04(A)(5), (6); 13 Ohio Admin. Code 5101:2-42-06 to -08.

Transfer of custody pursuant to R.C. 5103.15 is, in all instances, made to a public children services agency or private child placing agency. Transfers of temporary custody made pursuant to that provision are made either by the court or by voluntary agreement with a public children services agency or private child placing agency and fit neatly within the definition of "temporary custody" appearing in R.C. 2151.011(B)(12). Further, since R.C. 5103.15(C) requires that agreements provided for in R.C. 5103.15 be in writing and on forms prescribed and furnished by the Department of Human Services, there are clear written records establishing any change in the custody of a child made pursuant to R.C. 5103.15. See 13 Ohio Admin. Code 5101:2-42-04(A)(5), (6); 13 Ohio Admin. Code 5101:2-42-06 to -08.

R.C. 5103.16, in contrast, prohibits the placement of a child with a person or entity that is not certified by the Ohio Department of Human Services unless there is a court commitment or written consent of the Department.⁵ R.C. 5103.16 states that a child "may be placed temporarily without written consent or court commitment with persons related by blood or marriage, or in a legally licensed boarding home." R.C. 5103.16(A); see also R.C. 5103.02 (excluding from the definition of "[i]nstitution" or "association" an individual who is related to the children and stating that an individual who provides care for only a single-family group, placed there by their parents or other relative having custody, is "not considered as being within the purview of [R.C. 5103.03-.19]"). Op. No. 94-033 construed this language as permitting a change of legal custody when a child is temporarily placed, without court commitment or written

⁵ R.C. 5103.16 states, in part:

Except as otherwise provided in this section, no child shall be placed or accepted for placement under any written or oral agreement or understanding that transfers or surrenders the legal rights, powers, or duties of the legal parent, parents, or guardian of the child into the temporary or permanent custody of any person, association, or institution that is not certified by the department of human services, as provided in sections 5103.02 and 5103.03 of the Revised Code, without the written consent of the department, or by a commitment of a juvenile court, or by a commitment of a probate court as provided in this section. A child may be placed temporarily without written consent or court commitment with persons related by blood or marriage, or in a legally licensed boarding home.

R.C. 5103.16(A).

consent of the Department, with persons related by blood or marriage, or in a legally licensed boarding home. I suggest, instead, that this language merely permits the placement⁶ of the child in such circumstances, without indicating that the placement constitutes a change of legal custody. *See, e.g., Gallagher v. Gallagher*, 115 Ohio App. 453, 459, 185 N.E.2d 571, 575 (Henry County 1962) (the mother's "mere placing" of minor children in a home does not constitute evidence of relinquishment of custody, and the home does not make any claim to temporary or permanent custody of the children). *See generally* 1989 Op. Att'y Gen. No. 89-092 (a children services board may retain legal custody of a child while placing the child to live with a relative in another state pursuant to the Interstate Compact on the Placement of Children, R.C. 5103.20). Under this interpretation, a child may indeed be placed temporarily with a relative, without a court order or Department approval, but such placement does not affect the child's legal custody for purposes of R.C. 2151.011 or R.C. 3313.64(B)(2)(a).⁷ *See, e.g., Lucas v. Lucas*, 114 Ohio App. 474, 183 N.E.2d 138 (Brown County 1961) (a parent who has been awarded custody of a child is not required to reside continuously with the child but may provide the child a suitable home elsewhere, in this case with relatives, while retaining custody).

The conclusion that placement of a child with a relative without a court order does not affect a child's legal custody for purposes of school attendance is consistent with the definitions

⁶ The term "placement" is not defined for purposes of R.C. 5103.16. Related definitions indicate, however, that the placement of a child involves the making of a living arrangement for that child and does not require a change in the legal custody of the child. *See* R.C. 2151.011(A)(22) ("'[p]lacement for foster care' means the arrangement by a public children services agency or a private child placing agency for the out-of-home care of a child of whom the agency has temporary custody or permanent custody"); R.C. 2151.011(A)(23) ("'[p]lacement for adoption' means the arrangement by a public children services agency or a private child placing agency with a person for the care and adoption by that person of a child of whom the agency has permanent custody"); R.C. 5103.20 (for purposes of the Interstate Compact on Placement of Children, "'[p]lacement' means the arrangement for the care of a child in a family free or boarding home, or in a child-caring agency or institution," with certain exceptions); 13 Ohio Admin. Code 5101:2-5-01(N) ("'[d]irect placement' means the placement of a child by the parent, guardian or legal custodian of the child, with the participation and agreement of an agency, into an out-of-home care setting operated or supervised by the agency, with the parent, guardian or legal custodian retaining the legal custody of the child"); 13 Ohio Admin. Code 5101:2-42-03(UU) ("'[p]lacement for substitute care' is the arrangement by a PCSA [public children services agency] or PCPA [private child placing agency] for the care provided for a child apart from his parent or guardian, while the child's custody is held by an agency"); *see also* 13 Ohio Admin. Code 5101:2-27-45 (discussing "[p]lacement services for children"); 13 Ohio Admin. Code 5101:42-02(Z) (defining "[i]nterstate placement").

⁷ If a child is placed with relatives pursuant to R.C. 5103.16 for the purpose of adoption of the child, such placement may affect the school district in which the child is entitled to attend school. R.C. 3313.64 includes as placement for adoption a placement made by the child's natural parent pursuant to R.C. 5103.16 "with a person who will care for and adopt the child." R.C. 3313.64(A)(6). In appropriate circumstances, school attendance of the child who has been so placed will be governed by R.C. 3313.64(B)(3). R.C. 3313.64(B)(3) applies to a child who has been placed for adoption and who is not entitled under R.C. 3313.64(B)(2) to be admitted to the schools of the district where he resides, thereby indicating that a child who is placed for adoption is not necessarily "in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent" within the meaning of R.C. 3313.64(B)(2)(a).

of "temporary custody" and "agreement for temporary custody" appearing in R.C. 2151.011(B)(12) and (17). Further, it is consistent with the concept of legal custody that has been generally applied to R.C. 3313.64. See 1 R. Baker & K. Carey, *Ohio School Law* §9.01, at 433 n.11 (1994-95 Revision). In addition, this conclusion reduces the opportunity of a family to engage in "school shopping." See *State ex rel. Henry v. Board of Education*, 20 Ohio App. 3d 185, 188, 485 N.E.2d 732, 734 (Madison County 1984); 1994 Op. Att'y Gen. No. 94-070.

A notarized statement that is prepared by the court-designated custodial parent and purports to grant temporary custody of a child to a relative is not an "agreement for temporary custody," as that term is defined in R.C. 2151.011(B)(17), and does not operate to transfer legal custody for purposes of R.C. 3313.64(B)(2)(a). Rather, when a court has rendered a parenting decree allocating parental rights and responsibilities for the care of a child, see R.C. 3109.21(B), (D), that decree is binding upon parties to the proceeding and "[a]s to these parties, the parenting decree is conclusive...as to the parenting determination made, unless and until that determination is modified pursuant to law." R.C. 3109.30. Therefore, when the court has designated a custodial parent, that parent cannot transfer the legal custody of the child without modification of the court's parenting determination. In deciding whether to modify a parenting determination, "the court shall take into account that which would be in the best interest of the children." R.C. 3109.04(B)(1). See also R.C. 3109.04 (parents under a shared parenting decree may agree to modify the terms of the plan approved by the court and submit proposed modifications to the court; the modifications are effective "upon their inclusion by the court in the plan"); R.C. 3313.672(B) (the residential parent must notify the school of any court order or decree, or modification thereof, allocating parental rights and responsibilities and designating a residential parent and legal custodian).

For the reasons discussed above, I conclude that the temporary placement of a child with persons related by blood or marriage in accordance with R.C. 5103.16(A) does not affect the legal custody of the child for purposes of R.C. 3313.64(B)(2)(a). I conclude, further, that a notarized statement that is prepared by the court-designated custodial parent and purports to grant temporary custody of a child to a relative is not an "agreement for temporary custody," as that term is defined in R.C. 2151.011(B)(7), and does not operate to transfer legal custody for purposes of R.C. 3313.64(B)(2)(a). In order to implement a construction of R.C. 3313.64 that fairly reflects the provisions of R.C. 2151.011(B)(17) and R.C. 5103.16, I therefore overrule Op. No. 94-033 to the extent that it is inconsistent with this opinion.

Child Who Resides with Aunt

I turn now to the specific issues presented by your first question. You have described a situation in which the child's parents, now divorced, live outside a particular school district. The child's father has legal custody of the child pursuant to a court order. The child's aunt lives within the school district in question, and the father has prepared a notarized statement giving the child's aunt custody of the child.

Under the interpretation of R.C. 2151.011 and R.C. 3313.64(B) that is discussed above and adopted in this opinion, a notarized statement that is prepared by the custodial parent and purports to grant temporary custody of a child to a relative is not an "agreement for temporary custody," as that term is defined in R.C. 2151.011(B)(17), and does not operate to transfer legal custody of the child for purposes of R.C. 3313.64(B)(2)(a). Therefore, in the situation described in your first question, the child is not entitled pursuant to R.C. 3313.64(B)(2)(a) to be admitted

to the schools of the district in which the aunt resides. No other statutory provision requires that the child be admitted to that school district in those circumstances. See note 1, *supra*. Since the child is not by statute entitled to admission, the board of education is not permitted to admit the child without collecting tuition payments for the child. See R.C. 3317.08; R.C. 3327.06. Thus, the child can attend the schools of the district where the aunt resides only upon the payment of tuition.⁸

Child Who Resides with Mother

Your second question concerns another situation involving a divorce. In this instance, the mother lives in the school district in question, but the court has awarded legal custody of the child to the father, who lives in a different school district. The child lives with the mother, in accordance with a notarized statement provided by the father that grants the mother temporary custody. The question is whether the school district is required to provide education to the child without the payment of tuition.

As discussed above, the analysis adopted in this opinion compels the conclusion that a notarized statement prepared by the custodial parent is not sufficient to transfer the custody of the child for purposes of R.C. 3313.64. That conclusion does not resolve the question, however. It remains necessary to determine which school district the child is entitled to attend pursuant to R.C. 3313.64(B). R.C. 3313.64(B)(1) provides for admission to schools of the school district in which the "parent" resides, and R.C. 3313.64(B)(2) provides for school admission of a child "who does not reside in the district where his parent resides."

Application of R.C. 3313.64(B) to the situation you have described is dependent upon the definition of "parent" which is applicable to R.C. 3313.64. That definition states:

"Parent" means either parent, unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "parent" means the parent who is the residential parent and legal custodian of the child. When a child is in the legal custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent with residual parental rights, privileges, and responsibilities. When a child is in the permanent custody of a government agency or a person other than his natural or adoptive parent, "parent" means the parent who was divested of parental rights and responsibilities for the care of the child and the right to have the child live with him and be the legal custodian of the child and all residual parental rights, privileges, and responsibilities.

⁸ 1994 Op. Att'y Gen. No. 94-033 suggested that a child might be able to attend the schools of a particular school district pursuant to R.C. 3313.64(B)(2)(a), without the payment of tuition, if the child's custody changed without a court order, pursuant to an agreement under R.C. 5103.16. See Op. No. 94-033 at 2-154 n. 3. That suggestion was based upon the conclusion that an agreement made under R.C. 5103.16, without a court order, could change the legal custody of a child for purposes of R.C. 3313.64. This opinion rejects that conclusion and finds, instead, that without a court order, an agreement made under R.C. 5103.16 between persons related by blood or marriage cannot change the legal custody of a child for purposes of R.C. 3313.64. It follows that such an agreement cannot be used to obtain for a child the right to tuition-free education in the schools of the school district in which a relative resides.

R.C. 3313.64(A)(1) (emphasis added).

Pursuant to this definition, when the parents are divorced, the "parent who is the residential parent and legal custodian of the child" is the "parent" for purposes of determining school attendance. Pursuant to R.C. 3313.64(B)(1), the child "shall be admitted to the schools of the school district in which his parent resides." That provision contemplates that the child resides with the residential parent, who is also the legal custodian, and attends the schools of the district where the child and parent reside.

The definition of "parent," in the case of separation, divorce, dissolution or annulment, was changed from "custodial parent" to "residential parent and legal custodian" in 1989-1990 Ohio Laws, Part I, 53, 213 (Am. Sub. S.B. 3, eff. Apr. 11, 1991), as part of an act that made a variety of changes in domestic relations law and child support enforcement law. Am. Sub. S.B. 3 amended R.C. 3109.04 to provide that, in any divorce, legal separation, or annulment proceeding or in any proceeding pertaining to the allocation of parental rights, the court may allocate parental rights and responsibilities in either of two ways. The first is to "allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children." R.C. 3109.04(A)(1). The second is to "allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children." R.C. 3109.04(A)(2). R.C. 3109.04 provides that, if a parent is granted the care, custody, and control of a child under an order issued prior to April 11, 1991 (the effective date of Am. Sub. S.B. 3) and the order does not provide for shared parenting, the parent with custody is the "residential parent and legal custodian" as that term is used elsewhere in the Revised Code. R.C. 3109.04(K)(1). If there is a shared parenting order, each parent is the "residential parent and legal custodian," unless otherwise provided. R.C. 3109.04(K)(6). The court order may designate one parent as the residential parent for the purposes of determining the school the child attends. *See* R.C. 3109.04(K)(7).

You have indicated that, in the situation at issue in your second question, the father was designated by the court as legal custodian and neither parent was designated by the court as the residential parent. That situation does not involve an order of shared parenting. *See* R.C. 3109.04-.041. Instead, the father, who has been granted legal custody of the child, is the "residential parent and legal custodian" of the child. *See* R.C. 3109.04(K)(1); *see also* R.C. 2151.011(A)(9).

For purposes of R.C. 3313.64(A)(1), the father, who was named as legal custodian, is considered the "parent" of the child. R.C. 3313.64(B)(1) provides that a child "shall be admitted to the schools of the school district in which his parent resides." In accordance with the definition set forth in R.C. 3313.64(A)(1), the father is the parent for purposes of this provision, and the child is entitled to be admitted to the schools of the district in which the father resides. *See* Op. No. 94-070. Because the mother is not the "parent" under the definition contained in R.C. 3313.64(A)(1), the child cannot, pursuant to R.C. 3313.64(B)(1), be admitted to the schools of the district in which the mother resides.

R.C. 3313.64(B)(2)(a) provides that a child who does not reside in the district where his parent resides shall be admitted to the schools of the district where the child resides if the child

is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent. A child who is in the legal custody of his father but actually lives with his mother in another school district is not "in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent" and is not entitled, under R.C. 3313.64(B)(2)(a), to attend the schools of the district where the mother and child live.

In the situation described in your second question, the child is not entitled, pursuant to R.C. 3313.64(B)(1) or R.C. 3313.64(B)(2)(a), to be admitted to the schools of the district in which the mother resides, and no other statutory provision requires that the child be admitted to the schools of that district. See R.C. 3313.64(B)(2)(b), (c); note 1, *supra*. Therefore, the board of education of the school district in which the mother resides is permitted to admit the child to its schools only upon the payment of tuition. See R.C. 3317.08; R.C. 3327.06. The father's execution of a notarized statement purporting to grant temporary custody to the mother does not change the legal custody of the child for purposes of R.C. 2511.011 or R.C. 3313.64.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised:

1. For purposes of R.C. 3313.64, "legal or permanent custody" may be established by a court order, or by evidence of the transfer of temporary custody without a court order in accordance with R.C. 5103.15. The temporary placement of a child with persons related by blood or marriage in accordance with R.C. 5103.16(A) does not affect the legal custody of the child for purposes of R.C. 3313.64(B)(2)(b). A notarized statement that is prepared by the court-designated custodial parent and purports to grant temporary custody of a child to a relative is not an "agreement for temporary custody," as that term is defined in R.C. 2151.011(B)(17), and does not operate to transfer legal custody for purposes of R.C. 3313.64(B)(2)(a). (1994 Op. Att'y Gen. No. 94-033 (syllabus, paragraph 2), overruled in part.)
2. When a minor child of divorced parents is in the legal custody of the father pursuant to court order and resides with an aunt in a school district in which neither parent resides, the child is not entitled pursuant to R.C. 3313.64(B)(2)(a) to be admitted to the schools of the school district in which the child and aunt reside, even if the father prepares a notarized statement that purports to give the aunt temporary custody of the child. If no other statutory provision entitles the child to be admitted to the schools of that school district, the board of education is permitted to admit the child to its schools only upon the payment of tuition for the child.
3. When the minor child of divorced parents is in the legal custody of the father pursuant to court order, the mother is not named by the court as legal custodian or residential parent, there is no shared parenting order, and pursuant to agreement with the father the child resides with the mother in a school district that is different from the school district in which the father resides, the child is not entitled pursuant to R.C. 3313.64(B)(1) or R.C. 3313.64(B)(2)(a) to be admitted to the schools of the school district in which the child and mother reside, even if the father prepares a notarized statement that purports to give the mother temporary custody of the child. If no other statutory provision entitles the child to

be admitted to the schools of that school district, the board of education is permitted to admit the child to its schools only upon the payment of tuition for the child.