

RAINEY COLLINS LAWYERS

18 April 2023

National Council of Home Educators Of New Zealand

Attention: Cynthia Hancox

**By email:
cynthiahancox@actrix.co.nz**

Dear Cynthia,

OPINION – ENROLMENT OF CHILD IN EDUCATION WHEN THERE IS A DISPUTE BETWEEN PARENTS AS TO WHERE AND HOW A CHILD WILL BE EDUCATED

1. We thank you for your valued instructions.
2. We refer to your email correspondence of 1 March 2023 and note that you were seeking an opinion regarding the following points:
 - Where parents are not yet in agreement as to “how and where” a child will be educated, is the parent with the child in their care legally obligated to provide them with a suitable education in the meantime?
 - Can the parent therefore enrol their child in a suitable school and/or apply for an exemption to home school them?
 - Should the school/Ministry allow the parent to enrol the child in a public school or process an exemption application (given these options are of equal legal standing) whether or not they know there is disagreement between the guardians?
3. The abovementioned points that we will provide an opinion for below takes into account firstly that:
 - a. No Parenting Orders would be in place at the time that would direct where a child is to be educated; and

- b. That the home school option holds equal legal standing and there is no bias against that option in comparison to a public school enrolment option.
4. With regards to this opinion we do not go into significant detail around the concept in relation to guardianship. In terms of educational decisions, parents or guardians of the child have equal rights to make a decision as to the educational options for the child, and the overall principle is that agreement between guardians is highly encouraged in order to meet the child's best interests and welfare.
5. You have also questioned whether the parent who has the primary day to day care of the child is the parent in the meantime to act or not to act with regards to the child's education. On the surface level, it does not matter whether the parent who has the day to day care of the child (as opposed to a parent with lesser contact with the child) has a greater decision making role. It is more a factor that the parent who has the primary care of the child is more likely to than not be the person who would enrol the child in a form of education. However, if that parent is not taking steps to do so, the other parent should not be discouraged from taking that step in the best interests of the child.
6. There is also no mandatory law that schools must obtain the written consent of both parents in order to enrol a child in a school. In saying that, many schools would allow enrolments to occur with only one parent or guardian's signature. Some schools take the opposite approach and require both. Notwithstanding this, this opinion focuses on the legal positions with regards to your questions above.

Where parents are not yet in agreement as to "how and where" the child will be educated, is the parent with the child in their care legally obligated to provide them with a suitable education in the meantime?

7. In order to answer this question properly it is important to understand the context of guardianship as it relates to the father as a guardian of the child. In the instances where both parents are guardians, decisions about schooling need to be made jointly. A father will still be considered a guardian even if he does not provide day to day care for the child, if:
 - a. he is identified on the child's birth certificate as the father;

- b. he was married to, or in a civil union with the mother of the child at any time during the pregnancy; or
 - c. living with the mother in a de facto relationship at any time during the pregnancy.
- 8. This means that although one parent may have the child legally in their care, and on this particular example that guardian being the mother, it is likely that both parents will still be considered the legal guardians of the child.
- 9. The Court has jurisdiction to determine guardianship issues such as where and how the child is to be educated.
- 10. As you have noted correctly, where there is disagreement concerning the exercise of these guardianship positions the parties must attempt to resolve the differences through family dispute resolution (FDR) unless an exception applies under section 46(E) of the Care of Children Act 2004. If the dispute is not resolved through FDR then the Family Court will become involved under a section 46(R) application under the Care of Children Act from one of the parents or guardians.
- 11. You will also note that section 35 of the Education and Training Act 2020 (ETA) states that every domestic student must, between the ages of 6 and 16 be enrolled at a registered school. Neither the Care of Children Act nor the Education and Training Act have sections that provide guidance or a determination on how and where a child must be enrolled if there is not agreement between the guardians.
- 12. There is no clear legislative guidelines that prescribe what must be done by guardians in these particular situations whereby the parents are not in agreement as to where and how the child is to be educated. What is clear is that it is a requirement that every domestic student must be enrolled at a registered school between the ages of 6 and 16.
- 13. Case law reinforces the position that all children must be enrolled in school otherwise the guardians will be liable for a fine. This comes from the case of *Ministry of Education v JT (DC HAM CRI-2010-019-004187)*. In this particular case, the parent has 6 children to 6 different fathers and had been living a relatively transient lifestyle. The oldest child was already over 16 at the time that this case was heard. The woman

was convicted and fined \$200 plus costs to the Ministry. With the younger children they had not attended school for a large period of time, but latterly before the matter was heard, were enrolled in a correspondence school. The children underperformed significantly due to their history of non-enrolment and the mother was fined \$500 for each of the remaining children plus the legal costs for the Ministry of Education.

14. We take the outcome of this case to mean that there is a strict requirement by law for a child over the age of 6 until the age of 16 to be enrolled at a registered school and that the guardians are required by law to enrol that child in a form of acceptable education or face a fine.
15. Following this, it appears that the options in this instance for the parent are to either enrol the child in a registered school in accordance with section 35 of the ETA or home school the child pending the outcome of a section 38 ETA application. If the child has been home schooled sufficiently during this period then it could be possible that the Court would consider a mitigating factor in a dispute (i.e. potentially take the position that it is better for the child's best interests, welfare and development to home school the child whilst the application under s38 is pending than for the child to not receive an education at all). The Court may also take the view that briefly enrolling a child in a public school unilaterally and then withdrawing that child at a later time once a decision had been made either by the parents or the Court to home school the child or attend another school, is more disruptive for the child. Put simply, the transition from home-schooling to school would be less disruptive than the other way around, as the child may have already begun to develop relationships with other children in their class and their teacher.
16. We do note that we put forward this opinion tentatively. There is no clear cases that have explored significantly on this subject. With these types of cases, it is usually the more remarkable examples such as the one given above (where the mother had 6 children to 6 different fathers and had enrolled none of the children in schooling until very late) that get reported. Most parents who do not enrol the children in any school or apply to have the children home schooled prior to the age of 6 will end up facing a fine from the Ministry of Education until they can enrol the child in some form of acceptable education.

17. The welfare of the child is the key consideration for the Family Court when deciding guardianship related matters. We cannot guarantee that the Court will be sympathetic to an argument that the least disruptive and most beneficial course for the child when the parents can't agree on how and where to school the child would be for the child to be home schooled until either the Family Court has made an Order or the Ministry of Education has made a decision under section 38 of the ETA.
18. We are of the view there may be an option for a financial redress against the opposing parent for any fines incurred in relation to section 35 breach of the opposing parent not agreeing to enrol the child in a registered school or allow the child to be at the very least home schooled if the home schooling is in this particular case not the preferred option.

Can the parents therefore enrol their child in a suitable school and/or apply for an exemption to home schooling?

19. As per the above given that there is a strict legal obligation at law for a child over the age of 6 to be either home schooled or enrolled at a registered school, we would consider that the guardian therefore must enrol the child at a registered school until negotiations with the other guardian are resolved, **or** home school for the child without the exemption with the understanding that they may incur a fine (noting that this fine may be recoverable from the opposing parent if the opposing parent decided to raise the matter in a Disputes Tribunal/legal litigation).
20. Further, if the opposing parent will not agree to the child either being home schooled or enrolled in a public school, it still may be the case that a school will accept an application by one parent only.
21. The only other option for the non-opposing parent is to home school the child until either a direction has been made by the Court or certificate granted under section 38(1) of the ETA.

Should the school/Ministry of Education allow parents to enrol the child in a school or process the exemption application (given these options are of equal legal standing) whether or not they know there is disagreement between the guardians?

22. Whether a child can be home schooled is a discretionary exercise by a designated officer under section 38 of the ETA. We could not locate any case law on this section, however we note section 38(1) of the Act states *“An employee of the Ministry designated by the Secretary for the purpose (designated officer) may, on application by a parent of the student, grant the parent a certificate that exempts the student from the requirement of section 35 if the designated officer is satisfied that the student – (a) is to be taught at least as regularly and well as in a registered school; or (b) is to be taught at least as regularly or is to be taught as regularly and well as in a specialist school or specialist service (the student would otherwise be likely to need special education).”*
23. The designated officer therefore under this section has the discretion to grant a parent of the student an exemption certificate. Equally, the designated officer has the discretion to decline an application. As such, we take the view that it would be a breach of s35 for the designated officer make a decision to reject the application solely on that basis that the parents do not agree on the type of schooling.
24. We note that it is assumed that the parent applying for a section 38 ETA exemption has day to day care of the child. If it is a week about arrangement and the child has no access to the teaching parent on their alternating weeks or during full day periods during weekdays, then this would likely fall inside the scope of section 38(1) as it could impact whether the child is to taught as regularity either at home or in a registered school.
25. If the other parent or guardian has the child only on weekends and public holidays for example, then an officer could grant an exemption as weekdays are not affected.
26. If in this instance the designated officer has already refused to grant the certificate under section 38(1) of the ETA, then a parent can appeal to the Secretary under section 38(2). The Secretary must consider the report on the matter from the Chief Review Officer and confirm the review or overturn and grant a certificate.
27. Taking all this on board, we hold the opinion that it would be outside of the scope of the Ministry’s powers under section 38 of the ETA to refuse to grant a parent a certificate

which exempts the student from the requirement of section 35 for reasons that fall outside section 38(1). Following this, we take the view that the Ministry on the balance of probabilities should err towards processing the exemption application regardless of whether there is disagreement between parents.

28. Regarding the second component of your question, whether school should allow the parent to enrol a child without the consent of the opposing parent, this would be at the discretion of the school in question. The school must weigh up a possible complaint from the other parent against putting the parents in a position where they cannot comply with the law.
29. If there are any questions arising out of this opinion, please do not hesitate to contact us. It is our view that:
 - a. Parents and guardians risk being fined if they do not enrol their child in a registered school or have their child approved for a home school environment from the age of 6 years old;
 - b. Where and how a child is to be educated is a guardianship issue in which the Family Court can have the sole discretion of making that decision when the guardians cannot;
 - c. Section 38 of the ETA allows the Ministry to exercise its discretion to accept an application for an exemption for home schooling from a parent of the child regardless of whether the Ministry knows that there is a dispute;
 - d. In many cases it is likely going to be the Court's position that unless the interim schooling arrangement (whether that be by public school or home schooling) is not in the child's best interest, then a form of schooling is better for a child than no schooling at all.
 - e. If the only factor in the Ministry refusing an application for an exemption to s35 was down to there being a dispute between the guardians as to where or how the child is schooled, then the Ministry would be in a position of potentially indirectly contributing to a situation whereby the parent may continue to breach s35 unless there is a Court Order or direction that the child is not to be based in any form of education until an Order is made. This is an unlikely

scenario as we believe the Court would err towards a form of education rather than none at all.

Yours faithfully

RAINEY COLLINS

A handwritten signature in black ink, appearing to read 'Shaun Cousins', with a large, stylized initial 'S'.

Shaun Cousins

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