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PKM-I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-195969 **DATE:** May 15, 1980
MATTER OF: Ernest F. Gianotti--Education Allowance--
Transportation Expenses--Divided
DIGEST: Custody of Minor Children

- (1) New appointee was hired for position in Trust Territory of the Pacific Islands. Custody of his children was divided equally between employee and his former wife. He may receive education allowance authorized by Standardized Regulations (Government Civilians, Foreign Areas) for children meeting defined criteria presented in the Standardized Regulations for periods beginning when each child became a member of his household at the over-seas post.
- (2) Employee's transportation expenses for minor children whose custody has been divided between the employee and his former spouse are reimbursable pursuant to 5 U.S.C. § 5722 when his children met definition of "immediate family" as set forth in paragraph 2-1.4d of Federal Travel Regulations, and became "members of employee's household" consistent with decisions of this Office. Length of time which children actually live with parent-employee and discernible intent which characterizes these periods are integral evidentiary facts which must be considered in determining entitlement to travel expenses.
- (3) Employee's entitlement to education allowances under 5 U.S.C. § 5924(4) and transportation expenses under 5 U.S.C. § 5722 for his minor children whose custody has been divided between the employee and his former spouse is

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predicated on affirmative finding--satisfactorily established here--that children are "residing" at the parent-employee's overseas post and not merely engaged in "visitation travel" to the parent-employee's post while actually residing elsewhere.

- (4) The entitlement to an education allowance pursuant to 5 U.S.C. § 5924(4) and transportation expenses pursuant to 5 U.S.C. § 5722 provided for the children of a Federal employee, as a parent with only a divided right to custody of those children, must be determined by employing agency based upon the facts of the particular case. Doubtful cases should be referred to this Office.

The issues presented relate to the allowability of travel and transportation expenses and education allowances for the children of an employee stationed outside the continental United States in the light of a divorce decree providing that custody of the children shall be divided equally between the employee and his former wife.

For the reasons stated at length below, we have concluded, based upon the facts of this case, that the employee as a new appointee may be allowed travel and transportation expenses for his children under 5 U.S.C. § 5722 and education allowances for his children under 5 U.S.C. § 5924. The period of entitlement for each child begins with the time when the facts and the intent of the parties show that the child became a member of the employee's household at the overseas duty station. The employee may not be allowed the expenses or allowances for "visitation travel" when the child actually resides elsewhere.

BACKGROUND

This decision is issued in response to a letter from Mr. Dennis J. Hubscher, an authorized certifying

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limit abstract to this. Very nicely summarized

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officer for the Department of the Interior, requesting an advance decision on the propriety of payment of transportation expenses and an education allowance for the children of Mr. Ernest F. Gianotti, Associate Justice, High Court, Trust Territory of the Pacific Islands (TTPI). ID 7

Mr. Gianotti was appointed to the position of Associate Justice effective December 15, 1977, and was authorized travel and relocation expenses to his first duty station in the TTPI. At the time of his appointment, Mr. Gianotti had equal custody of two minor daughters under a divorce decree dated May 30, 1974. At the time this claim was filed the divorce decree provided in pertinent part that Mr. Gianotti was granted the physical care, custody and control of the children from the 1st day of December 1974, until the 1st day of June 1975, and like periods each year thereafter, at the family home in Great Falls, Montana. His former wife was granted physical custody of the children at the family home for the other 6 months of each year. The decree prohibited either of the parties from removing either of the children from Cascade County, Montana, without the prior written consent of the other party, or an order of a court having jurisdiction to make such an order.

The record shows that in August 1978 Mr. Gianotti was authorized an educational allowance for his older daughter, Christine, who attended Hawaii Preparatory Academy during the 1978-1979 school year. In June of 1979, Christine traveled from Hawaii to Truk, TTPI, to spend the summer with her father. In that same month Mr. Gianotti's younger daughter, Lisa, traveled to TTPI from Montana, where she had resided with her mother throughout the 1978-1979 school year. At that time, in view of the terms of the custody decree, a question was raised concerning Mr. Gianotti's entitlement to an education allowance for Christine for the 1978-1979 school year as well as to travel expenses for Lisa.

EDUCATION ALLOWANCE

Pursuant to the statutory authority contained in section 5924(4) of title 5, United States Code, an

education allowance may be granted to an employee in a foreign area. In accordance with the implementing regulations contained in section 270 of the Standardized Regulations (Government Civilians, Foreign Areas) the purpose of the education allowance is to assist in defraying those costs necessary to obtain educational services which are ordinarily provided without charge by the public schools in the United States; plus, in those cases where adequate schools are not available at the employee's post, the costs of room and board and periodic transportation between such posts and the nearest locality where an adequate school is available.

Our primary concern in the present case is with Mr. Gianotti's eligibility for the education allowance for his children in circumstances where, incident to a divorce decree, he has had only a divided right to their custody.

An education allowance may be provided for children meeting the following definition established in subsection 271.h of the Standardized Regulations:

"'Child' means a dependent who is one of the children defined in section 040m(2) and (4) and who is eligible for education at the elementary or secondary school level (grades K-12) except that such child must have attained the age of four years and must not have reached his/her 21st birthday."

The referenced definition of eligible "children" in section 040m reads as follows:

"m. 'Family' means one or more of the following relatives of an employee residing at his post,
* * *:

* * * * *

"(2) Children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support. The term shall

include, in addition to natural offspring, step and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian. (See subchapters 270 and 280 on education allowances and educational travel.)"

In our decision in 52 Comp. Gen. 878 (1973), we discussed the effect of a divorce decree, under which joint custody is awarded to both parents, on the employee's entitlement to a separate maintenance allowance. The question was raised as to whether, inasmuch as both divorced parents remain in the same legal relationship to the children with respect to custody as before the divorce, entitlement to allowances and other benefits under Government regulations of an employee-parent with joint legal custody would also remain the same. We concluded in part that the definition of "children" presented in section 040m(2) of the Standardized Regulations is sufficiently broad to include children whose custody, incident to a divorce decree, has been placed jointly in the employee and his former spouse.

In the present case, however, we address the clearly distinguishable circumstances where the court entered an order which divided or alternated the custody of the Gianotti children between their parents. That is, the custody of the children was not jointly in both parents, but rather the children were given first to one and then to the other parent for specified periods under conditions also prescribed by the court.

In view of the various factors which may affect the desirability of an order for divided custody, it is evident that the trial court has discretion as to whether it will divide custody, and that decision must depend upon the facts of the particular case. See 92 A.L.R. 2d 695, 699 (1963). Just as surely, the entitlement to certain

expenses and allowances provided for the children of a Federal employee, as a parent with only a divided right to custody of those children, must be determined based upon the facts of the particular case. Thus, for example, in our decision in B-129962, November 17, 1976, a Foreign Service Officer contended that the Government's failure to pay for visitation travel of a divorced officer's dependents when he lacks legal custody but nevertheless supports them was unfair. We held that 5 U.S.C. § 5924, as implemented by the State Department Standardized Regulations, authorized travel and educational allowances for family members residing at the officer's post, but made no provision for "visitation travel" to the employee's post by his dependent children residing elsewhere.

It is also important to note, recalling the express purpose of the education allowance, that even where an employee's eligibility can be satisfactorily established, the selection of a school is not an unfettered prerogative of the employee. As a result, section 272.2 of the Standardized Regulations introduces the rates which apply for the education allowance, stating in part as follows:

"Rates of education allowance are provided for 'school at post' 'school away from post' and 'home study'. Where a local school is adequate, the 'school at post' and the 'school away from post' rates are identical. In this circumstance, the rate for 'school away from post' does not reflect the costs of attending a boarding school but simply indicates the allowance available for an employee who desires to send his/her child away to school despite the availability of an adequate local school. Where a local school is inadequate, an allowance rate is established to assist with the costs of attending the nearest and, transportation considered, least expensive adequate boarding school. * * *"

In accordance with section 271e., of the Standardized Regulations a "school away from post"

means an elementary or secondary school so far beyond daily commuting distance of the employee's post as to necessitate board and room in connection with attendance. Allowable expenses in connection with a qualifying child's attendance at a school away from post are set forth in the following provisions of subsection 277.2 (July 1, 1979) of the Standardized Regulations:

"277.2 School away from Post (Sec. 271e)

- " a. Items listed in section 277.1a. through d.;
- " b. Room and board; limited to \$250 per month for up to 10 months when child does not reside in school dormitory but instead uses private boarding facilities;
- " c. Periodic transportation of the child between the post and the school, not to exceed trips indicated by school's vacation closing calendar or necessary weekend trips if boarding is on a 5-day basis."

Subsection 271a., of the Standardized Regulations defines an "Education allowance" as an allowance to assist an employee in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his service in a foreign area in providing adequate elementary and secondary education for his children. Accordingly, upon determining an employee's eligibility for an education allowance, it remains the responsibility of the authorizing officials to determine the type and extent of the qualifying employee's entitlement under the governing regulations.

TRAVEL AND TRANSPORTATION EXPENSES

Mr. Gianotti's claim for reimbursement for the transportation expenses of his two minor children in traveling to Truk, TTPI, is subject to a significantly different analysis. Under section 5722 of

title 5, United States Code, Mr. Gianotti may be reimbursed for the transportation expenses of his immediate family from the place of actual residence at the time of his appointment to the place of employment outside the continental United States; and these expenses on his return from his post of duty outside the continental United States to the place of his actual residence at the time of his appointment.

Implementing regulations contained in the Federal Travel Regulations (FPMR 101-7) (May 1973) (FTR) require in paragraph 2-1.5a(2) that the maximum time for beginning allowable travel and transportation--except in circumstances not pertinent here--shall not exceed 2 years from the effective date of the employee's appointment; or, in the case of Mr. Gianotti's immediate family, December 15, 1979.

In addition, paragraph 2-1.4d of the FTR (FPMR Temp. Reg. A-11, Supp. 4 April 29, 1977) defines "immediate family" as follows:

"d. Immediate family.

"(1) Any of the following named members of the employee's household at the time he reports for duty at his new permanent duty station or performs authorized or approved overseas tour renewal agreement travel or separation travel:

"(a) Spouse;

"(b) Children of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support (The term 'children' shall include natural offspring; stepchildren; adopted children; and grandchildren, legal minor wards, or other dependent children who are under legal guardianship of the employee or employee's spouse.);

"(c) Dependent parents (including step-and legally adoptive parents) of the

employee or employee's spouse (See (2), below, for dependent status criteria.); and--

"(d) Dependent brothers and sisters (including step-and legally adoptive brothers and sisters) of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support. (See (2), below, for dependent status criteria.)

"(2) Generally, the individuals named in 2-1.4d(1)(c) and (d) shall be considered dependents of the employee if they receive at least 51 percent of their support from the employee or employee's spouse; however, this percentage of support criteria shall not be the decisive factor in all cases. These individuals may also be considered dependents for the purposes of this chapter if they are members of the employee's household and, in addition to their own income, receive support (less than 51 percent) from the employee or employee's spouse without which they would be unable to maintain a reasonable standard of living"

The operative effect of the "immediate family" requirement on the transportation expense entitlement under the Federal Travel Regulations was the subject of our decision in B-187241, July 5, 1977. There, we directly addressed the issue of transportation expenses of minor children. Following a presentation of our decision in 52 Comp. Gen. 878, supra, we reasoned further as follows:

"We recognize that in modern divorce proceedings, as here, the employee-father, should, wherever possible, share in the legal custody and upbringing of a child or children of the marriage. Further, it is noted that the welfare of the minor children being of utmost importance, and particularly where the children are attending school, it is not always feasible for them to spend an

equal amount of time in the households of both the mother and the father. However, in order for an individual to be covered by the definition of 'immediate family' as it appears in the regulations and consequently entitled to the transportation allowance being claimed, it is necessary for that person to be one of the named individuals and a member of the household of the employee.

"With respect to the term 'household,' such term is not defined in the regulations. We have stated that the term is one of uncertain meaning and that persons may be members of the same household even though they are not living under the same roof."
[Citations omitted]

* * * * *

"However, the facts in this case show that the children actually reside with their mother approximately 11 months of each year and although the employee has joint custody of said children, rather than a permissive right to visit the minors, plans for them to visit at his residence in Juneau for one month during the summer, and is financially responsible for the support of his children, the period of time during which they actually live with the claimant is not of sufficient duration to warrant a determination that the children are in fact 'members of the employee's household.'" [Citations omitted]

As a result, recalling our decision in B-129962, November 17, 1976, supra, we believe that the length of time which Mr. Gianotti's children actually lived with their father at the overseas station, and the intent which characterized these periods spent with their father, are integral evidentiary facts which must be considered in the determination of the individual entitlements to travel and transportation expenses. Here again, it is the facts of this particular case which must support Mr. Gianotti's claim

for travel and transportation expenses for his daughters under 5 U.S.C. § 5722, and the implementing regulations.

ADMINISTRATIVE DEVELOPMENT

In connection with our further development of Mr. Gianotti's claim, we have been advised that he now has custody of both daughters. Specifically, appropriate decrees were entered giving Mr. Gianotti full custody of his daughter Christine effective August 27, 1979, and full custody of his daughter Lisa effective November 30, 1979. In addition, the following listing has been provided which indicates the daughters' whereabouts from December 1977 to the present:

| | |
|--|--|
| December 15, 1977, to May 31, 1978 | Both daughters in Montana |
| June 1, 1978, to September 1, 1978 | Both daughters in Truk |
| September 2, 1978, to June 1979 | Lisa in Montana Christine at H.P.A. |
| June 1979 to September 1979 | Both daughters in Saipan |
| September 1979 to Present | Christine at H.P.A. |
| September 1979 to December 9, 1979 | Lisa in Montana |
| December 10, 1979, to January 10, 1980 | Lisa in Saipan |
| January 10, 1980, to Present | Lisa at H.P.A. |

Based upon these findings, and in conjunction with the legal analyses noted earlier, the following allowances and expenses may be certified for payment in regard to each of Mr. Gianotti's daughters.

CONCLUSION: CHRISTINE

Christine's residence in Montana during the period from December 15, 1977,--the effective date

of Mr. Gianotti's appointment as Associate Justice, High Court, TTPI--through May 31, 1978, creates no entitlement in Mr. Gianotti for an education allowance and in fact no such allowance is claimed.

Christine's travel on or about June 1, 1978, from the Gianotti family home in Montana--the place of actual residence at the time of Mr. Gianotti's appointment as Associate Justice--to Truk, TTPI--Mr. Gianotti's overseas duty station--may be reimbursed pursuant to section 5722 of title 5, United States Code.

Although Christine actually resided with her father in Truk for only 3 months over the summer--leaving for school at Hawaii Preparatory Academy on or about September 1, 1978,--the facts support a finding that it was the intent of the parties that she remain with her father for an extended period to include her attending school. As we noted earlier, we believe that persons may be members of the same household even though they are not living under the same roof. The situation here, where Christine would have been residing with her father but for her attendance at a school away from post, is a good example of our extended construction of the concept of "member of the household of the employee." Thus, in the circumstances presented the record supports the determination that when she traveled to Truk in June of 1978 Christine became a "member of Mr. Gianotti's household" within the meaning of paragraph 2-1.4d of the FTR and our decision B-187241, July 5, 1977, supra. This conclusion is further supported by the fact that from and after June 1, 1978, Christine was either residing with her father at his overseas duty station or attending school away from that post. Accordingly, Christine's travel to Truk in June of 1978 is reimbursable pursuant to 5 U.S.C. § 5722 (1976).

In view of the findings noted above, Christine's matriculation at Hawaii Preparatory Academy from September 1978 to June 1979 entitles Mr. Gianotti to an education allowance under the provisions of

5 U.S.C. § 5924(4) (1976) and implementing regulations contained in section 270 of the Standardized Regulations. Under the facts of this case we conclude that the definition of "children" presented in section 040m(2) of the Standardized Regulations is sufficiently broad to include a child such as Christine whose custody, incident to a divorce decree, has been divided equally between the employee and his former spouse.

We note however, that at this point the applicable divorce decree allowed flexibility for either spouse to remove the children from Montana, provided prior written consent of the other party, or a court order were obtained. On this point the record contains a photostated copy of an undated, handwritten note, signed by one "A. McCracken," which extends permission for Christine Gianotti "to attend H.P.A. her senior year." While we do not question the authenticity of this document, we do not find that it is sufficient to comply with the nondiscretionary consent requirement ordered by the court. In the circumstances presented by Mr. Gianotti's claim we feel that an affidavit of the former spouse is required to sufficiently establish compliance with the court order's requirements. See 52 Comp. Gen. 878, 881, supra.

Presuming that this affidavit will be provided, it would clearly support the contention that Christine was primarily residing with Mr. Gianotti as his dependent child within the meaning of section 271h., and section 040m(2) of the Standardized Regulations. As a result, Mr. Gianotti would be entitled to receive an education allowance pursuant to section 270 of the Standardized Regulations, incorporating definitions and entitlements contained in sections 271a., b., c., and e.; 271.1; and 277.2 of those regulations.

One caveat should be noted in regard to Mr. Gianotti's education allowance for Christine which is based on the "school away from post" standards defined in subsection 271e., of section 270 of the Standardized Regulations. As we noted

earlier, in those cases where adequate schools are not available at the employee's post, the "school away from post" provisions of section 277.2 of the Standardized Regulations provide, in subsection 277.2(c), for periodic transportation of the child between the post and the school. As a result, the "educational travel" provisions of section 280 of the Standardized Regulations--which are granted in lieu of an education allowance--are not applicable to Christine's case. And, in fact, section 276.2 would appear to clearly preclude the payment of both educational travel and an education allowance where the child attends school in the United States (which under section 040a of the regulations includes Hawaii) by providing as follows:

"An education allowance shall not be paid for a child in the United States * * * (3) for the 12-month period immediately following his/her arrival in the U.S. under educational travel authority (Sec. 280) nor for any period thereafter during which he/she continues to be educated in the United States."

Christine's travel from school in Hawaii to her father's location post in Saipan in June of 1979, as well as her return to Hawaii Preparatory Academy in September 1979, are provided for and included in the "school away from post" education allowance to which Mr. Gianotti is entitled under section 277.2 of the Standardized Regulations. Similarly, Christine's matriculation at Hawaii Preparatory Academy from September 1979, to the present time is also covered by the education allowance entitlement under section 277.2, of the Standardized Regulations.

CONCLUSION: LISA

As in Christine's case, Lisa's residence in Montana during the period from December 15, 1977, through May 31, 1978, creates no allowance entitlement for Mr. Gianotti and, as we have noted, no such allowance is claimed.

Lisa's travel from the family home in Montana to Truk, TTPI, in June of 1978, was not reimbursable under 5 U.S.C. § 5722 (1976). In view of her return to Montana in September 1978, after a 3 month summer visit, the record does not support any intention on the part of the parents that Lisa would reside with her father as a member of his household within the meaning of paragraph 2-1.4d of the FTR and our decision B-187241, July 5, 1977, supra. We believe Lisa's travel in June of 1978, was primarily for the purpose of a summer visit, and this is evidenced by the fact that Lisa returned to the family home in Montana where she resided with her mother and attended public schools for the ensuing 9-month period.

In conjunction with these findings we must conclude that although 5 U.S.C. § 5924, as implemented by the Standardized Regulations, authorized educational allowances for qualifying dependents residing at an employee's post, there is no provision for educational allowances for an employee's dependents who reside elsewhere. See B-129962, November 17, 1976, supra. This conclusion is made especially clear by the following "special rule" in regard to education allowances for a child in the United States contained in section 276.2 of the Standardized Regulations:

"An education allowance shall not be paid for a child in the United States (1) who is residing with his/her mother, father, or legal guardian. * * *"

Therefore, since Lisa resided with her mother at the family home in Montana and attended public schools from September 1978 through June 1979, Mr. Gianotti is not entitled to an education allowance for Lisa during this period.

Lisa's travel to Saipan in June 1979 is subject to the same analysis as applied to her travel to Truk in June 1978. Here again, Lisa's return to the family home in Montana in September 1979 serves to characterize her trip to Saipan as a summer visit with her father. Thus the record

does not support any intention on the part of the parents that Lisa would reside with her father as a member of his household within the meaning of paragraph 2-1.4d of the FTR and our decision B-187241, July 5, 1977, supra. Therefore, Lisa's travel from the family home in Montana in June 1979 was not reimbursable under the travel and transportation expense entitlement provided by 5 U.S.C. § 5722 (1976).

In connection with the court's decree giving Mr. Gianotti full custody of Lisa effective November 30, 1979, the expanded record shows that Lisa traveled to Saipan to join her father on December 10, 1979. Thus, in the circumstances presented, Lisa's travel from the family home in Montana--the place of actual residence at the time of Mr. Gianotti's appointment as Associate Justice effective December 15, 1977,--to Saipan (TTPI),--Mr. Gianotti's overseas duty station--may be reimbursed pursuant to section 5722 of title 5, United States Code. At this point, the facts clearly support the intention of all of the parties involved that Lisa was joining her father for the purpose of residing at his overseas duty station as a dependent member of his household within the meaning of paragraph 2-1.4d of the FTR and our decision B-187241, July 5, 1977, supra. Also, Lisa's travel on December 10, 1979, when viewed with Mr. Gianotti's effective date of appointment of December 15, 1977, satisfies the regulatory requirement--contained in paragraph 2-1.5a(2) of the FTR--that the maximum time for beginning allowable travel and transportation shall not exceed 2 years from the effective date of the employee's appointment.

The expanded record further shows that Lisa traveled from her home in Saipan on January 10, 1980, to attend Hawaii Preparatory Academy. At this point Mr. Gianotti's entitlement to an education allowance for his daughter Lisa is subject to essentially the same legal analysis as that presented above in the case of daughter Christine. In short, the fact that Lisa remained in Saipan for only a month before traveling to a "school

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away from post" does not affect her status as a member of Mr. Gianotti's household, nor does that fact affect Mr. Gianotti's entitlement to both travel and transportation expenses for Lisa under 5 U.S.C. § 5722, and an education allowance for Lisa under 5 U.S.C. § 5924. The fact remains, that in the circumstances presented, Lisa's arrival in Saipan in December 1979 was for the purpose of residing with--as opposed to visiting--her father as a member of his household. Therefore, Mr. Gianotti is entitled to an education allowance for his daughter Lisa commencing in January 1980, and subject to the legal analysis provided above in the case of daughter Christine.



Acting Comptroller General
of the United States