

Opinion No. 59-59

June 10, 1959

BY: FRANK B. ZINN, Attorney General

TO: Miss Hazel M. Young Supervisor Child Welfare Services Department of Public Welfare P. O. Box 1391 Santa Fe, New Mexico

A dependent and neglected child may not be placed for adoption without notice to the parents.

A district judge may not under any circumstances sign consents in adoption cases.

An adoption may not be completed before a child reaches the age of one year.

The necessity of obtaining the consent for adoption from parents is not necessarily waived because of the mental illness of the parent.

A dependent and neglected child of a mentally ill person may be adopted without the consent of such person but statutory notice requirements must be complied with.

OPINION

{*91} This letter is in reply to your letter requesting our interpretation of the adoption laws of this State. Rephrasing your questions, they are as follows:

1. Is it possible to declare a child dependent and neglected and then place the child for adoption without notice to the parents?
2. Can a district judge sign adoption consents after declaring the child dependent and neglected?
3. Is it possible to complete an adoption before the child is one year of age?
4. When one parent has been adjudged to be mentally ill by a court of competent jurisdiction, does such action obviate the necessity of a consent for adoption from that parent?
5. Can the child of a mentally ill person be declared dependent and neglected and then placed for adoption without any consents?

In answer to your questions in the order appearing in your letter, it is my opinion that:

1. It is impossible to declare a child to be dependent and neglected and then place the child for adoption without notice to the parents.

2. A district judge has no authority to sign adoption consents after declaring a child dependent and neglected.
3. An adoption cannot be completed before a child attains the age of one year.
4. The fact that one parent has been adjudged to be mentally ill by a court of competent jurisdiction does not necessarily obviate the necessity of obtaining a consent for adoption from that parent.
5. A dependent and neglected child of a person who has been declared to be mentally ill by a court of competent jurisdiction may be adopted without the consent of such person, but the notice requirements imposed by certain statutes must be complied with.

The Supreme Court of New Mexico has handed down no less than eight opinions bearing upon the subject of adoption. None of these opinions are in point or apply here except possibly the case of **Guzman, et al. v. Avila, et al.**, 58 N.M. 43, in which paragraph 3 of the syllabus states:

"Adoption of a child under twelve years without consent of child's parents will be permitted {*92} only in cases falling clearly within statutory exceptions."

and in the case of **Heinrich, et al. v. Howe**, 50 N.M. 90, paragraph 1 of the syllabus states:

"The power to adopt children is a creation of statute, unknown to the common law, which statute may prescribe conditions under which adoptions may be effective, and jurisdictional requirements of statute must be strictly followed, the proceeding being a special one."

Several opinions have been handed down by this office pertaining to the subject of adoption. While none of them are perhaps directly in point, I am constrained to quote from our Opinion No. 4334, issued on July 9, 1943, in which the author of the opinion stated:

"This general question is considered in the following annotations: 24 A.L.R. 416, 91 A.L.R. 1387, 104 A.L.R. 1464. I also call your attention to 2 C.J.S., Adoption of Children, Section 21. The annotations appearing at 91 A.L.R. considers this problem in some detail. It is clear from considering these various annotations and text material, that statutes providing that the consent of a natural parent, under certain circumstances, is not necessary, is given a very strict construction."

The statutes pertinent to the questions you have posed as found in New Mexico Statutes Annotated, 1953 Compilation, as supplemented, are as follows:

"13-9-6. * * * The district court shall have jurisdiction in the matter of the adoption of children found by the court or jury to be dependent and neglected children and may in

appropriate adoption proceedings permit such children to be adopted by any legally qualified individual in the manner provided by law, without the consent of parents or guardians."

"22-2-3 (P.S.). * * * Except as otherwise provided herein, adoption proceedings shall be governed by the rules of procedure in civil actions as the same are or may be prescribed by law. The petitioner or petitioners, all persons whose consent is hereinafter required to be either filed in the proceeding or dispensed with, * * * shall be considered parties to the proceeding. * * *"

"22-2-5. WRITTEN CONSENT FOR ADOPTION NECESSARY. -- Subject to the provisions of section 6 of this act [22-2-6], written consent to the proposed adoption, duly acknowledged before a notary public, must be filed in the proceedings before any decree of adoption may be granted. Such consent must be obtained from the following:

- (a) The child, if over the age of twelve [12] years;
- (b) The parents of the child born in wedlock, if living;
- (c) The mother of the child born out of wedlock, if living;
- (d) The person or organization having lawful custody of the person of the child, if other than the parent or pa-

SENT REQUIREMENT. -- The consent of any person required by the terms of section 5 [22-2-5], other than that of the child over 12 years of age, may, in the discretion of the court, be dispensed with in any one or more of the following instances:

(a) In the case of a parent when he or she has been lawfully deprived of the custody of the child through divorce or legal separation;

{*93} (b) When he or she has been deprived of custody of the child by a court of competent jurisdiction in proceedings under or like in substance to those prescribed by chapter 85 of the Laws of 1917 (being sections 44-201 to 44-211, inclusive, of the 1941 Compilation, as amended [13-9-1 to 13-9-11]) being the law of this state relating to dependent and neglected children;

(c) When consent of the guardian of the person of the child, under appointment of a court of competent jurisdiction, is filed;

(d) After diligent search and inquiry, the names of the parent or parents or legal guardian, or their whereabouts, are unknown and cannot be ascertained; or where the parent or parents or guardian have wilfully failed to maintain and support the child, when obligated and financially able to do so, or have been guilty of such cruelty, depravity, abuse, or gross neglect toward the child that, in the opinion of the court, the child should be removed from the custody of such parent or guardian.

In all cases where a required consent is sought to be dispensed with under this section, notice of the time and place of a hearing to determine whether such consent should be required together with a true copy of the petition for adoption, with all exhibits, shall be served either in person or by publication upon such parent or parents or legal guardian, as the case may be, in the manner provided by law for service of process in civil actions. Such notice shall be directed in the name of the state of New Mexico to the surviving parent or parents or personal guardian of the child, as the case may be, as they appear in the petition or exhibits. The notice shall include the name of the court in which the proceeding is pending, the title of the proceeding, and the name and address of the petitioner or his attorney, and shall notify all persons to whom the notice is directed that unless they enter their appearance in the proceeding on or before the day specified for such hearing, being not less than 30 days from the date of personal service of notice and not less than 20 days after the date of last publication of notice, if service by publication is required, they shall be deemed to have consented to the granting of the adoption prayed for in the petition on file in the proceeding. If the parent, parents or guardian of the child are unknown and cannot, after diligent inquiry, be ascertained, they may be denominated 'unknown parent, parents or guardian of' (naming the child as it is named in the petition).

At such hearing, the court may hear evidence and either require or dispense with such consent according to law."

It is my belief that the foregoing statutes, and particularly Secs. 22-2-3 and 22-2-6, interpreted under the rules as enunciated by our Supreme Court and in the previous cited opinion of this office leave no room for any interpretation other than that which I have made in furnishing you with the answer to your first question.

In support of my answer No. 1, I have quoted certain sections of the New Mexico Statutes which bear not only upon my answer No. 1, but also upon answers Nos. 2, 4 and 5. Inasmuch as your questions and, of course, my answers, by their very nature are overlapping, I will refrain in the interest of brevity from repeating the sections in support of individually numbered answers.

I have been unable to find any law whatsoever granting authority to a district judge to sign adoption {94} consents at any time, either before or after declaring a child to be dependent and neglected; hence, my answer No. 2.

In answering your third question, Section 22-2-8, N.M.S.A., 1953 Compilation, is controlling. The pertinent portion of this statute reads as follows:

"* * * No final decree of adoption shall be entered until the child shall have actually resided in the proposed adoption home six [6] months or more preceding the entry of such decree **and if the child is under one [1] year of age, until it shall have attained the age of one [1] year;** * * *" (Emphasis supplied)

The language of this statute is clear and concise and it is my opinion that its positive language can be interpreted no other way except as I have stated.

In support of my answer No. 4, I cite Section 13-9-6, particularly the last paragraph thereof. I also cite Section 22-2-3, N.M.S.A., 1953 Comp. (P.S.) and Sections 22-2-5 and 22-2-6, which spell out the requirements as regard consents and the waivers thereof.

The fact that a parent has been adjudged legally incompetent does not necessarily bring the proposed adoption within the purview of Section 22-2-6. This section sets up certain situations wherein the consent requirements of Section 22-2-5 may be waived in the discretion of the court. "Waiver of Consent" provisions will be further explored in my answer No. 5. Section 22-2-6 provides that in all cases where a required consent is sought to be dispensed with under this section, notice of the time and place of a hearing to determine whether such consent should be required shall be served either in person or by publication upon such parent or parents or legal guardian in the manner provided by law for service of process in civil actions. This section further provides that a hearing can be held not less than 30 days from the date of personal service and not less than 20 days after the date of publication of notice if service by publication is required. It is further provided that at such a hearing the court may hear evidence and either require or dispense with such consent according to law.

Sections 22-2-3 and 22-2-6 leave no doubt but that statutory notice must be given to the person or persons named in the statutes in the absence of proper consents.

I believe that the foregoing supports my answer No. 5.

Trusting that I have answered your inquiries in a manner that will be of assistance to your department, I am

By Hilton A. Dickson, Jr.

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