

Opinion No. 64-135

November 10, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Carolina R. Gonzales, County Clerk, Santa Fe County Courthouse, Santa Fe, New Mexico

QUESTION

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If a minor child, younger than the minimum age for marriage without parental consent, is residing with both his mother and father, must he obtain the consent of both parents before obtaining a marriage license?

CONCLUSION

No, just the consent of his father.

OPINION

ANALYSIS

By qualification of your question you indicate that you are concerned only with a situation where a minor is living with both parents. In instances where the minor is in the custody of only one parent then the consent of that parent alone is necessary and sufficient. See **Owens v. Munden**, 168 N.C. 266, 84 S.E. 257, where the Court held, under a statute requiring the father's consent, that the consent of the mother was sufficient where the minor child was living with her mother and stepfather.

Several statutory sections deal with the problem of consent for the marriage of a minor. The question you ask is a product of the ambiguity of those sections. Section 57-1-5, N.M.S.A., 1953 Compilation, in the light of its history, requires the consent of both parents of the under age applicant, while Section 57-1-16, N.M.S.A., 1953 Compilation, indicates that the consent of only one parent is required. Section 57-1-10, N.M.S.A., 1953 Compilation is capable of either interpretation.

Section 57-1-5, *supra*, in its present form reads as follows:

"No person being a male, under twenty-one (21) years of age, and no person being a female, under eighteen (18) years of age, can marry, unless he or she obtain the consent of his or her parents, guardian or of the person under whose charge he or she

is, and for that purpose the presence of those parties, or of a certificate in writing, authenticated before competent authority, is required."

Before the 1923 amendment, this section applied only to males and read in part as follows:

"No person being a male, under twenty-one years of age, can marry, unless he obtain the consent of his parents . . ."

Thus it can be seen that the change merely made the section apply to both males and females and that it retained the plural of the word "parent". Under these circumstances we are of the opinion that the intention of the legislature in the amendment was to make the section applicable to females as well as males. The plural of the word "parent" was retained and the inescapable conclusion is that this section, by itself, requires the consent of both parents of the minor if the minor is in the custody of both his parents.

We must now determine if other statutory sections, when construed together with Section 57-1-5, N.M.S.A., 1953 Compilation, alter the above conclusion. Section 57-1-10, N.M.S.A., 1953 Compilation, outlines some of the duties of the county clerk when persons desiring to get married apply for a marriage license. A portion of that section, added in 1939, reads as follows:

"The county clerk shall issue no license, for the marriage of any male under the age of twenty-one (21) years, or any female, under the age of eighteen (18) years, without the consent of their parents or guardian. It shall be the duty of such county clerk to require the affidavit of at least two (2) reliable persons who are acquainted with the age of the applicant or applicants for license, as to the age of whom said county clerk may be in doubt."

While this section can be read as requiring the consent of one parent of each minor, it must be noted that the language is substantially the same as that in Section 57-1-5, supra, after the 1923 amendment.

Subsequently in 1961 the legislature enacted the present Section 57-1-16, N.M.S.A., 1953 Compilation. That section specifies the form to be used by the county clerk on an application for a marriage license. At the end of the form appear two identical sentences which read as follows:

"I, the parent (guardian) of ____, hereby consent to the granting of a license to marry, waiving the question of minority."

____ (Signature Parent (Guardian))"

Since the above quoted sentence appears only twice on the prescribed form it is evident that the form does not require the signature of both parents of each underage applicant for a license. In addition, the form uses the singular of the word "parent." We are of the

opinion therefore that this form indicates that only one parent need consent to the marriage of an underage child.

Our problem therefore is to reconcile the three statutory sections which we have discussed. Since repeals by implication are not favored, **State v. Valdez**, 59 N.M. 112, 279 P2d 868, it is our duty to harmonize the three sections if at all possible. Even though Sections 57-1-5 and 57-1-10, N.M.S.A., 1953 Compilation, standing alone, might require the consent of both parents of a minor candidate for marriage, we are of the opinion that they can be reconciled with Section 57-1-16, N.M.S.A., by an interpretation requiring the consent of only one parent. Such an interpretation is not without precedent. **Riley v. Bell**, 89 Ala. 597, 7 So. 155. In this last cited case the court held that the consent of the father alone was sufficient under a statute reading in part as follows:

". . . the judge of probate must require the consent of the parents or guardians of such minors, to the marriage, to be given either personally or in writing."

The Alabama Court went further in saying that the consent of the father was required even if the child were living with both parents. The rationale for this conclusion was the fact that the father was the head of the household and obligated to provide for the maintenance and education of the children.

In New Mexico it is likewise the husband who is the head of the household and who chooses the place and mode of living. Section 57-2-2, N.M.S.A. In giving his consent he would be speaking in a representative capacity for the wife. Somewhat the same effect is given to the husband's acts with respect to the wife's interest in community property. **Baca v. Belen**, 30 N.M. 541, 240 Pac. 803.

It is our conclusion, therefore, that when parental consent to the marriage of a minor is required, the consent of only one parent is necessary. This consent, however, must come from the father if the minor child is living with both parents, and if the father is competent to consent.