

Opinion No. 35-1185

September 30, 1935

BY: FRANK H. PATTON, Attorney General

TO: Hon. Reymundo Angel, Probate Judge, Las Vegas, New Mexico.

{*82} You have requested an opinion from this office as to whether or not it is possible to afford free process in the Probate Court for applications for appointment of guardians of the persons of minors.

Section 105-1311 of the New Mexico Statutes Annotated, 1929 Compilation, provides:

"If any person wishing to institute a suit, or having done so, shall make oath that he is too poor to pay the costs, he shall have all and any process of the court free of costs."

This statute was passed in 1851. The title to the Act at the time it was passed was "An Act Regulating Practice in the Supreme Court and District Courts of the State of New Mexico." This would seem to limit the free process to the Supreme and District Courts in this state. This office has previously ruled that the statute is not applicable to suits in Justice of the Peace Courts and we do not believe that it can be applied to Probate Courts.

Sections 62-129 of the 1929 Compilation gives District Courts concurrent jurisdiction in these guardianship proceedings with the Probate Court. It is possible that persons wishing to file such guardianship proceedings as you have in mind and where the minors and the person making application are paupers, they might go into the District Court with the application for appointment and thereby take advantage of the statute on free process above referred to.

At least some Courts have held that the term "suit" is a general term denoting any legal proceeding of a civil kind and that application for appointment of a guardian is included in the term "suit." {*83} See *In Re Oliver's Guardianship*, 83 N.E. 795, 77 Ohio State 474.

By: J. R. MODRALL,

Asst. Atty. General