

Opinion No. 51-5367

May 22, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Alva A. Simpson, Director, Department of Public Welfare, Santa Fe, New Mexico.

{*45} By letter of May 21, 1951, you requested an interpretation from this office concerning the last paragraph of Section 6, HB 168, recently passed by the Twentieth Legislature, in which the sentence commencing on line 25, page 4, appears to be incomplete.

As I am informed the Bill as passed deleted a portion commencing with the words "and not" on line 31 of page 4 through line 6 on page 5 of said bill. It appears that it was the intention of the Legislature to have done away with the requirement of publication but through error they deleted the words beginning with "they shall" on line 1, page 5, and ending with the word "proceeding" on line 3, page 5. This phrase would complete the sentence commencing on line 25, page 4 of the printed bill.

It is our belief that 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's 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.

This may be construed without affecting the validity of the law and as one sentence in such an interpretation it would be necessary to obtain personal service of notice and then consider unless an appearance is entered, at such hearing the court may hear evidence or request expenses according to law. This irregularity is cured by the **remainder of the Section providing** that the court will proceed unless an appearance is made.

Rule 4 (k) of Rules of Civil Procedure for District Courts, provides that service of summons outside of the State is equivalent to service by publication. This is not in any way meant to limit that type of service of process to cases where service by publication may be obtained. Service by publication being effective in actions in rem only, is generally applicable when the party obtaining such service is not able to locate the whereabouts of the party upon whom service is desired. In such cases an affidavit is necessary to obtain a Notice of Suit and when the defendant defaults, in view of the Soldiers and Sailors Relief Act, there are other measures necessarily taken to protect his or her interest. It is believed, although an adoption proceedings is in the nature of a proceeding in {*46} rem, that the legislature clearly intended that personal service be made upon one whose consent is necessary. If the petitioner on an adoption

proceeding is not able to locate the whereabouts of the parties desired, the court may hear evidence and either require or dispense with such consents according to law.

Thus concerning Section 6, which has to do with Service of Process, House Bill No. 168, Twentieth Legislature, is interpreted by this office to be valid and good law.

Concerning the authority of your **Department** to certify private institutions as placement agencies in accordance with this bill, reference is made to § 73-104(1) of the 1941 New Mexico Statutes Annotated, which is the Department of Public Welfare Act. This section states: "The state department shall 'Inspect and require reports from all private institutions, boarding homes and agencies providing assistance, care or other direct services to children * * *.'"

That being the case, the certification by your office of such agencies for placement is within the provisions of the Public Welfare Act.

I trust that this sufficiently answers your inquiry.