

Opinion No. 61-108

October 25, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. John Block, Jr., Chairman, State Corporation Commission, Santa Fe, New Mexico

QUESTION

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Are the wages earned by a wife during marriage community property so that they may be paid to the surviving husband without the necessity of his being appointed administrator in order to collect them?

CONCLUSION

Yes, unless at the time the wages were earned the wife was living separate from her husband.

OPINION

ANALYSIS

The earnings of a wife during marriage are community property unless such wages were earned while she was living separate from her husband. **Mounsey v. Stahl**, 62 N.M. 135, 306 P. 2d 258; **Hollingsworth v. Hicks**, 57 N.M. 336 P. 2d 724; Section 57-3-7, N.M.S.A., 1953 Compilation. Whether a legal separation is required in order to bring the exception into operation is open to some question. See Attorney General Opinion No. 4478 (1943-44).

Since, under the ordinary situation, the wife's wages are community property, Section 29-1-8, N.M.S.A., 1953 Compilation, becomes applicable. This Section provides as follows:

"Upon the death of the wife, the entire community property, **without administration**, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband." (Emphasis added).

In the event that the husband and wife were living separately when the wages were earned, there is another statute which authorizes you to pay the deceased wife's wages

to the surviving husband without the necessity of his being appointed administrator. Section 31-13-1, N.M.S.A., 1953 Compilation (P.S.) provides that:

"The surviving husband . . . of any deceased person, may **without procuring letters of administration**, collect from the State of New Mexico, or any political subdivision thereof, . . . any sum of money which the state of New Mexico, or any political subdivision thereof . . . may have owed such deceased person at the time of . . . her death for wages or salary earned . . . while in the employ of the state of New Mexico, or any political subdivision thereof . . . **provided said sum of money shall not exceed three hundred dollars (\$ 300.00).**" (Emphasis added).

In view of the above statutes, we advise you thusly: (1) If the husband and wife were not living separate when the wages were earned, you may pay the surviving husband the total amount of such wages even though the amount exceeds three hundred dollars and even though the husband has not been appointed administrator, . . . (2) If the husband and wife were living separate when the wages were earned, you may pay such wages to the surviving husband up to a maximum of three hundred dollars upon the filing of the affidavit required by Section 31-13-2, N.M.S.A., 1953 Compilation (P.S.). Again this may be done even though the husband has not been appointed administrator of the estate of his deceased wife.