

## **Opinion No. 63-151**

November 8, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. Charles S. Solomon Assistant District Attorney First Judicial District Santa Fe, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Under the law of New Mexico is there a duty for a husband to support his wife which is enforceable through the civil procedures of the Uniform Reciprocal Enforcement of Support Act (Sections 22-19-2 through 22-19-27, N.M.S.A., 1953 Compilation) when the obligee is a resident of another state and the obligor is a resident of New Mexico?
2. Is there such a duty of support so enforceable where the obligor is a resident of some other state and the obligee is a resident of this state?
3. Is such duty and enforcement possible where no support provision is contained in a divorce or separation action or where there is no valid decree of divorce or separation?
4. Under the provisions of the act, is a person who is a resident of another state and who has instituted proceedings under the act barred from also bringing any other proceeding under another act in this state and vice versa, and if such is not barred, must such person elect which suit will be prosecuted or may both of them be prosecuted?
5. Is the last word "obligor" in Section 4 of the act a typographical error?
6. Where the New Mexico Department of Public Welfare has furnished support to a resident obligee, should the action filed here under the act to be transmitted to another state be filed in the name of the Department?
7. If the New Mexico Department of Public Welfare should file such suit under the act, must it first initiate an action under § 57-2-3, N.M.S.A., 1953 Compilation, (which provides in substance that where a husband fails to provide support for his wife any other person furnishing articles necessary for such support may recover the reasonable value thereof from the husband)?
8. Under the act must the obligor applying for civil remedies thereunder file a pauper's oath before the office of the District Attorney can represent her?

#### **CONCLUSIONS**

1. Yes.
2. Yes.
3. Yes, under certain circumstances. See analysis.
4. No, but only one recovery could be had for the same period.
5. See analysis.
6. Yes.
7. No.
8. No, but see analysis.

## OPINION

### **{\*350} ANALYSIS**

The law of New Mexico must be determined in answering your first question. The fact that an obligation to support exists in the jurisdiction of the obligee would not render the obligor liable therefor in the absence of such a duty in this state. **Rosenberg v. Rosenberg**, 128 A. 2nd 863 (Me.); **Hartshorn v. Hartshorn**, 157 N.E. 2nd 563, (Ill.); **Pa. ex rel D.P.A., Mercer County Board of Existence v. Mong**, 117 N.E. 2nd 34 (Ohio).

By statute the common law is the law of this state except where modified or changed by statute or where the rights arise by reason of, or under, some other system of law. At common law a husband is liable for the support of his wife and it is the public policy of this state that a husband must support his wife according to his means, station in life, and ability and that if he does not, others may do so and recover from him. **Chavallier v. Conners**, 33 N.M. 93, 262 P. 173. Therefore, except as modified by statute the obligation and extent thereof remain as above stated. Our state has slightly modified this duty by § 57-2-4, N.M.S.A., 1953 Compilation, to deprive a wife who wrongfully deserts her husband of a right of support and to remove any obligation of the husband to support the wife when they are separated by agreement without support being stipulated in the agreement.

With the exception pointed out above, our court has consistently held that a duty of support is owed **{\*351}** from the husband to the wife, both at common law and under the provisions of § 57-2-1, N.M.S.A., 1953 Compilation. ("Husband and wife contract toward each other obligations of mutual respect, fidelity and support"). **Mindlin v. Mindlin**, 41 N.M. 155, 66 P. 2nd 260; **Kuert vs. Kuert**, 60 N.M. 432, 292 P. 2nd 115. Our court has likewise held in **Mindlin v. Mindlin**, and **Kuert v. Kuert**, supra, that remarriage of the

wife relieves the former husband of the duty of support of the ex-wife as of her remarriage.

Therefore, absent the defenses of unjustified desertion on the part of the wife and lack of offer to return; an agreed upon separation without a support provision; or remarriage of the wife; this state is under a duty under the act to enforce support on the part of an obligor resident and a non-resident obligee.

Under the provisions of the act and on the same basis as set forth under the first point, civil proceedings could be instituted in this state by an obligee resident here against a non-resident obligor, provided the state having jurisdiction of the obligor has enacted the Uniform Act or one similar enough to permit such enforcement and provided the duty of support existed in such foreign jurisdiction.

Question three is answered primarily in the affirmative for reasons set forth above. One additional exception would occur where there had been a decree entered in a divorce or separation action which did not order support of the wife and the matter had been litigated so as to become *res adjudicata*. A few cases seem to hold that even in such case, support could be required. **Daly v. Daly**, 120 A. 2nd 510 (N.J.). Some authorities apparently hold this to be true even though there is no evidence of changed circumstances, but many other cases would seem to require that, if such a decree could be later modified by proceedings under the Uniform Act, that there must be changed circumstances and that such action was **not** against the public policy of the respondent jurisdiction. **Freeland v. Freeland**, 313 S.W. 2nd 943 (Tex.); **Commission ex rel Halzbaur v. Halzbaur**, 138 A. 2nd 268 (Pa.). The answer therefore to this question would be yes, except as possibly modified by the foregoing.

In answer to the fourth question, the Uniform Act in Section 3 reads as follows:

"The remedies herein provided are in addition to and not in substitution for any other remedies."

Therefore a foreign obligee could sue under the provisions of the Uniform Act in such foreign jurisdiction and, prior thereto, simultaneously therewith, or subsequently thereto, could maintain a civil or criminal action in this state under some act or law other than the Uniform Act. There could, however, as between civil remedies, be but one recovery, and to such extent an election of actions could be compelled. Likewise, under general legal principles and our rules of procedure one civil action might be temporarily abated pending decision in another civil action, and a judgment in one civil action would probably permanently abate the other action as to any issues that thereby became *res adjudicata*.

The one place where remedies are mutually exclusive is where extradition proceedings are filed **under the act**, and the obligor thereafter submits himself to the jurisdiction of the court of the other state and complies with the court's support order. In such case the extradition shall not proceed. Section 22-19-5 and Section 22-19-6, {\*352} N.M.S.A.,

1953 Compilation. If extradition or other criminal proceedings are pending under some provision **other** than the Uniform Act the proceedings are not alternative and civil proceedings under the Uniform Act and also criminal or extradition proceedings under some other law or laws may proceed and vice versa. **Jackson v. Hall**, 97 So. 2nd 1, (Fla.); **Leffler v. Leffler**, 344 P. 2nd 754 (Ore.).

With respect to the fifth question, the enrolled and engrossed bill as passed and signed contains the word "Obligor" as the last word in Section 4 of the Uniform Act. The Uniform Act as proposed and passed in a majority of the states adopting the Act and as written by the Commissioners has the last word of the said section as "Obligee."

The history of the Act indicates that before the passage of Section 4, some states had held that the presence of the obligee in the jurisdiction during imposition of the duty of support was necessary and that, therefore, the word "obligee" was intended by the Commissioners **and** by the other states passing the section. It is possible, therefore, that the word "obligor" in our Section 4 was a typographical error in the bill as presented to the New Mexico House of Representatives, (House Bill No. 1, 1953 Session). This cannot be determined. However, the word "obligor" as it appears in Section 22-19-4, N.M.S.A., 1953 Compilation, is not a typographical error since it accurately reproduces the language of the act as enrolled and engrossed, and passed by the Legislature. The writer feels that the mistake, if it be a mistake, is immaterial.

Your next question and question seven will also be considered together. Section 22-19-8 N.M.S.A., 1953 Compilation, reads as follows:

"Whenever the state or a political subdivision thereof furnishes support to an obligee, it has the same right to invoke the provision hereof as an obligee to whom the support was furnished for the purpose of securing reimbursement of expenditures so made and of obtaining continuing support."

When the Department of Public Welfare disburses money, it is the state's money. The state is furnishing support through an agency created to do just that, among other things. The action should be brought: "State of New Mexico on the relation of the Department of Public Welfare."

The section above referred to gives the state or subdivision the same rights as the obligee. The statute makes the remedies cumulative and not in the alternative as to any other available action. There need not, therefore, be any action under § 57-2-3 N.M.S.A., 1953 Compilation, prior to instituting action under the Uniform Act.

The last question has been considered by several jurisdictions as to its constitutionality and the section has in all cases been held constitutional as a reasonable classification. The sections under consideration -- § 22-19-11, require the District Attorney to bring the action on request of the court where the obligee is a New Mexico resident, and § 22-19-17 which implies a duty on the part of the District Attorney to represent an obligee, suing in a foreign jurisdiction, where the obligor is a resident of this state.

The rationale of the cases and of the requirements seems to be that a wife suing for support might reasonably be assumed to be indigent or likely to become a charge of the state and the requirement of action by the office of the { \*353 } District Attorney is therefore a reasonable classification and therefore constitutional. There might be certain cases wherein this rationale would be palpably wrong, and in such case official civil action by the office of the District Attorney would not be authorized. However, in the absence of such convincing evidence, and on the request of the court, or, when the state is a respondent state, the office of the District Attorney should proceed to represent the obligee. In the absence of either of such situations, the District Attorney would use his discretion.

By: James V. Noble

Assistant Attorney General