

## **Opinion No. 79-25**

June 13, 1979

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** Honorable John B. Walker, District Judge, Fifth Judicial District, Post Office Box 1626, Carlsbad, New Mexico 83220

### **PUBLIC OFFICERS AND EMPLOYEES**

A district judge may not lawfully employ his unadopted stepdaughter as his secretary under the provisions of Section 10-1-10 NMSA 1978.

### **QUESTIONS**

Is the employment by a district judge of his unadopted stepdaughter as his secretary lawful under the provisions of Section 10-1-10 NMSA 1978?

### **CONCLUSIONS**

No.

### **ANALYSIS**

Section 10-1-10 NMSA 1978, being a law to prohibit nepotism with certain exceptions, provides:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided, that this act [10-1-10, 10-1-11 NMSA 1978] shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$600 or less a year, nor shall it apply to persons employed as teachers in the public schools."

### **OPINION**

The applicability of Section 10-1-10, **supra**, depends upon several elements or conditions. The situation presented clearly falls within the statute insofar as the

employing judge is a public officer and the employee's position is to be compensated out of public funds in excess of \$600.00.

It would also appear that the position as described in the personnel specifications for Secretary II may be considered that of an "assistant" to a judge. In Opinion of the Attorney General No. 76-35, dated September 23, 1976, this office, in concluding that the employment of a court stenographer was not subject to Section 10-1-10, **supra**, stated that an "assistant" is one who helps, aids or assists and is subordinate to a person in an official position. Such a relationship would be established between a judge and his secretary. Compare, Opinion of the Attorney General No. 57-224, dated September 10, 1957.

Next, it must be determined whether a stepdaughter is related to her stepfather within the third degree of consanguinity or affinity. It is generally accepted that children and parents are related within the first degree.

{\*60} For purposes of the law of descent and distribution, unadopted stepchildren are not recognized as being so related. See 23 Am. Jur. 2d, DESCENT AND DISTRIBUTION, Section 45. However, for general purposes, "affinity" is defined as the relationship between a wife and her husband's blood relatives or a husband and his wife's blood relatives. See, e.g., **Washington State Public Emp. Bd. v. Cook**, 88 Wash. 2d 200, 559 P.2d 991, 994 (1977). Degrees of affinity are commonly computed by finding that the relations of the wife stand in the same degree of affinity to the husband as they stand in degree of consanguinity to the wife and vice versa. See, e.g., **Chinn v. State**, 47 Ohio St. 575, 26 N.E. 986 (1890). Thus, as the judge's wife is related within the first degree of consanguinity to her daughter, the judge's relationship to the daughter is within the first degree of affinity.

The use of "affinity" as well as "consanguinity" in the statute "is a plain indication that the Legislature intended to extend the prohibition beyond certain blood relationships to include persons, within specified degrees, who were related by marriage." **State v. Geddes**, 101 N.H. 164, 136 A.2d 818, 819 (1957). Moreover, to include step-children within the prohibitions of Section 10-1-10, **supra**, is consistent with intent of the statute. The objectives of an antinepotism statute have been well-stated in **State ex rel. Robinson v. Keefe**, 111 Fla. 701, 149 So. 638 (1933) in which the Court explained:

"'Nepotism' has been defined as the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee. The Florida act should be construed in the light of its obvious purpose to discourage 'nepotism' as above defined."

It has been suggested that the rules of the court could be used to create a situation where the presiding judge may be technically considered the employing officer in order to avoid the prohibited relationship between the actual employer and employee. However, the objectives of Section 10-1-10, **supra**, will not be well-served by reliance

on a technical, but not substantive, exception. Adherence to the spirit or intent of a law will prevail over a literal construction of its terms. **Martinez v. Research Park, Inc.**, 75 N.M. 672, 410 P.2d 200 (1965).

In addition, Rule 3 of the Rules of the Fifth Judicial District states that the judge in each division shall exercise the hiring powers of the court. The duty is mandatory, and notwithstanding the general provisions of Rule 20(D)(3) of the New Mexico Judicial System Personnel Plan, the presiding judge does not appoint employees of the district court in the Fifth Judicial District. The special rule for that district would supercede the general personnel rule. As a matter of construction, a special provision prevails in any area of conflict with the general. See, e.g., **State v. Thomson**, 79 N.M. 748, 449 P.2d 656 (1969).

Finally, the approval exception provided by Section 10-1-10, **supra**, would not apply here. District judges are not bonded, and thus there is no officer, board, council or commission responsible for approving the bond. It follows, therefore, that there is no entity from which approval of the otherwise prohibited employment may be obtained.

{\*61} In summary, we conclude that the employment by a district judge of his stepdaughter as his secretary would be unlawful under the provisions of Section 10-1-10, **supra**.

#### **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General