

Opinion No. 34-813

October 4, 1934

BY: E. K. NEUMANN, Attorney General

TO: State Tax Commission, Santa Fe, New Mexico.

{*157} In your letter of October 2nd, 1934 you refer to an estate in San Miguel County in which the testator leaves the bulk of his property to an "adopted son, but not adopted by law."

The question arises as to whether or not that portion of the estate going to this "son" who was not legally adopted is subject to the exemption provided in Section 141-1101 of the 1929 Code. The attorney for the executor claims that in accordance {*158} with the decision in the case of Barney v. Hutchinson, 25 N.M. 82, 177 Pac. 890 such exemption should be allowed.

I do not agree with that conclusion. The case of Barney vs. Hutchinson, supra, merely holds that equity will enforce the specific performance of a contract to adopt a child so that the child will inherit in the same manner as blood children of the deceased. For the purpose of enforcing the contract equity will consider "that done which ought to be done." There is no question of the specific performance of a contract in the present instance.

I call attention to the case of Anderson vs. Blakely, 155 Iowa 430, 136 N.W. 210, which is cited in the case of Barney vs. Hutchinson, supra, wherein the court says: "* * * while the court cannot execute the intent and by its judgment establish the plaintiff in the legal status of a child of the foster parents, etc."

In connection with the construction of inheritance tax statutes it is said in 61 C.J. 1676 that "a statute creating an exemption should be construed strictly against the claimant and liberally in favor of the state."

Consequently, it is my opinion that Section 141-1101 of the 1929 Code means exactly what it says and that the term "legally adopted child" does not include an "adopted son, but not adopted by law."

By: QUINCY D. ADAMS,

Asst. Attorney General