Opinion No. 43-4334

July 9, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Miss Lois S. McVey, Supervisor, Child Welfare Services, Department of Public Welfare, Santa Fe, New Mexico

We have your letter of July 7, 1943, wherein you state that one of the District Judges has asked that you obtain an official opinion of this office concerning the general question of the necessity of obtaining the consent of the natural father, if living, to adoption proceedings, when the natural father and natural mother are divorced, and the custody of the child has been given to the mother, who has remarried, and the husband of the mother wishes to adopt the child.

You call attention to the fact that in many instances the natural father is in the Army and is abroad in foreign service, or otherwise cannot be located. I call your attention to the provisions of Section 25-207 of the New Mexico 1941 compilation, which provides:

"A legitimate child can not be adopted without the consent of its parents, if living together; and if legally separated, the consent of the parent having legal custody of the child must be obtained. It shall not be necessary to obtain the consent from a father or mother deprived of civil rights or adjudged guilty of adultery or cruelty, and for such cause divorced and deprived of the custody of the child, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty to, abandonment and neglect of, the child or of infamous conduct. (Laws 1893, ch. 32, Sec. 4; C. L. 1897, Sec. 1499; Code 1915, Sec. 16; C. S. 1020, Sec. 2-104.)"

This general question is considered in the following annotations: 24 A.L.R. 416, 91 A.L.R. 1387, 104 A.L.R. 1464. I also call your attention to 2 C.J.S., Adoption of Children, Section 21. The annotations appearing at 91 A.L.R. considers this problem in some detail. It is clear from considering these various annotations and text material, that statutes providing that the consent of a natural parent, under certain circumstances, is not necessary, is given a very strict construction.

Thus, the adoption statute under consideration in Re Lease (1918) 99 Wash. 413, 169 Pac. 816, provided:

"That, if the parents are living separate and apart, the consent of both is not required, but such consent may be given by the parent having the care, custody, and control of such child."

In holding that the divorced husband must give consent where the decree of divorce awarding the custody of the child to the wife, did not divest the husband of all parental

rights, but reserved to him the right to visit the child at any and all times within reason, the court said:

"Now, recurring to the italicized portion of our statute above quoted, it might seem, when read superficially apart from its evident spirit, that, when the care and custody of a child is given to one parent by a divorce decree, the consent of such parent alone would be sufficient to authorize the adoption of such child by another. But when we are reminded of the conclusive and far-reaching effect of an adoption decree, and that it is not a mere custody decree, like in a guardianship or other similar proceeding, every consideration of fairness to the natural parents dictates that the provisions of our statute prescribing the conditions under which consent may be dispensed with should receive a strict construction. We are of the opinion that, to enable one parent having the custody and control of a child to effectually consent to its adoption by another, such custody and control must be of such an absolute and unconditional nature that the other parent's right in the child is extinguished, or the other parent's conduct is such as to estop him or her from asserting such right. * * *"

This holding by the Washington court is typical of many similar holdings in different states. Therefore with this rule in mind, we consider the specific provisions of our statute. Under our statute, in view of this rule of strict construction, it would seem clear that unless the father in the particular case has been deprived of civil rights, or adjudged guilty of adultery or cruelty, and for such cause divorced and deprived of the custody of the child, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child because of cruelty, abandonment and neglect of the child, or of infamous conduct.

Further, in view of the strict construction that is placed on similar statutes by other courts, there might be a tendency to, even under some of the above circumstances, if the parent has been given the right to visit the child, to hold that the consent of such parent is necessary for the validity of the adoption proceedings.

We further point out that if the parent should be in the Army, that the Soldiers and Sailors' Civil Relief Act could possibly have some effect concerning the validity of an adoption proceedings, if the father does not actually consent to the proceedings.

However, if it is clear that the father has been deprived of all rights concerning the custody of the child, the right to visit the child, and was divorced and comes within the provisions of the statute specifically providing that the consent of such father is not necessary, it would be my opinion that the adoption proceedings would be valid regardless of the fact of notice or consent of the father, whether he is in the Army or not. Each case must, of necessity, be considered on its own merits, and no very general rule can be stated in an opinion of this nature which would be a guide to all cases presented.

Hoping that the above general discussion of this problem is of some benefit to you, I remain

By HARRY L. BIGBEE

Asst. Atty. General