

**Opinion No. 44-4466**

February 29, 1944

**BY:** EDWARD P. CHASE, Attorney General

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

I have your letter of February 25, 1944, wherein you state that Mrs. X, whose husband has been in the army for two years and has been out of the United States for more than one year, is pregnant. You further state that Mrs. X, upon the birth of her child, intends to leave her child and join her husband in Central America.

In view of this fact situation you request an opinion of this office concerning how the child may be legally adopted without obtaining the consent of the husband of the expectant mother, who is in Central America.

Under the law of the State of New Mexico a child is considered legitimate when born in lawful wedlock, and neither a husband nor wife may testify to facts concerning non-access by the other, which facts, if proven, would establish the illegitimacy of the child. See *Florence Salas v. Gabriel Olmos*, N.M. , P. (2d) , No. 4793, filed December 13, 1943. Therefore, the mother's statement that her husband is not the father of the expected child would be inadmissible in evidence and, therefore, you must treat the child as a legitimate child and must consider the husband its father.

Under Section 25-207 of the 1941 Compilation a legitimate child cannot be adopted without the consent of its parents, with certain exceptions not material to your inquiry. However, your letter would indicate that Mrs. X intends to abandon the child upon its birth. This fact would indicate that the child may become a dependent and neglected child. Therefore, in order to protect the child, I would suggest that you consider following the procedure concerning dependent and neglected children, wherein, if the Court should determine that the child is dependent and neglected it would become a ward of the Court and, under the provision of Section 44-206 of the New Mexico 1941 Compilation, the District Judge may, by order, permit the child to be adopted by any individual or association without the consent of the parents or guardians, upon the execution and filing with the Clerk of said Court of an agreement, duly executed and acknowledged by such individual or association, to the effect that the child shall be adopted, treated with kindness and properly cared for and educated.

Hoping that the above fully answers your inquiry, I remain,

By HARRY L. BIGBEE,

Asst. Atty. General