

Opinion No. 45-4811

October 25, 1945

BY: C. C. McCULLOH, Attorney General

TO: Miss Grace E. Nichols Foster Care Consultant Department of Public Welfare Santa Fe, New Mexico

{*149} In your letter dated October 20, 1945, you enclose an adoption agreement executed in the State of Texas by the parents of a child subsequently to be born, and by a couple from New Mexico. The parents, in this agreement, consent to the adoption by the other couple of the child, and the second couple agrees to adopt the child, and, in consideration, also to pay a certain amount to cover doctors' bills, hospital and other expenses incident to the birth of the child. You inquire whether such an agreement constitutes legal consent to adoption, and whether there is anything in the Texas law, or our law, to prohibit such a transaction.

This agreement undoubtedly is illegal in the State of Texas, where the same was entered into. The Courts of that state have held that an agreement whereby the parents consent to give up the custody and control of a child is against public policy, and therefore illegal. *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114, 15 A. L. R. 216; *Mulkey v. Alben*, 36 S. W. 2d 198.

However, an adoption agreement is provided for by statute in New Mexico as to orphans in an orphanage, under Section 5-208 of the N.M. 1941 Compilation. Adoption agreements in this state also are recognized as valid by the Courts. *Barney v. Hutchinson*, 25 N.M. 82.

The Supreme Court of this state has held that an agreement made in Texas, and illegal there, is enforceable in New Mexico, especially when failure to enforce the agreement would work an injustice upon the person adopted at a subsequent date. *Wooley vs. Shell Petroleum Corp.*, 39 N.M. 256.

Although our Courts have never passed upon the validity of an agreement made prior to the birth of the child to be adopted, I am of the opinion that the Courts would hold that such an agreement, as a contract, would be enforceable.

In the present instance, since the agreement and consent to adoption by the parents was made in Texas, and is illegal in that state, and since a consent to adoption may be rescinded or revoked by the parents, I am of the opinion that both you and the District Court would be justified in requiring a consent to adoption by the parents, to be filed at the time of, or subsequent to, the filing of the petition for adoption, and the agreement previously entered into may be considered as a factor in determining the advisability of recommending the adoption.