

## Opinion No. 46-4925

July 12, 1946

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Murray A. Hintz State Director Department of Public Welfare Santa Fe, New Mexico

{\*249} Replying to your request for an opinion concerning the legal residence of two children, which we will refer to as "A" and "B", and briefly set forth the facts as to each as condensed from your letter:

1. A was born 4-19-30 and B was born 5-14-40.
2. A and B's father abandoned his entire family previous to 1940, and the court of San Miguel County in Sept. 1944 found the father unable to maintain a home for the family.
3. The mother of A and B died Dec. 10, 1943 and previous to her death she had received Aid to Dependent Children in San Miguel County.
4. In the month of September, 1944, A and three other children of the family, which did not include B, were made wards of the District Court of San Miguel County.
5. In December 1943 a maternal aunt of B, took him to California to live with her, and, except for a short visit to New Mexico in 1944 under the care of said aunt, he has remained with her in California at all times since 1943.
6. The District Court of San Miguel County, in its order of September 1944, ordered that A be placed in the custody of the maternal aunt in California, and he has resided with her since that time.
7. The maternal aunt has cared for A and B independently, until April 1946, at which time she asked the Department of Social Welfare of Ventura County, California, for assistance for A and B.

Your question:

"The California agency has asked that we authorize the return of the children (A&B) to the State of New Mexico. Before doing this, we would like the opinion of the Attorney General as to whether these children would be considered the legal responsibility of the State of New Mexico or of the State of California."

Opinion as to A: Sec. 44-203 N.M.S.A. 1941, defines a "dependent {\*250} and neglected" child to "mean any child, of either sex, under the age of sixteen years, \* \* \*". A became sixteen years of age on April 19, 1946. Sec. 44-207 N.M.S.A. 1941 provides

punishment for interference with an order of the Court, and until the court rescinds or modifies its order, you would not be authorized to order the return of A.

Opinion as to B: The doctrine of Loco Parentis, under the facts stated apply: 46 C.J. "Parent and Child" Sec. 173 p. 1334:

"A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation." (Citing Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42).

The State of California, "General Provisions. 17.1, recognizes this status in "(17.1 (e) "the county in which the child is living shall be deemed the county of residence, if and when the child has had a physical presence in the county for one year."

It is therefore my opinion that "B" is not subject to authorization for return to New Mexico.

By THOS. C. McCARTY,

Asst. Atty. General