

**OPINION
70-280**

July 7, 1970 (OPINION)

Mr. Thomas E. Rutten

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RE: Public Welfare - Liability of Stepfather

for Support - ADC Eligibility

This is in response to your letter in which you asked for an opinion whether or not the case of King v. Smith, 392 U. S. 309, 20 L. Ed. 2d. 1118, has any effect on section 50-09-08.1 of the North Dakota Century Code.

Your inquiry is prompted by Manual Letter No. 765 issued by the executive director of the Public Welfare Board of the state of North Dakota dated June 23, 1970, which states:

"Paragraph 1. Material transmitted and purpose. Transmitted with the Manual Letter is a major change in policy relative to the determination of AFDC eligibility and grant entitlement for stepchildren. This change is necessitated by an interpretation of the 1968 U. S. Supreme Court decision in the case of King v. Smith, which, in effect, invalidates North Dakota law which holds a stepfather responsible for the support of his stepchildren. The following manual references are affected:

- a) Chapter 318-18, paragraph 7, 'Budgeting on behalf of stepchildren,' is revised in such manner that eligibility for stepchildren is determined on the basis of mutual understanding between the county welfare board and the stepfather as to the respective responsibility of each party rather than on the basis of strict adherence to conventional program regulations.
- b) Chapter 321-22, paragraph 13, 'Eligibility for stepchildren,' is revised to reflect the change and philosophy outlined above.

"This revised material conflicts to some extent with the policy expressed in chapter 318, page 24, paragraph 4. However, section 4 of chapter 318 will be rewritten within the near future and the appropriate changes will be made at that time.

"Paragraph 2. Notification of former applicants. Whenever possible, the county welfare board is expected to notify former applicants whose requests for AFDC were denied within the past two years and advise them of the current policy so that they may avail themselves of the opportunity to reapply if they wish."

The King v. Smith case decided in June of 1968, held that the mothers impropriety did not effect her children's eligibility for ADC. It specifically held that the impropriety of the mother by either, cohabiting with paramour in the house or outside of the house, did not effect the children's eligibility to ADC. The court also held that the presence of MARS (man assuming role of spouse) did not affect the eligibility of the children, unless he also had general obligation to support them. The King v. Smith case would in itself not have materially affected section 50-09-08.1 of the North Dakota Century Code. Said section was adopted through chapter 325 of the 1965 Session Laws and provides as follows:

"50-09-08.1. STEPFATHER'S LIABILITY FOR DEPENDENT CHILDREN. Notwithstanding the provisions of section 14-09-09 a stepfather is bound to support his wife's children for the duration of the marriage if without support from such stepfather they would be needy dependent children eligible for aid under the provisions of this chapter. A natural father is not relived of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section."

This section makes reference to section 14-09-09, which provides as follows:

"14-09-09. SUPPORT OF STEPCHILDREN. A husband is not bound to maintain his wife's children by a former husband, but if he receives them into his family and supports them, it is presumed that he does so as a parent and when such is the case, they are not liable to him for their support, nor he to them for their services."

However, the United States Supreme Court in the case of Lewis et al v. Martin decided April 20, 1970, 25 L. Ed. 2d. 561, had under consideration a question which involved some of the provisions of section 50-09-08.1. The court, after discussing King v. Smith, held that the obligations to support a child under state law must be of "general applicability" so as to make that obligation a reality a solid assumption on which estimates of funds actually available to children on a regular basis may be calculated. The net effect of the court's ruling in Lewis v. Martin was that unless the state law imposing an obligation to support is general in its nature, it could not be resorted to for purposes of depriving, otherwise eligible children, from the benefits under the ADC program.

Section 14-09-09 is a general statute and determines the relation and obligations between stepfather and stepchildren, whereas, section 50-09-08.1 has limited applications.

The case of Lewis v. Martin, while it does not completely negate section 50-09-08.1, nevertheless, vitiates partially its provisions. Under the holding of the Lewis v. Martin case, it will be necessary to determine what support, if any, the stepfather is providing to the stepchildren. The mere fact that a stepfather, who has entered into a ceremonial marriage with the mother of the children, does not constitute a general legal obligation to support the children of the mother. If the stepfather has adopted the children, a different

relation exists.

The court in Lewis v. Martin revisited its decision in King v. Smith and reasserted what it said, that Congress in adopting the ADC program had in mind persons who were legally obligated to support the children.

The provisions of section 50-09-08.1 have not been construed by North Dakota prior to the decision of the Supreme Court in the Lewis v. Martin case. In view of the tests laid down to meet the requirements of ADC, it is unlikely that the full extent of section 50-09-08.1 may ever be applied in determining eligibility of stepchildren under its provisions. Generally, the state defers to the federal authorities in construing and interpreting congressional acts or matters emanating out of Congress. In like matter, the federal authorities have deferred to the state authorities in matters relating to the interpretation and construction of state statutes and matters emanating out of the legislature and state constitution. In this instance, these procedures and reciprocal attitudes were disregarded or bypassed. In view of the Supreme Court's holding and regulations that are put out by HEW, nonconformance by the state of North Dakota or failure to comply with the concepts expressed by the rules of HEW or the holdings of the United States Supreme Court subjects the state to reprisals by the federal government of nonparticipation by the federal government or the withholding of ADC grants. In view of these possibilities, it is unlikely that the state Public Welfare Board can be persuaded to adopt a policy other than that directed by HEW.

It is, therefore, our opinion that section 50-09-08.1 has been rendered partially ineffective and that its provisions may not be resorted to for purposes of depriving stepchildren of benefits under the ADC program, unless it can be established that the stepfather is actually providing support to the stepchildren. Under the rulings of the United States Supreme Court, unless the stepfather adopts the children or in some other manner acts so as to bring the children within his protection and care, the mere fact that the stepfather has entered into a ceremonial marriage with the mother of the children does not automatically make him liable for general support of the children for the duration of the marriage. Because of the Supreme Court ruling, the legislature might wish to review the provisions of section 50-09-08.1.

In this respect, we wish to note that the Supreme Court in Lewis v. Martin said that the state is limited to demonstrating its provisions may be retained under the act as applied to nonadopting stepfathers by showing that the legal obligations placed on such stepfathers is consistent with the obligation required by the federal regulations. The federal regulations were considered by the court and were approved in the Lewis v. Martin case. This statement would also apply to the state of North Dakota and section 50-09-08.1.

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Attorney General