

**VOLUME NO. 36**

**Opinion No. 83**

**ADOPTION — Consanguinity, effect of adoption on; NEPOTISM — Consanguinity, effect of adoption on; NEPOTISM — Schools, Trustee and administrative employee; Section 48-105, 59-519, 61-212, Revised Codes of Montana 1947.**

**HELD The process of legal adoption does not affect the relationship by consanguinity under section 59-519.**

May 28, 1976

Mr. James E. Seykora  
Big Horn County Attorney  
P. O. Box 551  
Hardin, Montana 59034

Dear Mr. Seykora:

You have sought my opinion relative to the following facts:

Larry Yellowtail, an adopted person, is a member of the Lodge Grass School Board of Trustees. He has hired a woman named Regina Bends to serve in an administrative capacity within the school district. Regina Bends is married to Leonard Bends, who has the same natural parents as Mr. Yellowtail.

Your specific question is:

Does the process of legal adoption abrogate consanguinity for the purpose of applying section 59-519, Montana's nepotism statute?

This situation is rather unusual in that it involves two natural brothers who have been separated by reason of the legal adoption of one of them. The underlying question readily suggests itself: Are Mr. Yellowtail and Mr. Bends still "brothers"? If they are, Mrs. Bends is Mr. Yellowtail's sister-in-law and her appointment by him is a clear instance of nepotism.

I am unable to unearth any helpful factual precedent. It is stated at 15A C.J.S. Consanguinity, p. 569, that "the relationship by consanguinity is in its nature incapable of dissolution." But this quotation is merely dictum from an 1837 Vermont decision, the sole authority cited. The only case wherein facts resembling the instant ones have actually been considered is **Wasley v. Brown**, 193 F. Supp. 55 (D.C. Va. 1961). There it was held that a natural brother of a deceased adopted person was no longer a "brother" of the deceased under Virginia's wrongful death statute and hence not entitled to share in the award. However, that opinion is grounded upon statutes distinguishable from their counterparts in Montana.

Our statutes relating to the parties who can marry and the effect of adoption on intestate succession offer some useful analogies. Section 48-105 declares that brothers and sisters of the whole or half blood are incompetent to enter into a marriage contract. Thus, even if Mr. Yellowtail and Mr. Bends were not of the same sex they would be incapable of marrying each other. The fact that one of them might be adopted by somebody else certainly would not render them any more competent. Section 61-212 provides that the natural kindred of an adopted person have no rights to the latter's property by virtue of descent and distribution. Note, however, this section does not say the adopted person and his natural kindred are no longer "brothers" and "sisters"; for reasons of public policy, it merely cuts off any right of inheritance the kindred might otherwise have.

I think any interpretation of section 59-519 should be consistent with those of the sections just referred to. It is well settled that our nepotism law is to be liberally construed according to the fair import of its terms and with a view to effect its object (appointment by merit rather than relationship) and to promote justice. **State ex rel. Kurth v. Grinde**, 96 Mont. 608, 614, 32 P.2d 15 (1934). Since section 59-519 prohibits, without qualification as to relationship, the appointment to office of any person **related or connected to** the appointor within specified degrees of consanguinity or affinity, it seems manifestly wrong not to apply it here. The relationship by blood still persists, notwithstanding legislative words and acts of adoption. I therefore conclude Mr. Yellowtail and Mr. Bends remain related within the prohibited degrees of consanguinity.

It has been suggested the term "affinity" as used in section 59-519 refers only to the relationship the appointor has to the blood relatives of **his** spouse, and thus despite consanguinity between Mr. Yellowtail and Mr. Bends, Mr. Yellowtail is able to appoint Mrs. Bends to a position in the school district, even though Mrs. Bends could not appoint him if their roles were reversed. However, extensive research fails to disclose any support for this theory, and neither the language nor the policy of section 59-519 indicates the legislature ever intended such a distinction. Mr. Yellowtail's appointment of Mrs. Bends is consequently unlawful and void.

**THEREFORE, IT IS MY OPINION:**

The process of legal adoption does not affect the relationship by consanguinity under section 59-519.

Very truly yours,  
**ROBERT L. WOODAHL**  
Attorney General