

Opinion No. 73.**Orphans—State Orphans' Home, Admittance to—Residence.**

HELD: In the absence of any statutory restrictions, all resident children in the State, otherwise qualified, would be eligible to the State Orphans' Home.

March 29, 1935.

Mrs. Maggie Smith Hathaway
Secretary, Bureau of Child Protection
The Capitol

You have submitted the following request for opinion:

"A question has arisen as to whether Montana should assume financial responsibility for five children. The mother of these children, Mrs. Blackburn, came to Montana with the children in April, 1934, to make her home with a brother and sister. The father of the children died September, 1933, in Iowa. In August, 1934, Mrs. Blackburn married a Mr. Wells, who is part Indian, against the wishes of her brother and sister. Later they refused to continue rendering her assistance. Mr. Wells comes from a family reported to be afflicted with syphilis, and he has proven to be unable to support the family.

"The five children were taken to our State Orphanage December 18, 1934. Since the stepfather has not supported these children, what state is responsible for their care?"

Section 1485, R. C. M. 1921, pertain-

ing to the State Orphans' Home, provides: "Every orphan, foundling, or destitute child, under twelve years of age, of sound mind and body, shall be entitled to be received into said home at the expense of the state. * * *"

In the absence of any statutory restriction, all resident children in the state otherwise qualified, would be eligible to the State Orphans' Home.

A parent entitled to the custody of a child has a right to determine his residence. (Section 5850, R. C. M. 1921.) Section 33, R. C. M. 1921, provides: "The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children.

"The residence of the husband is presumptively the residence of the wife."

Apparently Mrs. Blackburn came to Montana with the intent of remaining permanently; her husband being dead; she had the right at that time to determine the residence of herself, as well as that of her children. Although apparently her residence was fixed in Montana, prior to her marriage to Mr. Wells, after that event at any rate her residence was presumptively in Montana, provided Montana was his residence. Although it is not specifically stated in your letter, I assume that Mrs. Wells is a resident of Montana. Since her residence, as well as the residence of her husband is in Montana, the residence of the children is likewise in the State of Montana, and the children being destitute, they are, in my opinion, eligible to the State Orphans' Home.