OPINION
70-207

December 17, 1970 (OPINION)

Mr. George M. Ackre

State's Attorney

Towner County

RE: Marriage - Incest - Adopted Relatives

This is in reply to your letter of 9 December 1970 with regard to the application of the incest statutes of this state.

Your letter indicates that your request is with regard to the legality of marriages between first cousins within the State of North Dakota where the parties to the marriage are related through adoption wherein one or the other of the first cousins was adopted into the family and no consanguine relationship exists.

Your questions are stated as:

1. Would such a marriage be considered incestuous pursuant to the provisions of section 12-22-06 of the North Dakota Century Code?

2. If the relationship between the parties were known to the County Judge prior to application for marriage license, could the County Judge issue a marriage license to such individuals who are cousins through adoption?

3. Assuming a marriage of first cousins by way of adoption did exist and your opinion would indicate that the marriage was not incestuous nor void or voidable or any combination of such circumstances would inheritance right of either spouse or children of the parties be effective?"

We note at 52 Am. Jur.2d., 917-918 Marriage Section 65 the statement that:

> Section 65. RELATIONSHIP BY MARRIAGE (AFFINITY) OR ADOPTION. Some state incest statutes extend their prohibition against marriage not only to persons related by blood, but also to persons related only by affinity, or in other words, by marriage. In the past the scope of the prohibited relationships by affinity was frequently almost coextensive with the prohibitions applicable to blood relatives, but affinity as a basis of incest prohibitions has been severely criticized, and many statutes today limit the prohibition against marriage of persons related by affinity to certain close relatives of the spouse, or else eliminate affinity completely as an obstacle to marriage. Furthermore, affinity statutes have, in some instances, been rendered of little value by the holding that the relation of affinity between one spouse and the blood relatives of the other ceases as soon as a

> divorce has been granted or on the death of either spouse, at least when there is no living issue of such marriage.
>
> Under existing affinity statutes, however, marriages have been held illegal when contracted by a woman and her father-in-law, a woman and her step-grandson, a man and his stepdaughter, a man and the widow of his uncle, and a man and his brother's widow.
>
> As to whether persons related only by adoption, and not by marriage, may marry each other, the position of the courts is unclear. While it might seem that such a marriage, if the relationship by adoption was of a degree within which marriage is prohibited, would be barred in any event by the fact that legal adoption is ordinarily held to create all of the legal consequences, obligations, and incidents arising and growing out of the status of natural parent and child, it has been held that a couple unrelated by blood, but first cousins by adoption, are not barred from marrying by incest statutes that forbid the marriage of first cousins."

We note further at 41 Am. Jur.2d., 516-517 Incest Section 7 the statement that:

> Section 7. RELATIONSHIP BY MARRIAGE. Relationship by consanguinity, or blood, is necessary to bring a person within the provisions of some statutes defining and punishing incest. Statutes extending to relatives by affinity, or marriage, the prohibition of incest are strictly construed in favor of the defendant. Under such statutes incest may be committed by a brother-in-law with a sister-in-law, and by a brother with a deceased brother's widow.
>
> A man is related by affinity to all the blood relatives of his wife and vice versa. There is, however, no affinity between the blood relatives of one spouse and the blood relatives of the other.
>
> Stepparents are related by affinity to their stepchildren, and sexual intercourse between them is incestuous under statutes including relationship by affinity, but not where the statutes are restricted to consanguinity. * * * "

We note also at 41 Am. Jur.2d., 516 Incest Section 6 the following:

> * * * Sexual intercourse with an adopted child is not incestuous where the statute requires blood relationship for the crime of incest. An adopted child has been held not to be a "daughter" within an incest statute forbidding sexual relations between persons within the degrees within which marriages are declared to be incestuous and void, the marriage law providing that a father shall not marry his "daughter".

Section 14-11-13 of the North Dakota Century Code provides:

> STATUS OF ADOPTED CHILD. The child so adopted shall be deemed, as respects all legal consequences and incidents of the natural

relation of parent and child, the child of such parent or parents by adoption the same as if he had been born to them in lawful wedlock."

Section 14-03-03 of the North Dakota Century Code provides in part:

> VOID MARRIAGES. The following marriages are incestuous and void:
>
> * * *
>
> 5. Marriage between first cousins of the half as well as the whole blood. This section shall apply to illegitimate as well as legitimate children and relatives."

Section 12-22-06 of the North Dakota Century Code provides:

> INCEST' DEFINED - PUNISHMENT. Any person who intermarries, cohabits, or has sexual intercourse with another person related to him within a degree of consanguinity within which marriages by the laws of this state are declared incestuous and void, knowing such other person to be within said degree of relationship, is guilty of incest and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years."

Looking to these statutes it would appear to us in the first instance that the criminal statute refers only to relatives by consanguinity and that the marriage statute refers to relatives by "the half or the whole blood," which to some extent at least would indicate that the legislative assembly did not by these enactments intend to include other relationships such as those established by marriage or legal decree. We note such cases as State of Mississippi v. Lee 17 S.2d. 277, 151 A.L.R. 1143 and the case cited in the annotation thereto People v. Kaiser (1897) 119 Cal 456, 51 P. 702 where the courts decided very definitely that the word "daughter" in such situations did not mean, "adopted daughter," "step-daughter" or "daughter-in-law."

On the basis of these authorities it would thus be our opinion that a marriage between "cousins only related by way of an adoption" is not prohibited by either sections 14-03-03 or 12-22-06 of the North Dakota Century Code. We find nothing in these statutes that would prevent a county judge from issuing a marriage license to persons who are cousins only related by way of adoption. While some confusion might arise in determining degrees of relationship for purposes for example of applying the laws of intestate succession in matters involving persons who are by reason of an adoption legally cousins, and who by reason of a marriage are also man and wife, we would assume that both the adoption proceeding and the marriage proceeding should properly be considered legal, valid and binding for the purpose of determining inheritance rights.

We hope the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General