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Validity of Proxy Marriage in Kentucky

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STUDENT NOTES

VALIDITY OF PROXY MARRIAGE IN KENTUCKY

Proxy marriage is properly classified as a type of formal contract contemplating a ceremony wherein one of the parties is represented through an agent duly authorized by a formal document to enter into the contract in behalf of his principal.¹ All statutory formalities such as licensing, serological tests, solemnization, etc., are complied with, the only varying feature being the absence of one and sometimes both of the parties.

Proxy marriage was formerly of only theoretical concern and its only application in the more civilized parts of the world was the rare occasions when it was employed by members of royalty.² The first World War and subsequent immigration revived interest in the subject in the United States, and it became a practical matter and a vexing one, for there was little legislation or precedent, if any, to serve as a guide.

That the problem is still in very much the same condition, can be gathered from the complaints now being heard from the various governmental agencies, particularly the Veterans Administration,³ who have the unenviable task of deciding the validity of such marriages from the dearth of tangible and conclusive legislation and adjudication on the subject.

The writer has found that of all the states, only Minnesota⁴ has made any provision by statute for proxy marriage. The remaining two states where proxy marriage has been allowed, Kansas⁵ and New

¹ See, LoLordo, *Proxy And Common Law Marriages*, Nov. 1943, I NATIONAL ASSOCIATION OF LEGAL AID ORGANIZATIONS BRIEF CASE 1, 2.

² MADDEN, HANDBOOK OF THE LAW ON PERSONS AND DOMESTIC RELATIONS (1931) 63.

³ See, The Lexington Herald, April 15, 1946, P. 8, Col. 2.

⁴ MINN. STAT. (1941, 1945 Supp.) 517.09; (The condition was attached, however, that the woman must be pregnant. This statute was limited to the duration of the war and 6 months.)

⁵ Howery, *Marriage by Proxy and Other Informal Marriages* (1944-45) 13 KAN. CITY L. REV. 43, 78: "Kansas is one of the states that has definitely ruled that statutory marriages by proxy are valid. The office of the Attorney General has handed down a favorable ruling as to the validity of such marriages. In addition, several marriages by proxy have actually taken place in this state and it seems that in reliance upon the ruling of the Attorney General and public opinion in general they will be upheld by the courts of this state. There is no difficulty in one party obtaining a license and no preliminary residence requirements are exacted. The marriage may be performed by proxy before a probate judge, justice of the peace or clergyman."

Mexico,⁶ do so by interpreting statutes of some years standing and not because of any express statutory enactment to that effect.

Theoretically, from the standpoint of agency and contract, a proxy marriage can validly take place. In an article on this subject it is said: "If as these courts maintain, a marriage contract is purely a civil contract, governed by the same principles of formulation, then it is difficult to escape from the conclusion that a marriage may be contracted by agency. Even the principle that an agent may not do acts of a peculiarly personal nature for his principal would seem to make no difference because the mere making of the contract involves nothing of such a nature; it is only the status which results from the contract which is peculiarly personal . . . Of course in those states where the personal presence of the principal is required, expressly or impliedly, by statute, no such question can arise."⁷ It is only the practical aspects that render such a marriage invalid, as, for instance, the statutory formalities which require the personal appearance of both parties to secure a license, the provisions in regard to serological examinations and physical examinations, and the requirements as to personal appearance at the ceremony.

On the basis of Kentucky Revised Statutes, sec. 402.050, the Attorney General of Kentucky has given his opinion that proxy marriage is invalid in this state. The applicable sub-section reads:

"At least two persons *in addition to the parties* and the person solemnizing the marriage shall be present at every marriage." (Italics supplied.)

Though the reasons for the invalidity were not given it is apparent that the italicized words were interpreted as requiring the personal presence of the parties to the marriage at the ceremony, hence entering the contract of marriage by proxy would not be in accordance with the statutory provision.

That this interpretation is conclusive is open to doubt. Another interpretation, neither extreme nor inharmonious with the statute, is that the word parties can just as well mean the person of the proxy and the other interested person, for the proxy marriage does not contemplate a ceremony lacking in parties. As has been said, "If the rule of agency is applied to proxies in the general sense, however, there is no reason for not interpreting a proxy to be the person himself. What one does by a proxy or agent, he does himself. This is one of the oldest maxims of the law in general."⁸ The Attorney General is in the position of contending that the statute provides that

⁶Howery, *Marriage by Proxy and Other Informal Marriages* (1944-45) 13 KAN. CITY L. REV. 48, 85: "An opinion by the Attorney General indicates that a valid statutory marriage by proxy is within the Statutes of New Mexico."

⁷Note (1931) 16 IOWA L. REV. 534, 537.

⁸Howery, *Marriage by Proxy and Other Informal Marriages* (1944-45) 13 KAN. CITY L. REV. 48, 67.

the personal presence of the parties is an absolute requisite, and nothing short of strict compliance will suffice to ensure the validity of the marriage. That this view is all a matter of interpretation is evident, and there is no logical and legal reason why a proxy marriage could not take place validly if this were the only objection. One can think of many hypothetical cases that would seriously embarrass the court and the question is posed whether the court would declare a proxy marriage invalid in a situation where all express statutory formalities have been met and where there are children and war insurance payments involved. It is one thing to render an opinion where the result would be preventive and no actual problem is faced, and an entirely different thing where such a belief would, if applied to an actual problem, work a great social injustice.

Another section of the statute which must be considered in reaching a conclusion is Kentucky Revised Statutes, sec. 402.120:

“(1) Each person making application for a marriage license shall, at any time within 15 days prior to the application, be examined by a physician authorized to practice in Kentucky as to the existence or nonexistence of any stage of syphilis infection that is or is likely to become communicable.

“(2) No county clerk shall issue a marriage license to any person who has failed to present and file with him either a medical certificate indicating that the examination required by this section has been made, or an order from a court of proper jurisdiction directing him to issue the marriage license.”

Another pertinent section, Kentucky Revised Statutes, sec. 402-130, says:

“The medical examination required by KRS 402.120 shall include a complete history, such physical examination as will reveal any existing clinical evidence of a syphilis infection, and a laboratory test or tests. All laboratory tests required by this chapter shall be made by a laboratory approved by the State Commissioner of Health, or by the laboratory of the State Department of Health. . . . The medical certificate shall be made on a form prescribed by the commissioner of health.”

Unlike the section of the statute dealt with in a previous part of this note, the immediate sections referred to above are capable of but one interpretation, and it is difficult to conceive that a proxy marriage could take place and yet observe all the formalities just mentioned. If the party were to comply with these provisions, the instances in which he could not be present would be rare.

In the case of service men, some states³ in lieu of the prescribed form and procedure regarding pre-marital examinations, accept certificates provided by the United States Army or Navy, in which event an absent person could comply with the examination require-

³ California is an example of a state that does so. (Laws 1943, c. 214.)

ments. These certificates are not accepted in Kentucky, so such a procedure cannot be used to secure the license essential to a valid ceremony. The one possible exception would be in the case of a pregnant woman who can secure a court order to compel the issuance of a license. Once a license has been obtained we are back to the conclusion that a valid proxy marriage could take place.

It would seem to follow from what has been said that proxy marriage is invalid in Kentucky, notwithstanding Kentucky Revised Statutes, sec. 402.050, which should be interpreted in favor of proxy marriage, but because of Kentucky Revised Statutes, sec. 402.120 and sec. 402.130, which make it practically impossible to secure a license without the personal appearance necessary for a physical examination.

The conclusion is that for practical, rather than theoretical reasons, a valid proxy marriage could not occur in Kentucky.

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