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## The Case for Marriage by Proxy

Marvin M. Moore\*

A PROXY MARRIAGE is one in which an agent represents one of the parties at the marriage ceremony.<sup>1</sup> The absent party (usually the groom) has selected the proxy and executed a power of attorney authorizing the latter to act for him.<sup>2</sup> An effort is made to comply with the local statutory formalities for marriage.<sup>3</sup> The bride procures a license and files the requisite serological tests, and after completion of the marriage ceremony the record is returned to the proper office for filing.

As will later appear, only a small number of American jurisdictions recognize proxy marriages performed within their borders.<sup>4</sup> The writer considers this fact deplorable. Admittedly, it is only during wartime that marriage by proxy is of great utility, since only then are a substantial number of lovers forcibly separated for protracted periods. But during wartime proxy marriage unquestionably serves a useful purpose,<sup>5</sup> and it is an undeniable, if regrettable, fact that since 1941 few years have been free from war, "hot" or "cold."<sup>6</sup> Surely, marriage should be possible between a woman and a man whose military obligations have compelled him to be apart from her. This would seem particularly true when a motivating factor is the discovery that the woman is pregnant.<sup>7</sup>

Since wars and other events have throughout history caused sweethearts to be separated, marriage by proxy is not a new

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<sup>1</sup> Annot., 170 A. L. R. 947 (1947).

<sup>2</sup> Hower, *Marriage by Proxy and Other Informal Marriages*, 13 K. C. L. Rev. 48 (1944).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Infra*, n. 24. No state refuses to honor a proxy marriage contracted in a jurisdiction which permits this form of matrimony.

<sup>5</sup> During World War II several thousand proxy marriages were performed between resident women and members of the armed forces stationed abroad. *Supra*, note 1. A number of marriages by proxy were contracted during World War I also. Comment, 55 Yale L. J. 735 (1946).

<sup>6</sup> Our government has been drafting men into the armed forces and stationing them abroad throughout the existing "cold war," and this obviously produces a need for the allowance of marriage by proxy.

<sup>7</sup> Declares one writer: "Probably the greatest single factor compelling the use of the proxy marriage is that of the legitimation of children." Comment, 25 So. Cal. L. Rev. 181 (1951).

institution. In fact, it has been employed fairly continuously since the late years of the Roman Empire, especially among the nobility and others of wealth.<sup>8</sup> The late Roman law considered marriage to be based solely upon the agreement of the parties to accept each other from the present moment as husband and wife.<sup>9</sup> Consent might be expressed by an agent as in an ordinary contract. However, though the Roman law permitted a man who was away from home to contract a proxy marriage, such a union could not be effected by a woman who was absent from her place of residence.<sup>10</sup> The most likely explanation for this distinction lies in the fact that the Roman law required the wife to be led to the husband's home.<sup>11</sup> If the woman were absent from her place of residence, she would usually be absent from that of her lover as well, and this requirement could not then be met. The fact that it was normally the man who was away from home (helping the Roman armies preserve the empire) doubtlessly contributed to the formulation of the distinction.<sup>12</sup>

For a long time the church manifested no clear position on the validity of proxy marriages. It expected the bride and groom to exchange their vows personally before the altar and to have their union blessed, but a couple's failure to do so did not preclude the creation of a valid marriage.<sup>13</sup> In the thirteenth century Pope Innocent III formally accepted the Roman view that a marriage might be accomplished by proxy.<sup>14</sup> Some canonists of this period contended that a marriage contract is by nature so different from an ordinary contract that the expression of consent should surely be made in person. But this objection was successfully met by the reply that a procurator represents the person of his principal, and the latter can therefore utter the necessary words through the former's mouth.<sup>15</sup>

At the Council of Trent, in 1563, it was decided that matrimonial consents must be exchanged before a priest and two

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<sup>8</sup> 1 Vernier, *American Family Laws* 72 (1931).

<sup>9</sup> Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 Harv. L. Rev. 474 (1919).

<sup>10</sup> 1 Esmein, *Le Mariage en Droit Canonique* 103 (1889).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra* note 7, at 184.

<sup>13</sup> Esmein, *supra* note 10, at 96.

<sup>14</sup> Lorenzen, *supra* note 9, at 475.

<sup>15</sup> Esmein, *supra* note 10, at 170.

witnesses.<sup>16</sup> For a while there was considerable dispute among canonists as to whether this requirement precluded the contraction of proxy marriages, but the ultimate conclusion was that it did not.<sup>17</sup> However, the proxy and the bride (or groom) had to comply with the new requirements.

During the Renaissance proxy marriages were "quite general" among the upper class and not infrequent among the common people.<sup>18</sup> Three famous persons of this period who married by proxy are Vasco Balboa, Christopher Columbus, and Queen Mary I of England.

At an early date<sup>19</sup> the canon law relative to marriage by proxy was accepted in England, and this method of getting married remained available there until the middle of the eighteenth century, when Lord Hardwick's Act was passed.<sup>20</sup> This statute and those which followed it<sup>21</sup> clearly contemplated the presence of both parties at the wedding ceremony.

The settlers of the American colonies brought with them the English law on marriage.<sup>22</sup> Since marriage by proxy was permissible in England when the settlement of our nation began, it would appear that this form of matrimony became acceptable here. This conclusion is supported by the fact that there are reports of proxy ceremonies having been performed in the colonies.<sup>23</sup>

The current status of the proxy marriage in the United States may be summarized as follows: Only nine states honor proxy unions formed within their borders. These are Florida, Idaho, Iowa, Kansas, Montana, Nebraska, Oklahoma, Nevada, and New Mexico. In four jurisdictions—Alabama, Georgia, South Carolina and Texas—the validity of matrimony by proxy is unknown.<sup>24</sup> And in the remaining thirty-seven states proxy

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<sup>16</sup> Lorenzen, *supra* note 9, at 476.

<sup>17</sup> *Supra* note 7, at 182.

<sup>18</sup> Goodsell, *A History of the Family as a Social Institution*, p. 203 (1929).

<sup>19</sup> By 1430 at the latest, for Lynwood's *Provinciale* makes mention of England's recognition of marriage by proxy, and this work was written in 1430. 147 *Provinciale* (Bretton-Hopyl ed. 1505).

<sup>20</sup> 26 Geo., c. 3 (1753).

<sup>21</sup> The Marriage Acts of 1836, 1892, and 1898. The citation of the last one is 61 Vict., c. 58, § 6.

<sup>22</sup> Lorenzen, *supra* note 9, at 482.

<sup>23</sup> *Supra* note 7, at 182.

<sup>24</sup> Smithburg, *National Legal Aid and Defender Association Chart* (1960).

marriages are invalid.<sup>25</sup> This last fact becomes especially interesting when it is noted that only one jurisdiction, Louisiana, has a statute expressly forbidding marriage by proxy.<sup>26</sup>

Before considering in detail the laws of individual states, one should realize that a proxy marriage may be sustained under either of two theories: That it constitutes a valid common law marriage or that it meets the statutory requirements for a ceremonial marriage.<sup>27</sup> In the fifteen jurisdictions<sup>28</sup> which still recognize the common law marriage parties may enter matrimony by merely agreeing to accept each other immediately as husband and wife.<sup>29</sup> No ceremony of any kind is necessary. However, a few of these states impose the additional requirement of cohabitation and repute.<sup>30</sup> "Repute," as used here, means a manifestation to others that the parties are married.

Only three of the nine jurisdictions in which proxy marriages may be validly performed sustain such unions as common law marriages. These states are Florida, Kansas, and Oklahoma. In 1943 the attorney general of Florida declared that persons could not accomplish marriage by means of a proxy ceremony in that state.<sup>31</sup> This opinion was supported by a 1920 Florida case,<sup>32</sup> which had held that the consents requisite to a common law marriage must be repeated by the parties in the presence of one another. However, in 1946 the Federal District Court surprised everyone by ruling that a proxy wedding performed in Florida was valid as a common law marriage.<sup>33</sup> The court said that only two elements are essential to a common law marriage—"capacity of the parties and mutual consent." Needless to say, both of these elements are normally present in a proxy marriage.

The attorney general of Kansas has declared that proxy unions may be formed in that jurisdiction,<sup>34</sup> and numerous proxy

<sup>25</sup> *Ibid.*

<sup>26</sup> *La. Civ. Code art. 109 (1932).*

<sup>27</sup> *Jacobs and Goebel, Cases and Other Materials on Domestic Relations 129 (1952).*

<sup>28</sup> These are Alabama, Colorado, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. *Smithburg, supra note 24.*

<sup>29</sup> *35 Am. Jur. Marriage § 28 (1941).*

<sup>30</sup> *35 Am. Jur. Marriage § 29 (1941).*

<sup>31</sup> *Comment, 55 Yale L. J. 748 (1946).*

<sup>32</sup> *Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156 (1920).*

<sup>33</sup> *U. S. v. Layton, 68 F. Supp. 247 (D. C. Fla. 1946).*

<sup>34</sup> *Howery, supra note 2, at 92.*

marriages have been contracted there. In fact, an article appeared in the Reader's Digest for December, 1945, concerning a Kansas City man who had acted as a proxy thirty-nine times.<sup>35</sup> The situation in Kansas is particularly favorable to marriage by proxy, since all that is necessary to effect a common law union there is mutual consent and "some measure of publicity."<sup>36</sup> A marriage ceremony fulfills the publicity requirement.

The law of Oklahoma is liberal toward informal marriage arrangements, and the state has consequently found it easy to treat marriage by proxy as a form of common law marriage.<sup>37</sup> Many proxy unions have been created there, a few with proxies for both parties.<sup>38</sup>

The remaining six of the nine jurisdictions in which persons may enter matrimony by proxy uphold such marriages as a form of ceremonial marriage. In Idaho and Montana proxy unions are possible under the following similar statutes:

Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations.<sup>39</sup>

Consent alone will not constitute marriage; it must be followed by a solemnization or by mutual and public assumption of the marital relation.<sup>40</sup>

That these two states should accept proxy ceremonial marriages is somewhat surprising in view of the fact that both jurisdictions have statutes requiring "the parties" to utter their consents *in the presence* of the person solemnizing the union.<sup>41</sup> Apparently the word "parties" is construed as meaning the bride (or groom) and the proxy. Although Idaho and Montana recognize common law marriages, neither state treats marriage by proxy as a form of common law union, since both jurisdictions

<sup>35</sup> 47 Reader's Digest 75 (1945). The man's name was Thomas H. Finnigan. When the interviewer asked Mrs. Finnigan whether she objected to her husband's practice of acting as a proxy she replied, "I don't mind, just so long as he doesn't go on the honeymoons."

<sup>36</sup> *Butler v. Butler*, 130 Kan. 186, 285 P. 627 (1930).

<sup>37</sup> Howery, *supra* note 2, at 92.

<sup>38</sup> Comment, 55 Yale L. J. 746.

<sup>39</sup> *Idaho Code Ann.* § 32-201 (1948). In a letter dated November 28, 1961, the Assistant Attorney General of Idaho wrote the author the following: "I personally know of four . . . proxy marriages which have been performed in Idaho and . . . believe that proxy marriage is possible in Idaho."

<sup>40</sup> *Mont. Rev. Codes* § 48-101 (1947). See Smithburg, *supra* note 24.

<sup>41</sup> *Idaho Code Ann.* § 32-204 (1948) and *Mont. Rev. Codes* § 48-128 (1947).

deem consummation essential to a common law marriage.<sup>42</sup>

The requirement of consummation likewise prevents Iowa from sustaining a proxy wedding as a form of common law marriage.<sup>43</sup> But since the state's marriage statutes contain no provision necessitating the presence of both parties, proxy ceremonial marriages are possible there.<sup>44</sup>

A proxy ceremony is effective in Nebraska if the bride and groom belong to a religious denomination which sanctions this form of marriage.<sup>45</sup> This result is produced by the following statute:

It shall be lawful for every religious society to join together in marriage such persons as are members of the society, according to the rites and customs of the society to which they belong. . . .<sup>46</sup>

The Roman Catholic Church is seemingly the only Christian religious denomination which *expressly* authorizes marriage by proxy,<sup>47</sup> but various other sects are willing to solemnize proxy weddings. Although Nebraska, like Idaho and Montana, has a statute declaring that "the parties" must state their consents *in the presence* of the individual who solemnizes the marriage, Nebraska's legal authorities, like those of the other two states, have refrained from so construing this statute as to preclude the creation of valid proxy marriages.

That marriage by proxy is not inconsistent with the laws of Nevada was decided in the 1951 case of *Barrons v. United States*.<sup>48</sup> There the facts were as follows: In the summer of 1944 Barrons, an army lieutenant serving in Africa, was informed that his sweetheart, June, was pregnant by him. He thereupon obtained the help of the Red Cross, which arranged for the performance of a proxy marriage in Nevada. One week after the ceremony took place Lieutenant Barrons was killed in action. The question arose as to whether June was entitled to the proceeds of the decedent's National Service Life Insurance policy, and the

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<sup>42</sup> Idaho Code Ann. §§ 32-201 & 32-203 (1948); *Stevens v. Woodmen of the World*, 105 Mont. 121, 71 P. 2d 898 (1937).

<sup>43</sup> *Banchard v. Lambert*, 43 Iowa 228, 22 Am. Rep. 245 (1876).

<sup>44</sup> Committee of the Association of American Law Schools, *Selected Essays on Family Law* 301 (1950); and Smithburg, *supra* note 24.

<sup>45</sup> Smithburg, *supra* note 24.

<sup>46</sup> *Nev. Rev. Stat.* § 42-115 (1952).

<sup>47</sup> Pilpel and Zavin, *Your Marriage and the Law* 45 (1952).

<sup>48</sup> 191 F. 2d 92 (1951).

answer to this depended upon whether she had become his wife. The United States Court of Appeals decided that she had, notwithstanding the fact that Nevada has not recognized common law marriages since 1943<sup>49</sup> and the additional fact that a Nevada statute<sup>50</sup> requires the parties to a ceremonial marriage to state their vows in the presence of the person officiating. Declared the court:

The statute does not clearly preclude the possibility of making the requisite declaration through an authorized agent. . . . The two principal objectives of the requirement of formal solemnization, apparently, are to insure the public interests in publicity and certainty. Both these objectives are achieved as well in the case of a proxy ceremony as in the usual type of ceremony. . . .

In the . . . absence of an express prohibition in the Nevada laws against such marriages it cannot be said that proxy marriages are inconsistent with its marriage laws.

New Mexico has an act similar to the quoted Nebraskan statute. New Mexico's enactment declares:

It shall be lawful for any religious society to celebrate marriage conformably with the rites and customs thereof.

. . .<sup>51</sup>

It would appear that in this jurisdiction a proxy union could be effected only between members of a religious sect which has authorized this method of marriage. However, the attorney general of New Mexico has expressed a different view. In a 1943 opinion the attorney general stated simply that New Mexico's marriage statutes permit a wedding solemnized with one party represented by a proxy.<sup>52</sup> Although the Opinion noted that the Roman Catholic Church has accepted marriage by proxy, it did not restrict this form of matrimony to Catholics or to members of other churches which perform proxy ceremonies.

After analyzing the laws of the nine jurisdictions which permit marriage by proxy one wonders why it is sanctioned by so few states. Why do only three of the fifteen jurisdictions which recognize common law marriages accept proxy weddings as a form of common law union? Admittedly, those states which

<sup>49</sup> *Ibid.*

<sup>50</sup> *Nev. Rev. Stat.* § 122.110 (1960). The statute operative at the time of this case was § 4054 of *Nev. Comp. Laws* (1930).

<sup>51</sup> *N. M. Stat. Ann.* § 57-1-3 (1953).

<sup>52</sup> *Opinions of Attorney General of New Mexico*, No. 4283 (1943).

deem cohabitation essential to a common law marriage can justify their non-recognition of proxy weddings, since the absent party to a proxy ceremony can seldom meet this requirement. But the majority of the jurisdictions which sanction common law marriages do not consider cohabitation necessary to the creation of such a union.<sup>53</sup> Under common law doctrine the status of marriage is created by a simple civil contract.<sup>54</sup> This being so, it is difficult to escape the conclusion that a marriage may be contracted by agency. For as a general rule a principal can appoint an agent to execute any act that the principal can lawfully perform. The argument, sometimes advanced,<sup>55</sup> that marriage is too personal an act for an agent to perform fails to differentiate between the marital relation and the ceremony by which it is created. The purely mechanical functions performed by a proxy at the marriage ceremony are obviously not unduly personal. It is submitted that a jurisdiction which recognizes common law marriages and does not require cohabitation cannot logically justify a refusal to accept matrimony by proxy as a form of common law marriage. As will appear shortly, policy reasons vindicating such a position are also lacking.

That only six states sustain proxy unions as a form of ceremonial marriage is likewise puzzling. True, proxy marriages are barred in some states by the fact that the laws require both parties to appear personally when applying for a license<sup>56</sup> or to be wedded in the presence of the person who solemnizes the marriage.<sup>57</sup> But there is no good reason why marriage by proxy should not be sanctioned as a kind of ceremonial marriage in the remaining jurisdictions. As mentioned earlier,<sup>58</sup> the parties to a proxy wedding endeavor to satisfy all of the local statutory formalities for marriage. Consequently, as was pointed out in the *Barrons* case,<sup>59</sup> marriage by proxy in no way frustrates the

<sup>53</sup> *Supra* note 44, at 300.

<sup>54</sup> *Supra* note 44, at 301.

<sup>55</sup> Woods, *Marriage by Proxy*, 12 J. Bar Ass'n D. C. 176 (1945).

<sup>56</sup> *Ariz. Rev. Stat. Ann.* § 25-121 (1956); *Ill. Ann. Stat.* ch. 89, § 6 (Smith-Hurd 1956); *Ind. Ann. Stat.* § 44-205 (1952); *Mo. Ann. Stat.* § 451.040 (Vernon 1952); *N. J. Stat. Ann.* § 37:1-8 (1940); *Ohio Rev. Code Ann.* § 3101.05 (Page 1960); *Pa. Stat. Ann.* tit. 48, § 1-3 (1960); and *Utah Code Ann.* § 30-1-8 (1953).

<sup>57</sup> *Minn. Stat. Ann.* § 517.09 (1947); *N. Y. Dom. Rel. Law* § 12; *N. C. Gen. Stat.* § 51-1 (1950); *Ore. Rev. Stat.* § 106.150 (1950); *R. I. Gen. Laws Ann.* § 15-3-8 (1957); and *Wash. Rev. Code* § 26.04.070 (1959).

<sup>58</sup> *Supra* p. 1.

<sup>59</sup> *Supra* note 48.

marriage statutes' obvious purposes, namely to achieve certainty as to when marriage has been contracted, to assure a minimum amount of publicity, and to prevent marriages likely to produce defective offspring.<sup>60</sup> And since a wedding ceremony is legally nothing more than the execution of a formal contract,<sup>61</sup> orthodox principles of agency law appear to support a ceremonial proxy marriage, just as they do a common law proxy marriage.

That matrimony by proxy does not offend public policy would seem to be evidenced by the fact that many countries with ethical and religious concepts similar to our own have for long periods accepted it. Among these nations are Austria, England, Germany, Mexico, Portugal, and Spain.<sup>62</sup> In addition, Belgium, France, and Italy authorized proxy weddings for the period of World War I, and the latter two countries permitted them again during World War II.<sup>63</sup> To quote from the English case of *Apt v. Apt*:<sup>64</sup>

It is difficult to assert that a marriage ceremony expressly recognized by the common law and adopted in civilized countries with a long Christian tradition is . . . essentially abhorrent to Christian ideas. . . .

And to repeat the court's words in the Ohio case of *Hardin v. Davis*:<sup>65</sup>

We have been unable to find any judicial declaration, here or elsewhere, which holds that a marriage by proxy is contrary to public policy or to the laws of nature as viewed by Christian nations.

Another policy consideration which tends to support the legal position of persons married by proxy is the long-recognized principle that the intent of the parties to a doubtful marriage

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<sup>60</sup> Concerning the last-named purpose, one writer has said: "(S)tatutes governing entry into marriage . . . protect the public against undesirable . . . marriages. . . . Protection is achieved by requiring . . . a license certifying the requisite mental capacity (and) freedom from disease . . . ; and by prohibiting incestuous . . . and miscegenetic marriages." Comment, 55 Yale L. J. 737 (1946).

<sup>61</sup> Committee of the Association of American Law Schools, *Selected Essays on Family Law* 301 (1950).

<sup>62</sup> *Hardin v. Davis*, 16 Ohio Supp. 19 (1945); and Lorenzen, *supra* note 9, at 478 and 481.

<sup>63</sup> Lorenzen, *supra* note 9, at 479; and Comment, 55 Yale L. J. 736 (1946).

<sup>64</sup> 176 L. T. 359 (1947).

<sup>65</sup> *Supra* note 62.

should be effectuated, in the absence of compelling reasons for a contrary decision.<sup>66</sup> Said the court in *Modianos v. Tuttle*:<sup>67</sup>

It is the uniform policy of civilized countries, especially those affected by the influence of Christianity, to encourage marriage as the basis of organized society and to recognize as valid all such as do not offend the essentials of that faith.

In conclusion, though only a minority of American jurisdictions sanction marriage by proxy, considerations of logic and public policy indicate that many more should do so. These include those common law marriage jurisdictions which do not require cohabitation and those non-common law marriage states which have no statutes clearly requiring both parties personally to apply for the license or personally to attend the ceremony. It is hoped that this situation will be remedied. When a state assumes the authority to prescribe the sole conditions under which its inhabitants may enter into so basic a relation as that of marriage, it incurs the responsibility of making certain that this right is barred only for good reason.

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<sup>66</sup> *Supra* note 62.

<sup>67</sup> 12 F. 2d 927 (D. C., La. 1925).