Denver Law Review

Volume 20 | Issue 11 Article 2

July 2021

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The Validity in Colorado of Marriages by Proxy

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Marriages by proxy or through the mail may seem incredible and subject to derision, but no longer are they confined to the scrutiny of a classroom in domestic relations. With so many of our soldiers abroad the validity of such marriages has become a matter of great importance.

Our problem may be stated thus: In Colorado may a soldier abroad enter into a valid marriage with his fiancee, who is in Colorado, by proxy or correspondence or in any other manner where the parties are not in each other's presence? Basically, this will depend upon whether the mere presence of the parties at the time of making a contract of marriage is an essential element to the agreement between them.

Prior to the decision of *Ex Parte Suzanna*, 295 Fed. 713 (D. Mass. 1924),[1] the validity of a marriage by proxy or agent had never been judicially determined either in the United States or in England. Such marriages were, however, upheld in the legal systems of many European countries. Marriages by proxy were permitted in England until the eighteenth century and became probably a part of the common law of this country.

In an article published in the *Harvard Law Review* in 1919,[2] Professor Ernest G. Lorenzen concluded that such marriages are valid in any state of the Union where common law marriages are recognized. Toward the end of the first World War the Judge Advocate General of the Army gave his opinion that a marriage by letter was valid.[3] In an opinion announced by a federal court in 1918, it was decided that marriage, like any other contract, may be effected by correspondence alone.[4] Further authorities may be added to *Ex Parte Suzanna* upholding such

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[1]The Suzanna case held that a marriage by proxy in Portugal, where such marriages are allowed, between a woman resident in Portugal and a man resident in Pennsylvania, was valid in any state where common law marriages are recognized.

[2]*Marriage by Proxy and the Conflict of Laws* (1919), 32 HARV. LAW REV. 473.

[3]*Ibid.* n. 488. EDITOR'S NOTE: But the following appears in DIGESTS OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1930 (1932), S. 476, p. 227:

"A written contract between a soldier of the American Expeditionary Forces in France and a woman of Cook County, Illinois, recites that the contracting parties recognize each other as man and wife. The purpose of the contract was to legitimize a child previously born to them. The War Department can make no authoritative ruling as to the validity of the purported marriage. Unless it is followed by a ceremonial marriage, as required by Illinois Laws, 1905, p. 317, it will not be recognized as valid in Illinois. *291.1, Jan. 8, 1919.*"

[4]Great Northern Ry. v. Johnson, 254 Fed. 683, 166 C. C. A. 181 (8th, 1918).

marriages when celebrated in a jurisdiction that recognizes common law marriages.[5] Generally, as to a marriage ceremony, the law of the state where the celebration took place is the law which governs its validity. Are there established principles of contract and agency, unshaken by considerations of public policy, to uphold such marriages in Colorado?

MARRIAGE BY PROXY

By Colorado statute marriage is considered as a civil contract to which the consent of the parties is essential.[6] We have two general ways of making a marriage: First, the solemnization in the form prescribed by statute, and second, an informal contract which requires no ceremony nor solemnization. Colorado law recognizes the validity of common law marriages. Our statute prescribing formalities for solemnizing marriage does not otherwise nullify a valid informal marriage.[7] Created by an informal contract, a common law marriage may be by parol or in writing, without ritual or form, expressed in any manner the parties desire. All that is required is capacity and the expression of present consent. May an agent make a contract of marriage for his principal which will be upheld as a common law marriage? If such marriage can be created by contract alone, established by satisfactory proof thereof, there is no reason why such contract cannot be made by an agent for his principal. If, however, in addition to the contract itself we require cohabitation or habit and repute as further elements to constitute a valid common law marriage, then obviously an agent cannot make such a contract, for these elements involve personal factors and would require the presence of both parties.

It is true that there is a conflict of opinion by the courts whether a valid common law marriage may be created by an agreement alone, without consummation or cohabitation.[8] While there are a number of cases in which the court by its language purports to require cohabitation, it will be observed that in nearly all of them the facts in the case actually showed cohabitation and the statement was dictum.[9] For a case to be considered as a precedent on this question it would seem that there should be present no evidence of cohabitation. While some courts regard this difference of opinion as a difference in measuring the quantum of proof necessary to prove a common law marriage, it is in a few cases a rule of substantive law. Actually, the cases are rare which expressly hold that cohabitation is essential to the validity of an informal marriage.

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[5]U. S. v. Tuttle, 12 Fed. (2d) 927 (E. D. La. 1925); Silva v. Tillinghast, 36 Fed. (2d) 801 (D. Mass. 1929); U. S. v. Commissioner of Immigration, 298 Fed. 103 (S. D. N. Y. 1924).

[6]4 1935 C. S. A., C. 107, S. 1.

[7]Taylor v. Taylor, 10 Colo. A. 503, 50 Pac. 1049 (1897).

[8]33 A. L. R. ANNO. 27 (1924).

[9]KOEGEL, COMMON LAW MARRIAGE (1922), 116, 138.

They are based on the theory that marriage is a status which cannot be obtained until the parties have publicly assumed the relationship either through a ceremonial marriage or have cohabited and publicly held themselves out as husband and wife. But this view violates the historical concept that if a mutual agreement in fact is clearly established by direct evidence, neither holding out nor cohabitation is necessary to constitute the parties husband and wife.[10] Most authorities agree that under the common law marriage may be created by agreement without cohabitation. Cohabitation and a holding out add nothing to a legal marriage, but are merely evidence from which a marriage may be presumed. Logically this is the proper view, for since "cohabitation" means not merely sexual intercourse but living together as husband and wife and entails a lapse of time sufficient to enable the public to judge the relations of the parties, there would be sexual intercourse before the marriage is completed, and this would surely be contrary to the real purpose of the marriage laws.[11]

Our supreme court has not been unaware of this conflict. In *Peters v. Peters, (Re Peters)*, 73 Colo. 271, 215 Pac. 128 (1923), 33 A. L. R. 24 (1924), it recognizes this conflict and takes the position that the habit and repute of marriage are not essential but merely evidence of the essential—consent.[12] Marriage is a contract to be established as any other contract. Evidence that the parties conducted themselves as man and wife is some evidence of such a contract; evidence that they did not is some evidence against it. By the same token consummation or cohabitation are merely evidentiary facts of consent.

It is true that prior to *Peters v. Peters*, the Colorado supreme court and the court of appeals used expressions that would seem to require the elements of cohabitation or habit and repute in addition to proof of the contract. *Klipfel's Estate v. Klipfel*, 41 Colo. 40, 92 Pac. 26 (1907); *Taylor v. Taylor*, 10 Colo. A. 303, 50 Pac. 1049 (1899); *Employer's Ins. Co. v. Morgulski*, 69 Colo. 223, 225, 193 Pac. 725 (1920). But in the *Klipfel* case there was no marriage ceremony or any express contract of marriage, and petitioner based his alleged marriage upon evidence of cohabitation and reputation (page 44). While in the *Taylor* case the specific holding was that no marriage was ever contemplated and the relations between the parties was wholly meretricious, in the *Morgulski* case evidence of cohabitation was resorted to merely to show the consent.

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[10]1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1890), S. 315; 27 HARV. LAW REV. (1914) 378 n.; Dalrymple v. Dalrymple, 161 Eng. Reprint 665 [2 Hag. Cons. 54 (1811)]; 2 KENT, COMM. *86; 2 GREENLEAF, EVIDENCE (16th ed. 1899) S. 460; 1 RUTHERFORD, INST. 345; 1 BL., COMM. *433; 1 BISHOP, *supra*, SS. 239, 313, 315, 317.

[11]L. R. A. 1915 E (57 L. R. A., N. S.) ANNO. 8, n. 25.

[12]Followed in Moffat Coal Co. v. Industrial Commission, 108 Colo. 388, 118 Pac. (2d) 769 (1941).

Thus, in one case the expression of the court was used to state a proved or admitted fact, while in the others, the contract of marriage was sought to be proven by cohabitation and habit and repute, and the court merely stated that the cohabitation of the parties, or their reputation, is evidence of a marriage.

We believe that in Colorado, marriage, though the most solemn of all contracts, is yet but a contract.[13] Proof of the contract alone is sufficient to constitute a valid common law marriage, but where the contract is denied or cannot be shown, or is based upon an implied understanding, mutual assent may be inferred from cohabitation or repute.[14]

If marriage is but a civil contract, made in the same manner as other contracts, there is no reason why it cannot be entered into through an agent. The mere presence of the parties at the time of the agreement is not essential to the formation of an agreement.[15] Nor can we logically say that the formation of such a contract is so personal in nature, or so immoral, that it cannot be delegated to an agent. The mere making of the contract is not personal in nature; only the status resulting therefrom is personal. If a general authority were given to an agent to select a spouse for one, at the agent's own discretion, it would be invalid, 1 Meechem, *Agency* (2nd ed. 1914) S. 126. Then it would be analogous to marriage brokerage contracts, which are uniformly regarded contrary to public policy. But a special authority given, and especially during war time, should be valid if the marriage contract is no different from other contracts.

Suppose our soldier in Australia, prompted by religious reasons, desires a church ceremony and in a form prescribed by statute. May he solemnize such marriage with his fiancee in Colorado through an agent who appears for him at the ceremonial marriage?[16] Failure to conform

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[13]Of course an informal marriage may be invalid for other reasons: viz., incapacity of parties; that the mutual promises are not consistent with the essentials of marriages. There must be more than a promise to live together; the relation must be mutually exclusive of marriage with someone else. Taylor v. Taylor, *supra* note 7. There must be an expression of present consent. In re estate of Danikas (Ryan v. Cordas), 76 Colo. 191, 230 Pac. 608 (1924). It cannot be a contract for future marriage. Radovich v. Radovich, 84 Colo. 250, 269 Pac. 22 (1928).

[14]In support of its holding in Peters v. Peters, *supra* p. 285, the court cites the leading American cases for the view that cohabitation and habit and repute are not necessary to constitute a valid common law marriage: viz., David v. Stouffer, 132 Mo. A. 555, 112 S. W. 28 (1908), and Hulett v. Carey, 66 Minn. 327, 69 N. W. 31 (1896), but in these cases cohabitation was a proven or admitted fact and the discussion was dictum. The doctrine has been upheld expressly in Great Northern Ry. v. Johnson, *supra* note 4 (also cited), and in Jackson v. Winne, 7 Wend. 47 (N. Y. Sup. 1828), 22 Am. Dec. 563 (1881), and U. S. v. Simpson, 4 Utah 227, 7 Pac. 257 (1885).

[15]Great Northern Ry. v. Johnson, *supra* note 4; Ex Parte Suzanna, *supra* p. 283.

[16]We note in the Denver ROCKY MOUNTAIN NEWS, Sept. 27, 1943, that a marriage was thus solemnized in Denver, the groom being represented by his father, who held a power of attorney.

with the formalities prescribed by statute should not affect the validity of such marriage as a common law marriage.[17] But we believe that such a formal marriage ceremony ought to be sustained as a formal marriage prescribed by statute, for if our statute does not expressly require the personal presence of both parties there is no reason why an agent may not go through the formalities of making a solemn contract for his principal. The only difference between a formal marriage as prescribed by statute and a common law marriage is in the method of expressing consent.[18]

Nowhere in our statute is the personal presence of the parties required. The application for marriage license need be made by only one of the parties; premarital examinations need not be made in Colorado nor filed in person, 4 1935 C. S. A., C. 107, S. 5. It has been contended that the requirement of personal presence of both parties can be found in the certificate of marriage, which recites that the officer has solemnized the rites of matrimony of *A* and *B* in the presence of two witnesses, *ibid.* S. 12, but the certificate does not state that *A* and *B* were personally present. In this form the ceremony itself is the thing attested by witnesses, not the personal appearance of the parties. It is axiomatic that statutory regulations of marriage are construed as directory only and are interpreted merely as directions to the solemnizing officer.[19] Indeed, since in Colorado marriage rests upon the fact of consent, it would follow logically that marriage might be contracted by proxy, although neither of the parties was present when the consent was exchanged by the parties.

Further problems might well be suggested: What under our law is the proper mode of appointing an agent to execute such a formal contract for his principal? If marriage can result from an informal contract no particular form of appointment should be required. The agent's authority may be conferred orally or in writing, provided it can be sufficiently proven and clearly discloses the principal's intention, the identity of the agent and what he is to do.[20]

If the agent makes out the application for license and must acknowledge it for purposes of representing his principal in a solemnized marriage ceremony, perhaps he should have written authorization verified by his principal. We doubt that failure to verify such application will invalidate the marriage, once the agency is proven.

Surely, it is advisable that the agency be conferred by writing and verified, and should clearly disclose the principal's intention, identify the agent and prospective spouse, and should show what the agent is to

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[17]39 A. L. R. ANNO. 538 (1925); Taylor v. Taylor, *supra* note 7.
[18]Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933).
[19]1 BISHOP, *op. cit. supra* note 10, SS. 403, 423-449.
[20]2 C. J. S., S. 26, p. 1055. An agent need not have written authority to make a simple written contract.

do. A seal is not necessary. The agent's authority should be clear and decisive.[21]

MARRIAGES BY CORRESPONDENCE OR TELEPHONE

If Colorado recognizes common law marriages without requiring cohabitation or personal presence as essential elements thereof, then an American soldier abroad should be able to enter into a valid marriage by mail if the one to whom he addresses his offer of marriage accepts it in Colorado. Surely, it would be simpler to create the marriage status by the exchange of consents through the mail. *Great Northern Railway v. Johnson, supra* note 4, expressly holds that a marriage by correspondence is valid if valid by the law of the state from which the acceptance was sent. It has been stated that under the correct common law doctrine a valid marriage might be contracted by mail.[22] Indeed, if a marriage by proxy is recognized under the common law there is no reason why we should require personal presence for a marriage created by correspondence. Marriage being but a civil contract, the rules to be applied should be the same as are applied to ordinary contracts. Personal presence of the parties should add nothing to the formation of their agreement. By what law will the validity of such marriages be governed? Under established principles of conflicts of law the law of the place of celebration will control the validity of a marriage. This will be where the contract is made. As to an ordinary contract the general rule is that the place where made is the place where the acceptance is mailed. Thus, if the acceptance were mailed in Colorado, the marriage should here be valid. While marriage creates a status there is no reason for applying a different rule.[23] In predicting that our court would uphold such a marriage we are guided by *Peters v. Peters,* where the court followed and rested its position upon the authority of the *Great Northern Railway* case.

By the same token marriages by telephone should be valid in Colorado, at least they should be upheld as valid common law marriages. An informal contract may be made over the telephone.[24] Such marriages undoubtedly would be subjected to the keenest scrutiny of our courts. The vagaries of war may justify unique ways of contracting marriages, but public policy will require the clearest proof of such contracts. What law will govern such a marriage? Applying the rule as to ordinary contracts, it would seem that the place from which the accepting party speaks

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[21]Thus, in Hawaii v. Li Shee, 12 Hawaii 329 (1899), the court held that assuming the marriage by proxy was valid, there was no proof that the proxy was given or that the alleged husband consented.

[22]1 BISHOP, *op. cit. supra* note 10, S. 325; SWINBOURNE, ESPOUSALS (2d ed.) 162, 181-183.

[23]Coad v. Coad, 87 Neb. 290, 292, 127 N. W. 455, 457 (1910). This was the reasoning of the Great Northern Railway case, *supra* note 4.

[24]17 C. J. S. 400, n. 77.

would be the place of celebration. If, therefore, made in Colorado, it should be valid. There is more doubt whether our courts would uphold such marriage as a ceremonial one prescribed by statute. Elsewhere it has been held that an oath cannot be administered by telephone,[25] nor can a wife acknowledge her husband's deed over the telephone.[26]

But if our statute does not require the personal presence of both parties, as we have contended, and if its prescribed formalities are merely directory, as the Colorado supreme court has held, such a marriage should be sustained as a valid ceremonial marriage. Our argument is that a marriage by telephone, and its preliminaries, may so be arranged that it will comply substantially with the prescribed statutory form. It should then be accorded recognition not as a common law marriage, but as a valid statutory one.

It may well be that by upholding such marriages we are making more uncertain and formless the one contract which ought to be the most formal and certain. However, such marriages may furnish the only devices available for our soldiers abroad to contract marriages. So far as the logic of our law is concerned such marriages should be valid. It is for our legislature to say whether they should be forbidden upon grounds of public policy.

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[25]Sullivan v. First Natl. Bank, 37 Tex. Civ. A. 228, 83 S. W. 421 (1904); Carnes v. Carnes, 138 Ga. 1, 74 S. E. 785 (1912).

[26]Wester v. Hurt, 123 Tenn. 508, 130 S. W. 842 (1910). But see Banning v. Banning, 80 Calif. 271, 22 Pac. 210 (1889), and Abernathy v. Harris, 183 Ark. 22, 34 S. W. (2d) 765 (1931).