Opinion No. 43-4283

May 11, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Russell C. Charlton, Adjutant General, State Director, Selective Service, Santa Fe, New Mexico

We have you letter of April 27, 1943, in which you request an official opinion of this office concerning a letter which you have inclosed, which requests information concerning the possibility of performing a marriage between a lady of this State and a member of the 200th Anti-Aircraft Battalion of New Mexico, who is now a prisoner in the Philippines.

This matter involves an extremely technical legal question which, due to the importance of this question and the fact that it may reasonably be expected to present itself many times in the future before this war is over, will be dealt with as fully and accurately as possible.

The first question which presents itself is whether, under the laws of the State of New Mexico, a license may be obtained. Section 65-111 of the New Mexico 1941 Compilation provides:

"Whenever said parties reside more than ten (10) miles from the county seat of any county they may, if they desire, make application for such license to any person authorized to perform marriages or to administer oaths under the laws of the State, who shall interrogate them in the manner prescribed by this act and the laws of the State, certifying the result thereof to the county clerk in writing without expense to the applicants. Upon satisfactory proof being produced that the parties are legally qualified to marry, the county clerk shall thereupon issue a license under the seal of the probate court authorizing said parties to contract marriage."

It would seem that a reasonable construction of this statute would be that whenever both of said parties do not reside within 10 miles from the county seat of any county this section would apply. While it is not shown in your letter whether both parties do reside within 10 miles from a county seat it cannot be said that the parties reside within 10 miles in any event, since at least one of the parties is in the Philippine Islands. It is therefore my opinion that by making application in conformance with the provisions of Section 65-111 a marriage license could be obtained. In other words, the member of the 200th that is now a prisoner of war in the Philippines should make application to a person authorized to perform marriages under the laws of this state. This would, of course, include any ordained clergyman, even though such clergyman was in the Philippines. See Section 65-102 of the New Mexico 1941 Compilation. We hope that it would be possible to arrange for such a marriage license application in compliance with Section 65-111 in cooperation with the American Red Cross.

It has recently come to my attention that a marriage by proxy was performed, one of the parties to which, was a prisoner of war in the Philippines, by the cooperation of the American Red Cross and the Catholic Church. This marriage, however, validated a previous marriage performed without the sanction of the church, and it also did not involve New Mexico law, and therefore the subsequent problems discussed as to marriages by proxy were not involved. There is, of course, no problem concerning the ability of the lady in New Mexico in preparing her application for the marriage license.

The next problem presented is whether, under the laws of the State of New Mexico, a valid marriage ceremony could be performed without the presence of both parties; in other words, whether it is possible, under the laws of the State of New Mexico, for a valid marriage ceremony by proxy to be performed.

38 C. J., page 1317, states:

"The consent of the parties must be unequivocally evidenced, but it may be evidenced in any form or manner, and verbally or by conduct alone, and no particular form of expression is necessary. It need not be manifested in the presence of witnesses, and it is not invariably necessary that the parties should be in the presence of each other."

35 American Jurisprudence, "Marriage," Section 22, provides:

"There is some difference of opinion concerning the necessity of the presence of the contracting parties at a marriage ceremony. On the one hand, the rule has been stated that to constitute marriage per verba de praesenti, the parties must be in the presence of each other when the agreement is entered into, but it need not be made in the presence of a witness, although without witnesses it may be difficult to establish it. On the other hand, there is authority for the view that it is not necessary, in order to effectuate a marriage contract, that the parties be in the presence of each other at the time of entering into such contract."

Schouler, Sixth Edition, "Marriage, Divorce, Separation and Domestic Relations," Volume 2, Section 1212, in discussing this situation, states as follows:

"Marriage by proxy or without the presence of the parties at a ceremony was formerly allowed in the Roman law and was also recognized under the canon law, and the English law until the eighteenth century. It was thus a part of the common law of England at the time of the settlement of this country, and was probably incorporated by the colonists as such into their common law. Statutes in many States requiring certain details as to the ceremony and presence of the parties have rendered this common law obsolete, but in States where common law marriages are still recognized, and where consummation of the marriage is not necessary for its validity, there seems no reason to doubt that a marriage by written contract of parties not in the presence of each other may be valid. Such a marriage will be governed by the law of the State where the contract is made, which is the place where the acceptance is mailed, although there is

strong authority that a marriage by mail can be sustained only when valid by the laws where both live.

"The exigencies of the Great War revived the interest in such marriages, and laws were passed in Belgium, France and Italy to enable soldiers in service to contract marriages with women at home. In this country the Adjutant General, on December 21, 1918, advised the military authorities that they might assist soldiers in contracting marriages with women at home, advising them, however, of the dangers of this course, that the validity of such marriages would depend on the law of their domicile, and that the legality of such marriages was in this country a matter of grave uncertainty."

It is noted that Schouler would seem to indicate that a marriage by proxy in the United States would only be legal in a state which recognizes common law marriages.

The New Mexico Supreme Court, in the case of In re Gabaldon's Estate, 38 N.M. 392, 34 Pac. (2) 672, has positively held that the common law pertaining to marriages is no part of the law of the State of New Mexico. In other words, common law marriages and the common law pertaining to marriages form no part of the jurisdiction of this state and, if the reasoning of Schouler is strictly followed, marriage by proxy would not be expected to be upheld in New Mexico.

The matter is treated in more detail in 32 Harvard Law Review, 473, by Ernest G. Lorenzen, who arrives at the conclusion that the courts could be expected to sustain a marriage by proxy in states recognizing common law marriages only. I do not adopt Schouler's and Lorenzen's result as applied to New Mexico due to certain peculiarities of our laws which are later considered.

In 16 Iowa Law Review, 534, it is pointed out under a statute such as ours that marriage is a civil contract. It is stated at page 537:

"There remains the question whether or not an agent may contract a marriage for his principal by going through the formal ceremonial solemnization as provided by statute in all States. Of course, in those States where the personal presence of the principal is required, expressly or impliedly, by statute, no such question can arise. But in those states which do not require such personal presence -- as seems to be the case in Iowa by the wording of the statute -- no apparent reason presents itself which would militate, against the employment of an agent to go through the formal ceremony, that is, to make the formal contract, for his principal, thus resulting in the principal's entrance into the marriage status. Though there is some conflict as to the proper method of appointing an agent to execute a formal contract, there is no doubt that an agent may enter into such contracts for his principal. Such being the rule, and a formal marriage ceremony being nothing more than the execution of a formal contract, the obvious and logical conclusion is that an agent may thus formally contract a marriage for his principal. And so, although a common law marriage probably cannot be effected by proxy in Iowa, the prediction may logically be made, under a fair construction of our statute, that a formal marriage by proxy would be upheld by the Iowa courts."

A Harvard law professor of considerable note, Ernest G. Lorenzen, prepared and had published an article in 32 Harvard Law Review, 473 to 488, dealing with this question and related matters. He states, at page 482:

"Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts. That there are serious objections to marriage by proxy is apparent. The uncertainty in regard to the legal existence of such a marriage arising from the fact that the power of attorney is revocable and may have been revoked without knowledge of the other party or the proxy prior to the celebration of the marriage would suggest of itself the expediency of prohibiting such a marriage. In view of the fact, however, that marriage by proxy was permissible in England until the eighteenth century and has been recognized in all countries so long as marriage rested upon mere consent, it must be regarded as valid in those states in which the common law marriage still exists. Should this view be taken by the courts it would follow logically that marriage might be contracted in such a state by proxy, although neither of the parties was present when the consents were exchanged by the proxies."

In Lorensen's last paragraph he summarizes the problem as follows:

"Marriage by proxy, so far as American soldiers are concerned, would have a more practical bearing as regards marriages celebrated in this country. Many American soldiers must have been ordered abroad on such short notice that they were unable to get married before leaving. Suppose that one of these soldiers, feeling that the war might continue several years, should have asked a friend to act as his proxy in this country and that the marriage consent had been exchanged in his behalf with his fiancee in the state in which she lived. If the common law marriage still existed in the state such marriage would probably be valid, as has been shown above. If the common law marriage is not authorized in the state of her residence she might go to a neighboring state where it still exists and exchange marriage consents there with her fiancee's proxy. Such a marriage, if valid, where celebrated, would be recognized by the other states of this country under the ordinary rules governing the conflict of laws. Even the courts of the home state whose law has been evaded would probably recognize the validity of the marriage. American courts have gone to the very extreme in sustaining marriages on grounds of policy, notwithstanding an evasion of the domestic law. As regards legal prohibitions to marry there is a conflict of view on the question, but there appear to be no modern cases in England or the United States which have refused to recognize, on the ground that there has been an evasion of the domestic law, a marriage validly celebrated in accordance with the law of the state where the marriage took place, where the difference in the law concerned merely matters of form. Inasmuch as the question whether a marriage may be entered into by proxy relates clearly to the formalities, a marriage so celebrated in conformity with the local law will be recognized, notwithstanding any evasion of the law of the state in which the parties were domiciled. A logical application of the principle would enable the parties to get married in a state authorizing marriage by proxy without going there themselves, both parties being represented by proxies."

It is further noted that there have been certain cases wherein a marriage by proxy was performed when one of the parties was in this country and another of the parties was in a foreign country, wherein marriage by proxy was specifically recognized by the law. In these cases it was held, in the American Federal Courts, that since the marriage by proxy was a valid marriage where performed, which was in a foreign country, it was therefore, under fundamental law, a valid marriage in this country. See Ex parte Suzanna 295 Fed. 713 and Sylva v. Tinninghast, 36 Fed. (2) 801.

It will be noted that these cases did not, as they would seem to at first glance, pass on this question, since it turned on another well established rule of law. Therefore, from a thorough search and as stated by leading legal authorities, there have been no cases in this country directly passing on the question. There has been one case in a state that recognized common law marriages where a marriage was perfected by correspondence only and the consent, which was all that was necessary under the common law as interpreted by that state, was found in the exchange of letters and, therefore, a valid marriage was held. Therefore, it would seem clear that a marriage by proxy could be performed and would be valid in certain states which recognize common law marriages. However, it is pointed out that some states, such as Texas, recognize common law marriages, but, on the other hand, require, besides a showing of consent, that the persons consummate the marriage and openly hold themselves out as husband and wife. Therefore, if it should be attempted to go to a state where there could be no reasonable question concerning a marriage by proxy it would be necessary to carefully analyze the decisions of such states as to whether consent alone is sufficient for a common law marriage.

Section 65-102 of the New Mexico 1941 Compilation has been construed to require a marriage ceremony before a marriage is valid in this state. It is noted, however, that what constitutes a marriage ceremony is not specifically set out. In determining whether a common law marriage was valid our Supreme Court, in the case of In re Gabaldon's Estate, supra, in construing this statute, our Supreme Court stated:

"The practical effect is as if the Council of Trent was the law of the land, and the territorial Assembly then modified it. So it seems to us, and so we think the law stood when the first regulatory statute was passed in 1863 (Laws 1862-63, p. 64), requiring registration and prescribing penalties."

Therefore, in determining whether or not in this state a valid ceremony could be performed by proxy it is necessary to refer to the Council of Trent and determine whether or not a marriage ceremony could be performed by proxy.

Lorenzen states, on page 476 of 32 Harvard Law Review:

"Since the Council of Trent (1563) matrimonial consents must be exchanged according to the Canon Law before a priest and at least two witnesses. Otherwise the marriage is invalid. There appears to have been at first considerable dispute among the canonists on the point whether this new requirement affected the rules of the Canon Law relating

to marriage by proxy. Some argued that the priest and the witnesses were to identify the parties and ascertain their intention to marry and that this necessitated the presence of both parties. **This contention was rejected,** it being held that the main object of the provision of the Council of Trent was to give publicity to the marriage, to bring the fact of marriage to the notice of the church. Thereupon some maintained that the power of attorney must be executed in the presence of a priest and two witnesses, but this view also did not prevail. **The result was that even in those countries in which the Council of Trent was accepted a marriage conforming to the requirements of this Council might be entered into by proxy upon the same conditions, so far as the proxy is concerned, as before."**

Also see page 475 of this work, which points out that since the time of Innocent III, about the time of the Lateran Council of 1215, the Catholic Church has accepted the view that the marriage contract, being based upon the present consent of the parties, might be entered into by messenger. The history, from such date, of marriage by proxy is outlined by Professor Lorenzen.

The same version is substantially stated by Waywod, Vol. K. in his work "A Practical Commentary on the Code of Canon Law." Paragraph 1901, page 658. (Access to this and the following cited works was obtained by courtesy of the local Archdiocese). It seems well established that at present canonist lawyers consider that Canon 1089 specifically authorizes marriage by proxy. Also see "A Commentary on Canon Law," Vol. 5, by the Rev. P. Chas. Augustine, O. S. B., D. D., Professor of Canon Law.

In view of the foregoing it is my opinion that a ceremony as contemplated by our statutes includes a ceremony performed with one party represented by a proxy as allowed and recognized by the Catholic Church since before the Council of Trent. However, the difficulties of such marriages are apparent and, in view of the fact that our Supreme Court has never passed on this question, it would be advisable for parties married by proxy to go through a new ceremony when such should become possible and, therefore, avoid any possibility of embarrassment to the parties or children in the event that our Supreme Court should make a different holding on the question, thereby overruling this opinion.

By HARRY L. BIGBEE,

Asst. Atty. General