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The State of South Carolina

Office of the Attorney General

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The Honorable Bobby B. Rabon
Probate Judge of Sumter County
Room 206
Sumter County Courthouse
Sumter, South Carolina 29150

Dear Judge Rabon:

Several months ago, you inquired as to the authority of a Probate Judge to perform proxy marriages and to accept licenses from others who are authorized to perform marriages who might also perform proxy marriages. In a telephone conversation with another attorney in our office, you clarified your question, asking whether and how a marriage can be performed between parties, one of whom is physically located in South Carolina, with the other party located outside the state or the United States.

What is contemplated would not be an actual proxy marriage but would instead be an absentee marriage by electronic means. The potential spouse physically located in South Carolina would obtain a marriage license application from a Probate Judge, which application would be completed by that person and sworn to before a notary public. That partially completed application would then be transmitted by facsimile machine or mailed to the absent party for similar execution before an officer authorized to administer oaths as outlined in S.C. Code Ann. § 30-5-30 (1991) and returned by mail or facsimile machine. The original application and facsimile transmittals would then be filed with the Probate Judge in South Carolina and the marriage license obtained.

Thereafter, a wedding ceremony would be conducted by long distance telephone by a minister or other official authorized to perform marriage ceremonies in South Carolina, each party's conversation being separately witnessed by an individual authorized to administer oaths who could thereafter attest, by affidavit, to the identity of the party

involved and the authenticity of his or her vows. Affidavits from the parties, properly witnessed and notarized, together with an affidavit from the official performing the marriage itself, would thereafter be filed to establish an official record of the marriage.

You have asked whether such a procedure would be authorized under the laws of this State and, if not, whether a marriage could be performed in some other fashion given the circumstances described. A number of issues must be considered to respond completely to your inquiry; many previously-rendered opinions of this Office address some of those issues. 1/

Proxy Marriages

This Office has opined on numerous occasions that a proxy marriage would most probably not be recognized as valid in South Carolina. Ops. Atty. Gen. dated January 29, 1952; January 15, 1951; August 21, 1961; December 29, 1961; March 12, 1966; July 18, 1963; December 13, 1954; March 25, 1963; August 25, 1964; August 1, 1955; May 16, 1958; July 26, 1960; February 26, 1959; January 17, 1966; February 6, 1962; and September 9, 1959. As noted in many of these opinions, however, no court in South Carolina has apparently opined on the validity of a proxy marriage allegedly contracted in this State.

The sole exception located among the prior opinions is an opinion dated November 23, 1965, concerning a proxy marriage contemplated between a resident of this State and his fiancee who was a resident of Cuba. That opinion provided:

> Raymond Garcia is within this State and his fiancee is a resident of Cuba. She would be permitted to leave Cuba under Castro's recent order provided she is married to a person in this country.

1/It must be noted that all of these opinions have existed for a number of years, yet the General Assembly has not amended any of the relevant statutes or seen fit to otherwise alter the conclusions stated therein. It is well-recognized that the absence of any amendment following the issuance of an opinion of the Attorney General strongly suggests that the views expressed therein were consistent with legislative intent. Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977).

> In view of the exigencies of this situation and for humanitarian reasons, I advise that, in my opinion, the circumstances warrant the issuance of a license and the performance of a proxy marriage. I reach this conclusion in view of the exceptional facts and the urgent necessity for the performance of a marriage which may, in fact, be otherwise held valid and would, in this case, resolve all doubts in favor of the validity of the issuance of the license and the marriage.
>
> These views are predicated solely upon the facts existing, which show that the resolution of such doubts in favor of the marriage will secure the release of a person from a Communist-dominated country.

While the circumstances giving rise to your question would be viewed as exigent by some (most particularly the couples contemplating marriage and their families), this prior opinion was limited to the facts presented therein and represents a departure from the general position taken by this Office as to the probable validity of proxy marriages.

As noted, the courts of this State have not had occasion to rule on the validity of proxy marriages. All marriages are presumed to be valid unless and until a court declares otherwise. Op. Atty. Gen. dated November 8, 1961. The court of common pleas would have jurisdiction "to hear and determine any issue affecting the validity of a contract of marriage," by S.C. Code Ann. § 20-1-510; the probate court has certain jurisdiction to decide such questions relative to the administration of estates and determination of heirs. See § 62-1-302; Weathers v. Bolt, 293 S.C. 486, 361 S.E.2d 773 (S.C. App. 1987). In any event, if the requirements are met, such a marriage could in fact be a common law marriage, which is recognized in this State. Id.

Telephone or Electronic Considerations

This Office has previously advised that a marriage performed by telephone, where one of the participating parties is in this State, would not be valid, though noting

that there is no decision of our courts precisely on point. Ops. Atty. Gen. dated March 25, 1963 and January 29, 1952. The latter opinion authored by former Attorney General T. C. Callison, which addressed proxy marriages as well, stated: "There are those who have undertaken to contract matrimony by long-distance communication so to speak. What the attitude of the Court will be when such a marriage is up for consideration I am unable to say."

By an opinion dated May 27, 1964, addressing the application for a marriage license by telegram, former Attorney General Daniel R. McLeod opined that the requirements of law were probably not met but that the "deficiency" did not affect the validity of the marriage.

Appearance in Person

By an opinion dated January 29, 1952 referred to earlier, former Attorney General Callison stated:

> South Carolina regards the marriage contract as a civil contract, but we do prescribe certain requisites for the performance of the marriage contract. One is that a marriage license has to be procured and the application for such marriage license has to show that the parties seeking to get married have the legal ability to enter into marriage. Each party is supposed to sign an affidavit as to their capacity to be married, etc. All of this clearly indicates that the presence of the parties is anticipated....

Former Attorney General McLeod opined that persons applying for licenses to marry must appear in person. See Op. Atty. Gen. dated July 18, 1963. He also opined on May 19, 1964:

> You also ask whether or not you must appear in person in order to obtain a license for marriage. Although there is no specific requirement that this be done and no court decision discussing the question, in our view, the marriage statutes of this state contemplate that

> the parties appear in person when applying for a marriage license. ... By such a requirement, the likelihood of fraud is reduced.

The omitted language from the last opinion referred to present § 20-1-10 and a statute repealed in 1972 which prohibited miscegenation; the only apparent reasoning for mentioning those statutes was to suggest that the Probate Judge could determine, by viewing the bride- and groom-to-be, that such statues would not be violated, though the reason was not so stated.

Reference to a "wedding ceremony" is found in § 20-1-330 and 20-1-340, but no particular form of ceremony is required by these or any other statutes. In such a case, the court in Respole v. Respole, 70 N.E.2d 465 (Ohio 1946), stated:

> Solemnization of marriage, or the celebration of the marriage ceremony or rites comprehends a personal appearance together by the contracting parties before one authorized by law to celebrate marriage ceremonies, and that the marriage ceremonies or rites be entered into and performed by the parties to such marriage together with the minister or other person authorized to perform such in the presence of each other and one or more witnesses, in order that the fact of the marriage contract may have due publication for the sake of notoriety, and the certainty of its being made .... Statutes regulating marriages do not generally prescribe any particular form, but recognizes [sic] the right of the parties to choose any form they may desire.

70 N.E.2d at 467-468. But see Torres v. Torres, 144 N.J. Super. 540, 366 A.2d 713 (1976). Such language suggests strongly that the presence of both parties is required for the ceremony.

Use of Facsimile Machine

Because this Office has previously opined that proxy or telephonic marriages probably would not be considered valid in this State, and further that the parties should appear in person to obtain their marriage license, it is not absolutely necessary to examine the validity of documents transmitted by facsimile machine to the probate courts. In the event that a declaratory judgment be sought as to the validity of a proxy or telephonic marriage or the need to appear in person to obtain the marriage license, the following comments are offered as to documents transmitted by facsimile machine.

The prevalence of facsimile and photographic copies of documents is increasingly noted by courts and legislatures. The Uniform Photographic Copies of Business and Public Records as Evidence Act, § 19-5-610, recognizes that a facsimile copy of a record of a business or public official may be offered as evidence just as the original record might be offered (assuming the requirements of § 19-5-610 are met). Courts in other jurisdictions have permitted facsimile documents to be admitted into evidence or to be put to the same uses as the original documents would have been. Madden v. Hegadorn, 236 N.J. Super. 280, 565 A.2d 725 (1989) (candidate for public office permitted to file his nomination form, including notarized signature, by "fax"); Harwood v. State of Indiana, 555 N.E.2d 513 (Ind. 1990) (records of prior out-of-state conviction were not inadmissible because they were facsimile copies); People v. Snyder, 181 Mich. App. 768, 449 N.W.2d 703 (Mich. App. 1990) (law enforcement officer faxed unsigned search warrant to judge; over the telephone, officer swore to the warrant; judge signed the warrant and returned by fax; signed, faxed document qualified as a court document); People v. Fournier, 793 P.2d 1176 (Colo. 1990) (search warrant). See also Nevada Op. Atty. Gen. No. 90-16 dated October 24, 1990 (applications for certificate of number and certificate of title may be transmitted by telefax) and McCormick on Evidence, § 236 (2nd Ed. 1972).

A review of the cases and materials cited in the preceding paragraph point out that a number of factors must be considered in determining whether a "faxed" copy of a document may be considered as valid and effectual as the original. Any statutory requirements, the "best evidence" rule, authentication, any evidence of fraud, due process concerns, and the like are often mentioned. While our research did

not discover marriage license applications by "fax" to have been addressed, courts have found a number of other uses of "faxed" documents to have been acceptable. Because we have opined previously that marriage license applicants should apply in person, we need not reach the question; due to developing technology, perhaps legislative or judicial clarification should be sought.

Ministerial Duty to Record

This Office has previously advised, as reiterated above, that proxy or telephone marriages probably would not be considered valid or legal marriages in this State. The action to be taken, as to filing or recording the license by the Probate Judge, if such a marriage should nevertheless be performed, must also be addressed.

Section 20-1-340 of the Code provides:

> The probate judge ... who issued any such license shall, upon the return of the two copies to him by the person who performs the wedding ceremony, record and index such certificate ... . [Emphasis added.]

Also to be considered is § 20-1-360 which provides that "[n]othing contained in this article [Article 3, Chapter 1, Title 20] shall render illegal any marriage contracted without the issuance of a license." Thus, common-law marriages are recognized. Finally, as noted earlier, § 20-1-510 authorizes the court of common pleas to "hear and determine any issue affecting the validity of a contract of marriage."

When a Probate Judge receives the two copies of the marriage license, he is required to record and index the same; such is indicated by use of the word "shall," which connotes a mandatory action. S.C. Dept. of Hwys. and Public Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). If the license on its face appears to comply with the statutory requirements relative to marriage, the Probate Judge must record and index the license. Cf., Ops. Atty. Gen. dated April 3, 1984; August 31, 1984; October 18, 1990; and Green v. Thornton, 265 S.C. 436, 219 S.E.2d 827 (1975) (all relative to the ministerial duty of the Secretary of State to accept for filing documents which appear to conform to the applicable statutes). The Probate Judge would not be in a position at that point to determine the

validity of the purported marriage. By accepting the license for recording, the Probate Judge is establishing an official record of the marriage, see §§ 20-1-570 and 20-1-580, but does not establish the validity of the marriage.

Due to the advancing electronic technology which was not in existence when our statutes governing marriage were adopted, it might be advisable to seek legislation to clarify the marriage statutes, particularly as to proxy or telephonic marriages or the use of "faxed" applications for licenses. In the alternative, a declaratory judgment action could be sought as to any or all of the above issues.

Nothing contained herein is intended to comment upon the validity or legality of a particular marriage ceremony or a particular application for a marriage license. Too, this Office does not intend to usurp the discretion or judgment of a Probate Judge in actions to be taken in a specific situation.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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