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The "Contract Marriage" In Montana Is Invalid

By EDWIN W. BRIGGS*

The idea has arisen in Montana that a marriage, based solely on a writing declaring the intent of the parties to "marry," and a filing thereof, following execution by the parties and witnessing, is all that is necessary in this state to establish a perfectly valid marriage. Without doubt a deliberate and calculated intent to evade the "medical examination" requirements of our Code, adopted in 1947, and sometimes also to evade the requirement of parental consent for minors, is a prime factor contributing to the development of this idea, aided and abetted by the officials involved, in those counties where the practice has developed.

A few years ago, a student comment in this Review challenged the validity of that proposition on the following grounds: (1) The Code sections relied on do not validate such procedure for creating a new marriage at all. (2) There is no permissible common law basis therefor in Montana. (3) However arguable these propositions may have been before 1947, it should be recognized that the enactment into law of the "medical examination" requirements for marriage must be held to have repealed, at least by implication, any such rule that may be thought to have existed theretofore.

The two Code sections primarily involved are worded as follows:

48-130. (5724) Declaration of marriage—how made. Persons married without the solemnization provided for in section 48-116 must jointly make a declaration of marriage, substantially showing:

1. The names, ages, and residences of the parties;
2. The fact of marriage;
3. The time of marriage;
4. That the marriage has not been solemnized.

48-131. (5725) Contents of declaration. If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing:

1. The names, ages, and residences of the parties;
2. The fact of marriage;

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1Laws of Montana, 1947, c. 208; REvised CODEs OF MONTANA, 1947, §§ 48-134 through 48-141 (hereinafter the REvised CODEs OF MONTANA will be cited as R.C.M.)

2R.C.M. 1947, § 48-118. Those persons "officiating" for the declaration, principally justices of the peace or notaries public, also achieve a considerable "evasion" in the fees they charge. A justice of the peace is prohibited by statute to charge more than $5.00 for marrying a couple. R.C.M. 1947, § 25-304. A notary public is limited to $1.00 for first signature in an acknowledgment, and fifty cents for each additional signature. R.C.M. 1947, § 25-112. Yet, when they officiate at these "ceremonies" they charge $10.00. If an attorney is asked to "draw up" the marriage "contract," the minimum fee he charges is $25, the standard minimum fee scheduled for drafting a contract, though the only "contract" is the declaration which, at least in Superior, follows standard forms.

3. That no record of such marriage is known to exist. Such declaration must be subscribed by the parties and attested by at least three witnesses."

A careful examination of the enumeration of facts which must be certified to in the declaration, set forth in section 48-130, almost conclusively shows that those drafting the section originally had in mind a marriage already consummated. They are not those "facts" which one would expect in a contract to be entered into for the purpose of creating the marital status for the first time on the basis of that contract. The "fact of marriage," the "time of marriage," and that "the marriage has not been solemnized" all connote a "marriage" already completed, with these required recitals simply providing an adequate "evidentiary basis," upon which to permit the formal recording of that fact. Even the word "substantially," suggests that the framers realized that an estimate or approximation of the time of the marriage (and hence also the fact as to just when it was accomplished) might be necessary. Something of the incongruity of the contrary construction is suggested strongly by the statement in the declaration form generally used,' attempting to satisfy the requirements of section 48-130: "We do hereby declare that we are married and do enter into the marriage relationship at this time and place and at the time of the execution of this declaration...we hereby certify that this marriage has not been solemnized." Of what conceivable use are the italicized portions, if it is a marriage just now being created for the first time by the present declaration?

A remarkable thing about this modern interpretation of these sections, asserting the validity of the "contract marriage," is that it flies in the face of and is in direct conflict both with leading California and Montana deci-

'Emphasis added. Note that § 48-131 is described editorially as simply setting forth the "contents" of the declaration provided for in § 48-130. Webb demonstrates conclusively that this is an incorrect description of that section. Webb, supra note 3, at 77-79.

"The standard form, apparently used often in Superior is as follows:

DECLARATION OF MARRIAGE

H............ and W............ do hereby jointly make and execute a declaration of marriage and make the following statements and representations of facts pursuant to the provisions of R.C.M. 1947, section 48-130.

That H............ is ............years of age, and resides at ..................................

That W............ is ............years of age, and resides at ..................................

We do hereby declare that we are married and do enter into the marriage relationship at this time and place and at the time of the day of .........................., 19............ at ....................AM PM.

We hereby certify that this marriage has not been solemnized.

In witness whereof, we hereunto set our hands this..................day of .........................., 19............

Signatures of two witnesses.

Notarization.

Another form in common use assumes the necessity of stating the declaration in terms of a mutually binding agreement creating the marriage relationship for the first time, in the present moment. It requires each party to affirm that: "I do here in the presence of Almighty God and these witnesses, take H (W) to be my lawfully wedded husband (wife), and I do hereby acknowledge and declare myself to be the lawfully wedded wife (husband) of H (W) ... ." though it also complies with the proviso that the declaration "substantially show" that the marriage has not been solemnized. The degree of formality used by different officials varies greatly, also. Some justices of the peace carry out essentially the same ceremony as if it were based on a marriage license.
The "Contract Marriage" Is Invalid

Sions construing section 48-130. Relying on an earlier California case, the Montana Supreme Court declares, in State v. Newman:4

It is not suggested by counsel for the defendant, who acted as notary in taking the acknowledgment of the parties to the declaration, that this constitutes a marriage in itself. It does not contain a present promise to enter into the marriage relation, but refers back to the alleged contract of marriage on the 27th of November, 1921. In Toone v. Huberty, 104 Cal. at 260, 37 Pac. 944, the supreme court of California held that a declaration conforming in all respects to the requirements of section 75 of the Civil Code, which is identical with section 5724 of our Code, did not constitute a marriage. Independent of the declaration, there must be all of the elements necessary before a marriage can result. The declaration was provided by statute for the purpose of authenticating a marriage. It takes the place, in an unsolemnized marriage, of the certificate filed by the officiating magistrate or clergyman in the case of a solemnized marriage.

So it is submitted that both the wording of this section and the most authoritative decisions construing it justify the conclusion that its purpose was not to provide an alternative ceremony or method for creating a marriage, but rather was simply to furnish a formal procedure for regularizing and making a matter of record marriages already in existence but created in some irregular manner, or under section 48-131 for restoring records of formally existing marriages, the records of which may have been destroyed in one way or another. The first class—the irregular marriages—include the common law marriages, and very possibly marriages which may have originally been approved by special tribal or church ceremonies, but without that legal record of their existence normally made of civil marriages. The second class is dramatically illustrated by the mass destruction of records in the San Francisco earthquake and fire of 1906.4

*State v. Newman, 66 Mont. 180, 192, 213 Pac. 805, 808 (1923) (emphasis added). Although the particular declaration involved in this case correctly relied on an alleged common law marriage, consummated in the past, the court found that there was not the necessary common law marriage because of no "public assumption." The only thing left to support the marriage is the declaration, and it is on this point that the court states so positively as a general principle that the "declaration," of itself, is never sufficient to create a marriage—rather is its purpose merely to authenticate a marriage already in existence.

Despite this case, a defendant, jailed on a statutory rape charge, recently was allowed to avoid prosecution in Western Montana, by getting the girl, who was the state's only witness, to join with him in a declaration, and having it filed.

R.C.M. 1947, § 48-116 provides:

By whom marriages may be solemnized. Marriage may be solemnized by either a justice of the supreme court, judge of the district court, justice of the peace, priest, or minister of the gospel of any denomination, or the mayor of any city. Marriages may also be solemnized by religious societies according to the usage of such societies.

Perhaps the declaration and recording of marriages "solemnized" by the "usage" of religious societies should be effected under § 48-131, which applies to "solemnized marriages" for which no "record" is known to exist. It at least should be permissible to so declare thereunder. In 1897, California enacted § 79 1/2 (now § 79a) of the Civil Code declaring that, though the statutory ceremonial requirements were not applicable to religions having "peculiar modes of entering the marriage relations," such marriages "must be declared as provided in § 76 [our § 48-131]."

*Though nothing is said about marriages by Indian tribal custom, or similar customs, such marriages would seem to be eminently fitting subjects for declaration under one or the other of these sections, at least whenever such Indian couple decides to live apart from and outside the tribe.

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Not only do both the wording of these sections and the most authoritative decisions construing them fully support the above conclusions, but an examination of their history in the California Code, where they originated, is as conclusive of the correctness of those conclusions as history can be. That history also reveals that the editorial description of section 48-131, as involving merely the contents of the declaration required by section 48-130, is based on the erroneous assumption that both deal with the same subject matter. Such is not the case. As edited in the California Code, its corresponding section is described as “involving a declaration where there is no record of the solemnization”—a very different subject from that indicated in the Montana Code. The subsequent history of these sections in California, following the Montana adoption of them from California in 1895, demonstrating that these explanations have always been the accepted ones in California, and that they have never lost sight of them, is detailed in Mr. Webb’s comment.

Since the interpretation given these sections by some Montana lawyers is in such basic conflict (1) with every other section in the Montana Domestic Relations Code limiting the conditions and procedures for creating the marital relationship, (2) with the sections’ wording, (3) with the controlling court decisions, and (4) with their history, the only rational explanation therefor is the want of an apparent reason for their presence in the Code other than to create a marriage. Once it is realized generally that there is an entirely adequate explanation for them, consistent with other provisions of the Code, without resorting to this extreme explanation, the supposition that they provide an extremely informal and hasty alternative “ceremony” for creating the marriage should be rejected forthwith.

Mr. Webb gave solemn warning that this so-called “contract marriage” was being used especially to evade the then recent requirements of a premarital medical examination both by Montana residents and by “others who come into the state for the purpose of avoiding the laws of their domicil.” Within the brief period of seven years the volume of “evasion,” in one county seat alone, has become appalling. The town of Superior, County Seat of Mineral County, has become notorious as the “Gretna Green” of Montana. The competition for the traffic has become so intense that some of its citizens are operating “marriage mills” with flamboyant, large signs, garishly lighted all night to entice prospective customers to the advertiser’s door.

The court records there starkly reveal the volume of this business.

In addition to the fact that all of the Domestic Relations Code dealing with marriage, gives every indication that, in setting forth the procedures for securing a license, it is intending to provide for the exclusive method for marriage thereby, and to the clear implications of the premarital medical examination requirement, a third section in the series we are now examining further supports our conclusions. R.C.M. 1947, § 48-133, states: “If either party to any marriage denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the district court, to have the validity of the marriage determined and declared.” (Emphasis added.) Note that at least one party claims that a marriage already has been consummated, in this section, which merely completes the group of four sections dealing with the recording of irregular marriages.

I am glad to acknowledge the able assistance, in this study, of Mrs. Mary H. O’Neill, Clerk of the Court of Mineral County, at Superior, and Mr. Thomas Murray, who practiced law in Superior for some years and is now in the County Attorney’s office in Missoula. I am indebted to them for compiling the statistical data revealing the extent of the use of the declaration and filling to establish the marriage relationship.
first recorded declaration, in the modern records at least, now kept separately from other filings, was on July 3, 1947—just three days after the "medical examination" law became effective. For the last six months of 1947, 91 contract, and eight licensed marriages were recorded. For the full year 1955, 203 contract, and 28 licensed marriages were filed." For the first ten months and five days in 1956, to November 5, 222 contract, and 30 licensed marriages were filed. Already boasting a record number of contracts, 1956 holds promise of exceeding any previous year by quite a large number. The over-all statistics for the past nine years show a very definite growth trend involving a growing practice of evasion with an attendant prosperous "marriage mill business" for Superior. The total number of contract marriages from July 1, 1947, to November 5, 1956, is 1830. The total of licensed marriages is 287.

In 1947, 84 nonresidents and seven residents filed declarations; in 1955, 146 nonresidents and 57 residents used this device for "marrying." In contrast, licenses were issued to thirteen nonresidents and fifteen residents in the latter year.

On the face of the records, the percentage of minors marrying by contract does not appear to be very large. A rough count reveals only 130 of the total of 1830 contract marriages involve one or more minors. This is about 7.1 per cent of the total. Taking this number at its face value, the first thing to be noted is that there appears to be no protection whatever given to the interest of the parents in the marriage of minors—parental consent is not a condition to the entering into and filing of a declaration. This is another of the serious evasions of the law which the "declaration" makes possible. That this frequently has devastating effects on the parent-child relation in families in other states, as well as our own, is attested to by the fact that more than once the court clerk in Superior has received anxious inquiries from nonresident parents asking whether it is possible that their child actually has been legally married in Montana simply by a

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First contract marriage issued July 3, 1947.

Marriage licenses sold from Jan. 1, 1947, to July 1, 1947—271. Superior has long operated as a marriage mill for nonresidents, particularly from Idaho and Washington, who have wanted to avoid the premarital medical examination requirements or other delaying regulations in their home state. This astounding first half-year total of licenses issued, reveals that Superior has only partly recovered that business by resort to the "contract marriage" declaration, as a device for evading Montana's own medical examination requirement. Though it is being used in growing volume, not all people are willing to rely on it.

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<th>Year</th>
<th>Contracts</th>
<th>Licenses</th>
<th>Year</th>
<th>Contracts</th>
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<td>25</td>
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<td>208</td>
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<td>219</td>
<td>40</td>
<td>1956 to Nov. 5th</td>
<td>222</td>
<td>38</td>
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<td>187</td>
<td>25</td>
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<td>287</td>
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<td>1952</td>
<td>183</td>
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It is of some interest to note that the contract marriage also is used in Missoula County, although only very rarely. From July 1, 1947, to December 1, 1956, the court clerk at Missoula issued 4,772 licenses and filed 70 declarations. Also of interest is the fact that although Missoula County has several times the population of Superior, the latter did practically half as much "marriage business" as did the former. From January 1, to July 1, 1947, no declaration was filed.
filed written agreement, while he or she was supposed to be ‘‘out’’ just for
the evening on a date.‘‘

Moreover, there is much reason to doubt the accuracy of the percentage
just given. Indeed, one of the most serious objections to this whole pro-
cedure is the extremely lax, informal, and wholly unreliable basis on which
the asserted ‘‘qualifications’’ of the principals concerned are established.
Originally, a single instrument, known as the declaration, was filed, sub-
scribed by two witnesses, which declaration, framed apparently on the pro-
visions of section 48-1304 (though that section says nothing of witnesses),
stated at one and the same time that ‘‘we do hereby declare that we are
married,’’ and also that ‘‘[we] do enter into the marriage relationship at
this time and place and at the time of the execution of this declaration.’’
About three months later, the requirement that each party make an affi-
davit as to his qualifications was added. A comparison between the declara-
tion and the affidavits frequently shows a discrepancy between the two as
to the age qualifications of one or both parties. Irregularity and/or care-
lessness is further demonstrated by such things as a single witness, though
two are required by the form, and ‘‘notarizing’’ by the then clerk of the
court, not a notary, but using another’s expiration date, and putting on the
court seal. The consequences of such informality are further revealed by one
case in particular in which H’s real name was Welsch. For some reason W
induced H to promise to change his name to Thomas, so the declaration was
subscribed in the name of Thomas. H never did effect the legal change of

4Actually, a considerable amount of the court clerk’s time in Superior is devoted to
answering inquiries of all kinds relating to or growing out of its ‘‘marriage mill’’
business. And the anxious inquiries from parents are all too common.

The following news item, appearing in the Daily Missoulian for December 19,
1956, illustrates the participation of Montana and Superior in a developing domestic
tragedy occurring in a distant state, hundreds of miles away:

San Francisco (AP)—A teen-age mental hospital patient was sought
throughout California Tuesday on a charge that he kidnaped his pretty
bride at gunpoint from the Daly City home of her parents and fled in a
stolen car.

The 16-year-old husband, Michael Wiegner . . . broke into the home of
Mr. and Mrs. John Mowatt at Daly City, police said, bound the couple and
dragged off their protesting daughter, Clo Ann, 17.

Probation Officer Anthony Lovoy said Clo Ann and Wiegner eloped in
November and were married in Superior, Montana. The girl was brought
back to Daly City.

The boy was taken to the Napa hospital only last Friday. He had been
in trouble with police since he was 14.

Lovoy said Clo Ann felt that Michael needed love and tenderness and it
was her duty to ‘‘stand by him.’’ But, Lovoy added: ‘‘She learned quickly
that love wasn’t enough to reform a hoodlum. She said she wanted to be
rid of the boy.’’ (Emphasis added.)

Almost certainly this couple used the contract marriage. Apparently, Wiegner had
to travel hundreds of miles, through several states, before finding a marriage mill
tailored to suit his needs exactly.

4Although § 48-131 is clearly described as intending to explain what must be con-
tained in the ‘‘declaration’’ provided for in § 48-130, probably whoever originally
drafted the form in general use in Superior, ignored the former section. It certainly
ignores the clear express requirement of three witnesses called for by that section.
And very probably, one of the two witnesses it does call for will be the notary or
other ‘‘official’’ presiding. Often no attempt is made to have more than one wit-
ness. Cf. Webb, supra note 3, at 76, n. 1. The court clerk’s office in Superior has
been very concerned because three witnesses are not used as prescribed by § 48-131,
name, however. The prospective mother then inquired of some of the local officials in what name she should record the birth of her child, to be born shortly.

Although the early records reveal a number of minors, below the statutory age of "capacity to marry," "contracting" a marriage, apparently this was stopped a few years ago by formal proceedings against some of those officiating therein. Hence, the one place for which there might be some social justification advanced for the exceptional use of the "contract marriage," is precluded by that action. That is, the case occasionally arises of a girl below the statutory age of capacity who has become pregnant. Though both the prospective mother and father may be very anxious to marry, and the parents of both are equally anxious, few if any court clerks will issue a license therefor.

One of the more serious objections to the so-called "contract marriage" is the extremely cavalier treatment it often gets from the principals themselves. There is much reason to suspect that they often assume that a marriage so easily created by simple declaration can be just as easily dissolved. Several of these persons have been back a number of times to enter into still another "contract," with a different party each time. Though the affidavits presumably recite that they have been "divorced," from the prior spouse, there is no evidence of what they understand to be necessary to constitute a "divorce." Then there always is the strong possibility that, if a nonresident litigates his marital status in the foreign domiciliary court, the court will find that he never has been lawfully married at all—thus requiring either an annulment or a declaration of nullity. This much is

The court records in Superior indicate that two persons, one a notary public and the other a notary public and justice of the peace, were fined for marrying "minors" by contract. Presumably these were persons under the statutory age of capacity to marry.

Cf. Briggs, The Status of an Annulled Marriage in Montana, 4 MONTANA L. REV. 14, 35 (1948). Citing various cases from several other states and showing the influence of common law doctrine on decisions interpreting codes setting statutory age limits on the capacity to marry, the author advanced the view that under the influence of these decisions, and under the special problems actually facing it in actual cases, the Montana Supreme Court probably would decide that the common law ages governing "capacity" still would prevail. He had no thought, however, of approving the old common law in its recognition of the "inchoate" marriage under the ages of twelve and fourteen respectively.

At least seventeen men have been married two or more times by contract in Superior in the last eight years. Five have been married three times, and one has filed a different declaration four times between the middle of 1951 and early in 1956. The declarations never give the mailing address of the principals—only the towns allegedly their residences. One W.J.H. filed a declaration of marriage on January 13, 1951; he was back to file another one with a different woman on April 4, 1951, less than two and one half months apart. Though generally, of course, it was not possible to check on the divorces of these people, that was possible for the one having four declarations to his credit, one L.A., giving Missoula as his residence. The names of the women involved indicate that probably only two different persons were involved. He actually has three divorces recorded to his credit in Missoula. He seems to be marrying, divorcing, and remarrying the same girl much of the time.

If such annulment should occur in California, almost certainly any court there would rule that the parties were not married in Montana by the declaration. All of the "authority" available to them would compel that result. Their own statutory history of these and related sections and the pertinent judicial authority, both in California and Montana, all compel that conclusion. And if the issue arose in another state it would be guided by exactly the same criteria, forcing them to consider whether there had been the acts required by the governing law to establish a common law marriage subsequent to the declaration.
clear—it is quite impossible for a foreign court to establish the legal status of the "contract marriage" in Montana, so long as that status is so uncertain and doubtful in Montana itself. That provides still another strong reason why the Montana legislature should deal resolutely and effectively to clear up this scandalous state of the law, by appropriate clarification of the Code sections involved.

Such clarification can be achieved in a number of ways. Perhaps the simplest method would be by slight amendment in the wording of sections 48-130 and 48-131. That portion of section 48-130, now stating, "Declaration of marriage—how made. Persons married without the solemnization . . .," should be amended to read as follows: "Declaration of consumed marriages—how made. Persons who have consummated a marriage, but without the solemnization. . . ." The only change called for in section 48-131 is in its editorial description. Whereas it now states, "Contents of declaration," it should be made to read, "Declaration where there is no record of the solemnization," as California's statute has always described it.