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# ARTICLES

## Reviving Proxy Marriage

*Andrea B. Carroll*<sup>†</sup>

Ask people to identify the most important event in their lives and their answers bear an overwhelming resemblance. The day of their marriage ranks near the top of the list for virtually all.<sup>1</sup> Entry into the marital relationship is a decision we approach with much contemplation and reflection.<sup>2</sup> Typically, the decision is not made whimsically. Indeed, popular culture has admonished us that “only fools rush in,” a virtual axiom in today’s society.<sup>3</sup> Nonetheless, American states recognize without exception that marriage is merely a contract.<sup>4</sup> It creates myriad rights and responsibilities<sup>5</sup>—essentially

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<sup>1</sup> See Andrew Sullivan, *Why the M Word Matters to Me*, TIME (Feb. 8, 2004), <http://www.time.com/time/magazine/article/0,9171,1101040216-588877,00.html>.

<sup>2</sup> See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1254-55 (1998).

<sup>3</sup> ELVIS PRESLEY, *Fools Rush In*, on ELVIS NOW (RCA Records 1971); DECADE BY DECADE 1940S: TEN YEARS OF POPULAR HITS ARRANGED FOR EASY PIANO 49 (crediting songwriter Johnny Mercer as the author of the song popularized by Elvis Presley). For use of the phrase dating back to the early twentieth century, see also Alexander Pope, *An Essay on Criticism*, in THE RAPE OF THE LOCK AND OTHER POEMS OF ALEXANDER POPE 70, 90 (Macmillan Co. 1921) (“For fools rush in where Angels fear to tread.”).

<sup>4</sup> 52 AM. JUR. 2D *Marriage* § 4 (2009). See generally E. SCHILLEBEECKX, MARRIAGE: HUMAN REALITY AND SAVING MYSTERY 388 (1965) (contractual basis of marriage came from the Roman *consensus* idea of marriage adopted by the Roman Catholic Church).

<sup>5</sup> 55 C.J.S. *Marriage* § 1 (2009); see also Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, I Gave Him the Best Years of My Life*, 16 J. LEGAL STUD. 267, 272 (1987) (“Even seemingly vague and poetic marriage vows imply, yet conceal, a set of rights and obligations that are generally understood by the parties.”).

conferring a status<sup>6</sup>—but the parties’ relationship is, at base, nothing more than a contractual one.

Still, modern society has elevated the marriage contract above all others. This distinction has focused overwhelmingly on the very personal nature of the marital relationship, a feature nonexistent in the arms-length contractual dealings with which we are accustomed to working when applying contract law.<sup>7</sup> As a result, marriage is subject to a number of requirements, even at the level of contractual formation, that are unknown to the general law of contract.<sup>8</sup> With the exception of the thirteen American jurisdictions allowing common law marriage,<sup>9</sup> spouses must participate in person in a formal marriage ceremony at which they express their free consent and affirm their intent to undertake the marital relationship, with all the rights and duties it entails.<sup>10</sup> To solidify the union, a solemn ceremony is typically required: a qualified officiant must preside<sup>11</sup> and witnesses must be present.<sup>12</sup> No other contract is subjected to as high an entry

<sup>6</sup> 55 C.J.S. *Marriage* § 2 (2009) (“Marriage is generally considered a civil contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion.”).

<sup>7</sup> *Id.*; 1 JOEL PRENTISS BISHOP, *MARRIAGE AND DIVORCE* § 3 (6th ed. 1881) (“While the contract remains a mere agreement to marry, it is not essentially different from other executory contracts. . . . But when it is executed in what the law accepts as a valid marriage, its nature as a contract is merged in the higher nature of the status.”); see also Scott & Scott, *supra* note 2, at 1248. See generally *Maynard v. Hill*, 125 U.S. 190 (1888).

<sup>8</sup> See Scott & Scott, *supra* note 2, at 1289; see also *Bishop v. Britain Inv. Co.*, 129 S.W. 668, 676 (Mo. 1910) (“[W]hile we speak of marriage as a civil contract, yet that is a narrow view of it. The consensus of opinion in civilized nations is that marriage is something more than a dry contract. It is a contract different from all others.”).

<sup>9</sup> A common law marriage is a marriage between two people who did not obtain a marriage license nor solemnize their union by formal ceremony. Although state laws vary, it generally requires the mutual consent of the parties to the marriage, cohabitation, and a public declaration that the parties are husband and wife. *E.g.*, *Hurley v. Hurley*, 721 P.2d 1279, 1284 (Mont. 1986). Common law marriage is permitted in Alabama, Colorado, Georgia, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. COLO. REV. STAT. ANN. § 14-2-109.5 (West 2005); GA. CODE ANN. § 19-3-1.1 (West 2003); MONT. CODE ANN. § 40-1-403 (2009); N.H. REV. STAT. ANN. § 457:39 (2010); S.C. CODE ANN. § 20-1-360 (1976); TEX. FAM. CODE ANN. § 2.401 (West 2006); UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2007); *Hoage v. Murch Bros. Constr. Co.*, 50 F.2d 983, 985-86 (D.C. Cir. 1931); *Wall v. Williams*, 11 Ala. 826 (1847); *Gammelgaard v. Gammelgaard*, 77 N.W.2d 479 (Iowa 1956); *Smith v. Smith*, 165 P.2d 593 (Kan. 1946).

<sup>10</sup> RESTATEMENT (SECOND) CONFLICTS OF LAW § 283 (1971).

<sup>11</sup> See, e.g., LA. REV. STAT. ANN. § 9:202 (2008) (“A marriage ceremony may be performed by (1) A priest, minister, rabbi, clerk of the Religious Society of Friends, or any clergyman of any religious sect, who is authorized by the authorities of his religion to perform marriages, and who is registered to perform marriages; (2) A state judge or justice of the peace.”).

<sup>12</sup> State law varies on the number of witnesses required to perfect a ceremonial marriage. For example, Arizona requires two witnesses, while Connecticut does not require any witnesses so long as the officiant is qualified or the parties

requirement.<sup>13</sup> Moreover, the application of one of the most fundamental doctrines of contract law—namely, that a contracting party need not formally enter into the contractual relationship himself but may instead designate an agent to act on his behalf<sup>14</sup>—is generally viewed as inapplicable to the marital relationship.<sup>15</sup> So-called proxy marriages, then—in which one party authorizes an agent to stand in his stead at the marriage ceremony—are widely disdained in the United States.<sup>16</sup>

Agency theory, we say, is simply not well suited to application in the marital context.<sup>17</sup> Thus, a proxy marriage is not a valid marriage at all in most states.<sup>18</sup> Only five American states have recognized otherwise, and nearly all in an exceptionally narrow context involving military personnel.<sup>19</sup> So serious is the contempt for proxy marriage that the doctrine has been rejected throughout most of this country for almost seventy years.<sup>20</sup> But things have changed, and it is time to reevaluate the efficacy and equity of distinguishing between marriage and all other contractual relationships to which agency theory applies.

Society has evolved in a much more mobile direction.<sup>21</sup> Its members more often find themselves separated by great distances, by different means, and for different reasons than they did in the past.<sup>22</sup> Thousands of couples desiring to marry are unable to fulfill ceremonial marriage requirements because active military service

reasonably believe him to be. ARIZ. REV. STAT. ANN. § 25-125 (2007); CONN. GEN. STAT. ANN. § 46b-24 (West 2004 & Supp. 2008).

<sup>13</sup> *But see Comments*, 15 TUL. L. REV. 436, 436 (1941) (describing elaborate ceremonial procedures for transferring title to real property in medieval times; such form requirements no longer exist today).

<sup>14</sup> 1 FLOYD RUSSELL MECHEM, A TREATISE ON THE LAW OF AGENCY § 80 (2d ed. 1914).

<sup>15</sup> *Id.* §§ 124, 126.

<sup>16</sup> Emily Post, *The Day of the Wedding*, in ETIQUETTE: THE BLUE BOOK OF SOCIAL USAGE ch. 26 (1937); *see also* Marvin M. Moore, *The Case for Proxy Marriage*, 11 CLEV.-MARSHALL L. REV. 313, 313 (1962).

<sup>17</sup> MECHEM, *supra* note 14, § 126.

<sup>18</sup> *See id.* §§ 124, 126; *see also* 52 AM. JUR. 2D *Marriage* § 15 (2009) (“Under the law of some states, parties cannot be married by proxy. In such states the personal presence of both the bride and the groom at the marriage rites is essential to the proper solemnization of the marriage, and a marriage by proxy is invalid as a ceremonial marriage.”).

<sup>19</sup> CAL. FAM. CODE § 420 (West, Supp. 2010); COLO. REV. STAT. ANN. § 14-2-109 (West 2005); MONT. CODE ANN. § 40-1-301 (2009); TEX. FAM. CODE ANN. § 2.006 (West 2006); 80 Op. Att’y Gen. 261, 1980 WL 117668 (Kan. A.G.) (1980).

<sup>20</sup> NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 154 (2000).

<sup>21</sup> *See* DAVID J. ELAZAR, BUILDING CITIES IN AMERICA: URBANIZATION AND SUBURBANIZATION IN A FRONTIER SOCIETY 16 (1987) (describing the “nomadism” of the American people as one of the hallmarks of American life); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 413 (1990).

<sup>22</sup> *See* John S. Broadway, *Legalizing Proxy Marriages*, 21 U. KAN. CITY L. REV. 111, 112-14 (1952). *See generally* Briffault, *supra* note 21.

makes travel impossible.<sup>23</sup> Far more often these days, other employment commitments require one party to live away from home, making personal participation in a marriage ceremony impossible or impracticable.<sup>24</sup> For example, in what was perhaps the highest profile proxy marriage attempted in the United States, a Russian cosmonaut working while orbiting Earth aboard the International Space Station in 2003 married his Texan bride by proxy through the use of an agent standing in for him at NASA.<sup>25</sup> Same-sex partners around the country, who may now legally marry in six American jurisdictions,<sup>26</sup> might avoid the cost and other significant burdens of traveling to a state permitting same-sex marriage by appointing proxies and remaining in their home state.<sup>27</sup> In each of these situations, denying parties who strongly wish to take on the contractual obligations of marriage deprives them—and, worse still, their children—of the many personal and property rights afforded to married persons.<sup>28</sup>

Perhaps more importantly, the law has evolved as well. Agency theories, once relegated almost exclusively to commercial transactions,<sup>29</sup> now apply to scores of personal dealings. As a result of legal developments in the last thirty years, one can, among other

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<sup>23</sup> Broadway, *supra* note 22, at 114; Moore, *supra* note 16, at 313.

<sup>24</sup> See Briffault, *supra* note 21, at 413. See, e.g., *Government Jobs Overview*, FED. JOBS NETWORK, <http://federaljobs.net.overview.htm> (last visited Oct. 3, 2010) (“Many federal workers’ duties require travel away from their duty station to attend meetings, complete training, or perform inspections while others—such as auditors, instructors, field engineering crews, and safety investigators—may require extensive travel for weeks or months at a time. Some employees are on continuous travel . . .”).

<sup>25</sup> James Oberg, *Cosmonaut in World’s First Space Wedding*, MSNBC.COM (Aug. 12, 2003), <http://www.msnbc.msn.com/id/3077947>. Internationally, many of history’s most famous couples were married by proxy. Napoleon married Maria Louisa by proxy in 1810 with an archduke performing his role. 2 JOHN S.C. ABBOTT, *THE HISTORY OF NAPOLEON BONAPARTE* 172 (1855). Marie Antoinette and King Louis XVI were also married by proxy. JEANNE-LOUISE HENRIETTE CAMPAN, *MEMOIRS OF MARIE ANTOINETTE* 38-39 (1910).

<sup>26</sup> Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia allow marriages between same-sex partners. N.H. REV. STAT. ANN. § 457-A:1 (2010); VT. STAT. ANN. tit. 15, § 1201-07 (2007); D.C. CODE § 32-701(3) (2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In addition, the tribal law of the Coquille Indian Tribe in Oregon permits same-sex marriage. COQUILLE INDIAN TRIBAL CODE § 740.010(2) (2008).

<sup>27</sup> See Kevin Lavery, *Online Gay Marriage Seen as Game-Changer*, NPR.ORG (Dec. 14, 2009), <http://www.npr.org/templates/story/story.php?storyId=121283017> (describing the serious economic boon that might be fostered if states allowing gay marriage allowed parties to seek marriage licenses online); see also Adam Candeub & Mae Kuykendall, *E-Marriage: Breaking the Marriage Monopoly* (MSU Legal Studies Research, Working Paper No. 07-25, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491704](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491704).

<sup>28</sup> See *infra* Part III.A.2.

<sup>29</sup> MECHEM, *supra* note 14, § 10 (“If agency be deemed to belong to contractual representation properly, it will at once be seen that it belongs to a condition of society in which commercial transactions are highly developed. A non-commercial society, while it might have much use for servants, would have little need of agents. The historical condition seems to accord with this conclusion.”).

things, appoint an agent to make end-of-life decisions,<sup>30</sup> appoint an agent to draft a will,<sup>31</sup> even appoint an agent to exercise custody over one's child.<sup>32</sup> In other words, agency doctrine has permeated the most personal of our relationships, save the marital relationship.

The time has come to reassess our long-standing intolerance of proxy marriage. To that end, Part I of this article surveys the history of proxy marriage, from early Roman times to today, with a view toward providing an explanation for the doctrine's negative perception in both the United States and abroad. Part II describes the reluctance to sanction proxy marriage based on the theory that agency law is not properly extended to exceptionally personal transactions. In addition, it challenges the assumption that marriage is too personal to be governed by agency principles given agency law's application to other intimate dealings. Part III details, from an equitable standpoint, why proxy marriage is needed in today's mobile society and argues that existing protective mechanisms inherent in agency law can ensure the continued integrity of proxy marriages. Finally, Part IV argues that it is time to stop singling out the marital contract as unworthy of an agency regime; a widespread revival of proxy marriage is long overdue.

## I. THE VALIDITY OF PROXY MARRIAGE: THEN AND NOW

The history of proxy marriage is as long as it is sordid. Indeed, some scholars trace the origin of proxy marriage to biblical times.<sup>33</sup> It was a well-accepted means of perfecting a marriage in antiquity under both of the world's great legal traditions—civil law and common law; it remained possible through the Middle Ages;<sup>34</sup> and it likely even took hold in the American colonies.<sup>35</sup> In fact, proxy marriage was practiced somewhat prolifically in the United States until just after World War I, when racial and immigration concerns led to its virtual demise.<sup>36</sup> Today, the possibility of a valid proxy marriage in America is rather scant. Much of the rest of the world holds quite a different view, however, making the legality of proxy

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<sup>30</sup> See *infra* Part II.C. Pennsylvania was the first state to enact a special durable power of attorney for health care decisions in 1983. Cynthia M. Garraty, *Durable Power of Attorney for Health Care: A Better Choice*, 7 CONN. PROB. L.J. 115, 119 (1992) (citing 20 PA. CONS. STAT. ANN. §§ 5601-5607 (Purdon Supp. 1991)). By 1992, thirty-two states had done so. *Id.* at 120.

<sup>31</sup> See *infra* Part II.A.

<sup>32</sup> See *infra* Part II.B. See, e.g., LA. REV. STAT. ANN. §§ 9:951-:954 (2008).

<sup>33</sup> See, e.g., Luke B. Henry, *California and Proxy Marriage*, 27 J. ST. B. CAL. 294, 294 (1952) (“The first recorded instance of a marriage contracted by proxy is said to have been when Rebecca offered water from the well to the servant of Abraham who had been empowered to find a wife for Abraham’s son, Isaac.”).

<sup>34</sup> See *infra* Part I.A.2.

<sup>35</sup> See *infra* Part I.A.4.

<sup>36</sup> See *infra* Part I.A.5.

marriage a controversial issue over which nations regularly engage in vigorous debate.<sup>37</sup>

### A. *The Genesis and Development of the Proxy-Marriage Doctrine*

The validity of a proxy marriage was recognized at some point across almost all societies. Even those groups most expected to abhor the doctrine—in particular, organized religious groups, such as the Roman Catholic Church—embraced proxy marriage as necessary and equitable.<sup>38</sup> As a result, proxy marriage rather easily gained acceptance in the United States.<sup>39</sup> After its introduction, however, the doctrine quickly became loathed and was ultimately abrogated.<sup>40</sup>

#### 1. Roman Acceptance of Marriage by Messenger

For the ancient Romans, marriage was viewed as a contract—a relationship “based solely upon the agreement of the parties to take each other from that moment as husband and wife.”<sup>41</sup> Thus, in Roman times, the only precondition for a valid marriage was mutually expressed consent.<sup>42</sup> No particular ceremony or officiant was required, and the consent of the spouses was not required to take any particular form.<sup>43</sup> As in all contracts, expressions of consent could be made in writing, orally, and sometimes even tacitly.<sup>44</sup>

This perception of marriage as a mere civil contract was taken quite seriously, so much so that Roman authorities viewed the expression of consent (at least for a man) as possible not only in person but also through a letter or the use of an agent, both of which were acceptable means of consenting to ordinary contractual relationships.<sup>45</sup> Thus, Roman law permitted a man away from home to

<sup>37</sup> See Egon Schwelb, *Marriage and Human Rights*, 12 AM. J. COMP. L. 337, 365-69 (1963).

<sup>38</sup> See *infra* Part I.A.2.

<sup>39</sup> See *infra* Part I.A.4.

<sup>40</sup> See *infra* Part I.A.5.

<sup>41</sup> Ernest G. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 474 (1919).

<sup>42</sup> FRITZ SCHULZ, *CLASSICAL ROMAN LAW* 111 (1951). This has been true, at least, since the time of Alexander the Great. See Charles Donahue, Jr., *The Case of the Man Who Fell into the Tiber: The Roman Law of Marriage at the Time of the Glossators*, 22 AM. J. LEGAL HIST. 1, 11-12 (1978). In more ancient times, the consent of the bride was altogether unnecessary, though Roman law evolved to require the consent of both the bride and groom. A.A. Roberts, *Marriage by Proxy: Including a Brief Consideration of the Nature of Marriage and of Agency*, 60 SALJ 280, 284 (1943). Additionally, a paterfamilias' consent to the marriage of a child under his power was required. Susan Treggiari, *Ideals and Practicalities in Matchmaking in Ancient Rome*, in *THE FAMILY IN ITALY FROM ANTIQUITY TO PRESENT* 94 (David I. Kertzer & Richard P. Saller eds., 1991).

<sup>43</sup> Treggiari, *supra* note 42, at 95-96.

<sup>44</sup> *Id.* at 96.

<sup>45</sup> Lorenzen, *supra* note 41, at 474.

perfect a marriage in his absence through the use of a messenger.<sup>46</sup> The intended husband's use of a proxy in this manner created a perfectly valid marriage.<sup>47</sup> The option to marry by proxy, however, did not extend to an absent woman, largely due to Roman views of the appropriate course of conduct between parties immediately after the marriage ceremony.<sup>48</sup> The notion was that wife needed to be led into the domicile of the marriage such that the parties could officially begin their married life, and in early Roman times, the marital domicile was necessarily that of the husband.<sup>49</sup> It was therefore impossible for a Roman wife to use a proxy to perfect the marital contract because she could not then be led to the marital domicile. The Roman husband, however, was free to marry by proxy at will.<sup>50</sup> By roughly 550 AD, the requirement that the wife be led to the home of the husband was no longer a clear legal mandate, though it persisted as a custom for some time.<sup>51</sup> Thus, by the middle of the sixth century, proxy marriage had fully taken hold as a legally permissible manner of creating the marital relationship.<sup>52</sup>

This rather complete acceptance of proxy marriage by Roman citizens and jurists would prove significant. The spread of Roman law throughout nearly all of Europe<sup>53</sup> and its role in shaping the civil law of a number of European countries more than six centuries later<sup>54</sup> ensured proxy marriage a continuing presence in the international legal landscape.<sup>55</sup>

## 2. Canon Law's Surprising Approval

Perhaps even more significant to the long-term survival of the proxy-marriage doctrine than its Roman law reception is the warm welcome it received in Roman Catholic canon law. One might assume that marriage was always inextricably linked with religion, but the link did not actually appear in law until approximately 541 AD. The *Corpus Juris Civilis*, the Emperor Justinian's influential compilation of early Roman law,<sup>56</sup> required that all but citizens holding high office "betake themselves to some place of worship and declare their intention" to a church official before several witnesses such that the

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Roberts, *supra* note 42, at 284.

<sup>49</sup> *Id.*

<sup>50</sup> DIG. 23.2.5 (Pomponius, Sabinus 4); Roberts, *supra* note 42, at 284.

<sup>51</sup> See sources cited *supra* note 50.

<sup>52</sup> Roberts, *supra* note 42, at 284.

<sup>53</sup> See PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 39-41 (1999).

<sup>54</sup> See *id.* at 43-49.

<sup>55</sup> See *infra* Part I.B.2.

<sup>56</sup> Eric Gillman, Note, *Legal Transplants & Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT'L L. 263, 263 (2009).

church could document the marriage.<sup>57</sup> Canon law certainly recognized marriage as a legal relationship—a contract.<sup>58</sup> But in requiring that the parties celebrate the perfection of their contract in the church and with the blessing of a priest, canon law sought primarily to provide the marriage publicity (i.e., to “bring the fact of marriage to the notice of the church”).<sup>59</sup> Ensuring that the marriage was entirely voluntary—that the parties did truly consent to the creation of the contract—might best be described as an afterthought, a positive side effect of the requirement that marriages take place in a church.<sup>60</sup> On the background of this aim to bring couples into the church to celebrate their marriage contracts, canon law was required to take a legal stance on proxy marriage—in essence, to determine whether one spouse’s failure to personally declare consent before witnesses and a priest was sufficient to taint the entire marriage with nullity. Rather surprisingly, the canon law view was that it was not.<sup>61</sup>

Centuries later, in 1215, proxy marriage aroused great attention at canon law when the Roman Catholic Church, under Pope Innocent III’s leadership, fully endorsed the Roman view of the validity of a marriage perfected with one party using a stand-in.<sup>62</sup> In a development somewhat progressive for the time, however, canon law modified the Roman rule, making it possible for *either* husband or wife to marry by proxy.<sup>63</sup> Thus, the possibility of proxy marriage became rather well accepted—and gender-neutral—in the canon law of the early thirteenth century.<sup>64</sup>

More than one hundred years later, under Pope Boniface VIII, the church’s approval of proxy marriage persisted,<sup>65</sup> though not without some dissatisfaction. A number of church officials voiced opposition to the continuing acceptance of proxy marriage, suggesting that the marital contract is one “of such far reaching consequences that [consent] should be expressed in person instead of by proxy.”<sup>66</sup> Even in the face of this opposition, however, the church continued to

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<sup>57</sup> Roberts, *supra* note 42, at 285-86.

<sup>58</sup> Lorenzen, *supra* note 41, at 475.

<sup>59</sup> *Id.* at 476.

<sup>60</sup> By the time of the Council of Trent in 1563, issues relating to the voluntariness of consent to the marital relationship had gained more sway. CARRIÈRE, DE MATRIMONIO § 4; EMIL FRIEDBERG, LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS 490 (1895); *see also* Lorenzen, *supra* note 41, at 476 (“Since the Council of Trent (1563) matrimonial consents must be exchanged according to the Canon Law before a priest and at least two witnesses.”).

<sup>61</sup> Lorenzen, *supra* note 41, at 473 (“That marriage by proxy was allowed in the . . . Canon Law is an established fact.”).

<sup>62</sup> 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 370-71 (Cambridge Univ. Press 1898); *see also* Lorenzen, *supra* note 41, at 475.

<sup>63</sup> Lorenzen, *supra* note 41, at 475.

<sup>64</sup> *Id.* at 474.

<sup>65</sup> *Id.* at 475.

<sup>66</sup> *Id.*

treat proxy marriages as valid.<sup>67</sup> The majority view was that there *is* an in-person expression of consent by a principal to a proxy marriage.<sup>68</sup> Agency theory views the agent as a “stand-in” for the principal, such that when an agent expresses his assent to a contract, the principal has essentially “pronounce[d] the words” himself “through the [agent’s] mouth.”<sup>69</sup>

By the time of the Roman Catholic Church’s most important ecumenical council, the Council of Trent in 1563, the church’s internal debate over the permissibility of proxy marriage had reached a fever pitch again. Disagreement centered upon whether the appointment of a proxy was to be done in the same form as the expression of consent in the marriage ceremony itself—namely before a priest and at least two witnesses.<sup>70</sup> Focusing on the core intent of canon law’s ceremonial requirement (again, to publicize the marriage to the church), the prevailing view was that ceremonial requirements need not extend to the contract created between an intended spouse and the proxy he appointed to act on his behalf, as the form of this agency contract did not bear in any way on the church’s knowledge of the marriage.<sup>71</sup> Thus, at the termination of Council of Trent in the late sixteenth century, proxy marriage was still very much a part of canon law.

### 3. English Common Law Reception

The early English common law of marriage, much like Roman law, focused virtually all of its marriage requirements on ensuring the voluntary consent of both spouses. And thus, a solemn ceremony—in which the husband pledged to love, comfort, honor, and keep his wife in sickness and health, and to remain faithful to her, and in which the wife vowed to do the same, and also to obey and serve her husband—was a critical part of any English marriage ceremony.<sup>72</sup> Such declarations were intended to assure that the contracting parties “seriously weigh and consider” married life and express consent only after fully analyzing the rights and duties the relationship would bring.<sup>73</sup>

The English ceremonial requirements necessarily raised the question of whether marriages contracted with the parties outside each other’s physical presence—and thus unable to make the necessary declarations in person—could have validity. The English answer to this question was clear. The Church of England wholly

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 476.

<sup>71</sup> *Id.*

<sup>72</sup> WILLIAM TEGG, *THE KNOT TIED: MARRIAGE CEREMONIES OF ALL NATIONS* 19-20 (1877).

<sup>73</sup> *Id.* at 20.

adopted the canon law view of proxy marriage.<sup>74</sup> Marriages between absent persons could be validly contracted by letter, by messenger, or through the use of agents.<sup>75</sup> The only exception at English law, which was apparently not a requirement of either the Roman or canon law systems, was that parties to a proxy marriage “have some notice or intelligence” of the other party to the marital relationship, “for unto those who be utterly *unknown* to us, we cannot yield our Consent no . . . more than it is possible for us to love them, of whom we have never heard.”<sup>76</sup>

With that one narrow exception, proxy marriage was as well accepted in England through the eighteenth century as it was in the rest of the world.<sup>77</sup> Indeed, proxy marriage has a place among some of the most famous in English history. Queen Mary of England married Philip II of Spain in a proxy ceremony in 1554, with a Count Egmont standing in for the groom.<sup>78</sup> Likewise, King James I of England married Anne of Denmark in August of 1589 by proxy.<sup>79</sup> After the proxy ceremony, Anne set sail to Scotland but was forced by storm to the coast of Norway; in what has been described as the “one romantic episode of his life,” the king sailed with three hundred men to meet his new bride.<sup>80</sup> And proxy marriage in old England was neither restricted to, nor practiced solely among, the nobility. Ordinary citizens separated by substantial distances were known to perfect marital relationships from afar as well.<sup>81</sup>

#### 4. Proxy Marriage’s Postcolonization Survival?

When the British migrated to America in the seventeenth century, they were said to carry their law with them, which still legitimized proxy marriage.<sup>82</sup> The new American colonies essentially adopted English law after their colonization.<sup>83</sup> It is virtually universally

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<sup>74</sup> *Id.* at 21-22; *see also* Lorenzen, *supra* note 41, at 480-81.

<sup>75</sup> Lorenzen, *supra* note 41, at 481 (quoting SWINBURNE, *ESPOUSALS* 162 (2d ed. 1711)).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 482. The first recorded evidence of proxy marriage in England is in Lyndwood’s *Provinciale*, written in 1430. *Id.* at 480.

<sup>78</sup> 1 WILLIAM H. PRESCOTT, *THE HISTORY OF THE REIGN OF PHILIP THE SECOND, KING OF SPAIN* 90-91 (1882); TEGG, *supra* note 72, at 184.

<sup>79</sup> Hugh Chisholm, *Anne of Denmark*, *ENCYCLOPEDIA BRITANNICA* 69-70 (11th ed. 1910).

<sup>80</sup> DAVID HARRIS WILLSON, *KING JAMES VI AND I* 85 (1956).

<sup>81</sup> *See generally* SWINBURNE, *supra* note 75, at 162 (“Betwixt them that be absent, Spousals or Matrimony may be contracted three manner of ways; that is to say, by *Mediation* of their Proctors, or of *Messengers*, or of *Letters*; provided nevertheless in every of those Cases, that the Parties have some notice or intelligence the one of the other, at hand by *Fame* or *Report* . . .”).

<sup>82</sup> Lorenzen, *supra* note 41, at 482.

<sup>83</sup> *Id.*

accepted, however, that the new colonies adopted English law only to the extent that it was suited to their unique colonial conditions.<sup>84</sup>

While there is no hard and fast evidence that colonial American law sanctioned proxy marriage, colonial embracement of British law strongly suggests that proxy marriage was permitted in early America. “That [marital] consent might be expressed by an agent was admitted by the Roman law, by the Canon law, and . . . by the English law as late as the eighteenth century.”<sup>85</sup> The only remaining question is whether colonists might have rejected the British law sanctioning proxy marriage as unsuited to the times.<sup>86</sup> That is highly unlikely. Proxy marriage was likely even more closely tailored to American colonial society than it was to its British counterpart: “Many a colonist must have left his sweetheart behind when he first ventured over seas. [Still others] must have desired, after becoming established in this country, to marry someone whom they had known in their native land.”<sup>87</sup> In either situation, a trip to the homeland merely for the purpose of perfecting a marriage was as time consuming as it was cost prohibitive.<sup>88</sup> Proxy marriage was precisely the legal device to solve the problem created by the distance gap. It “would enable the woman to become the man’s wife before leaving her home” country on a long and arduous journey to the colonies.<sup>89</sup>

As a result, though there is very little evidence in colonial law of a wholesale acceptance of proxy marriage,<sup>90</sup> its suitability for colonial times, and the fact that American states in the decades following colonization seemed to recognize the possibility of a proxy marriage, make it a near certainty that proxy marriage did migrate to the new world along with its British settlers.

##### 5. The Twentieth Century: Marriage, War, Prostitutes, and “Picture Brides” Intertwined

If proxy marriage was legally sanctioned in colonial America, it went virtually unrecognized for decades. But around the turn of the twentieth century, and for the following forty years, proxy marriage garnered substantial new interest.<sup>91</sup> The reason for the renewed attention paid to the old, perhaps even dying, doctrine was clear. Two

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<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (“Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts.”).

<sup>91</sup> Lillian M. Gordon, *Marriage by Proxy: The Need for Certainty and Equality in the Laws of the American States*, 20 SOC. SERV. REV. 29, 32 (1946).

world wars raised new social problems to which the traditional conception of ceremonial marriage provided no just solution.

Servicemen stationed overseas strongly desired the ability to use proxy marriage to make formal unions for which they were unable to express consent in the physical presence of their intended wives. World War I, "when only four million men were in the armed forces, occasioned a demand whose dimensions impelled the Judge Advocate General of the Army to provide a model form of contract for marriage by mail."<sup>92</sup> And by the time of World War II, "when over eleven million persons were in the armed forces, the need for a valid form of marriage between absent parties assumed even greater proportions."<sup>93</sup> Because family law at the time branded children born outside of wedlock as illegitimates not entitled to the same legal rights and protections as children born of a marriage,<sup>94</sup> there was more at stake than these servicemen's sense of pride and emotion. "[C]hildren fathered by servicemen before embarkation" deserved a means of legal protection that ceremonial marriage could not provide.<sup>95</sup>

As a result, many members of the armed forces in both world wars engaged in proxy marriages, despite the lack of clarity as to whether such marriages carried the force of law in early twentieth-century America.<sup>96</sup> Some scholars of the time argued that these marriages were no doubt legally valid.<sup>97</sup> Others argued that clarification was needed on the validity of a marriage ceremony conducted with the use of an agent.<sup>98</sup> A few state legislatures responded with narrowly-tailored bills that recognized the validity of proxy marriages between absent servicemen and their partners.<sup>99</sup> Still other states decried the practice of proxy marriage altogether, begrudging its perceived disastrous impact on American immigration policy.<sup>100</sup>

Regardless of the generally prevailing view of the propriety and necessity of proxy marriages for military personnel, a growing fear and loathing of the practical effect of a broad approval of proxy marriage reached new heights in the 1920s. This concern was largely fueled by immigration policy, racism, and a staunchly-held American

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See Christopher C. Brown, *Illegitimacy and Veterans' Benefits Legislation*, 21 HOW. L.J. 421, 421-22 (1978).

<sup>95</sup> *The Validity of Absentee Marriage of Servicemen*, 55 YALE L.J. 735, 736 (1946).

<sup>96</sup> *Id.* at 735.

<sup>97</sup> See *Comments*, 25 S. CAL. L. REV. 181, 181 (1952) ("The validity of a proxy marriage may be sustained on either or both of two basic theories. The first and more common theory upholds the proxy marriage as being a valid common law marriage . . . . The more recent and intricate approach sustains the act as being a valid ceremonial marriage which fully complies with the technicalities of the jurisdiction." (citation omitted)).

<sup>98</sup> *The Validity of Absentee Marriage of Servicemen*, *supra* note 95, at 736-37.

<sup>99</sup> Gordon, *supra* note 91, at 33 (describing New Jersey and Georgia bills to permit proxy marriage for servicemen on duty).

<sup>100</sup> *Id.*

view of love-based marriage that was not widely accepted in many other cultures at the time.<sup>101</sup>

The crux of the growing distaste for proxy marriage stemmed from a gate-keeping problem. If American soldiers stationed overseas were permitted to marry their brides from a distance, then the law effectively recognized absentee marriages conducted by proxy. And once the law admitted the possibility of valid absentee marriages, it was confronted with the possibility that the absent spouse might not be an American citizen serviceman stationed abroad. Rather, an absentee marriage with the assistance of a proxy might be conducted between an American citizen, present in person for the marriage ceremony, and his bride located abroad. And while the base legal transaction was the same—one American citizen in the United States marrying another not present in the United States for the ceremony—perception of the two situations differed immensely. Men who wished to marry foreign brides by proxy were dubbed scoundrels, pimps, or worse.<sup>102</sup>

The core of the problem was that immigration rules provided for easy, automatic, and permanent resident status in the United States for the spouse of any American citizen.<sup>103</sup> When American men began to use proxy marriage to choose foreign brides who eventually emigrated to the United States, concerns arose along two fronts. First, the Bureau of Immigration<sup>104</sup> became worried that the doctrine of proxy marriage was being abused as a means of bringing foreign prostitutes into the United States.<sup>105</sup> That concern was racially tinged. Immigration officials at the time “suspected all Jews at entry ports; only Asians drew more fire.”<sup>106</sup> Immigration agents believed that ninety percent of Japanese and Chinese women immigrating to the United States at the time were actually brought in as prostitutes.<sup>107</sup> Second, even when it was clear that a proxy marriage did not involve the immigration of a prostitute, American officials disdained the continuation of proxy marriage and the benefits it conveyed on spouses living abroad because they believed it led to the proliferation

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<sup>101</sup> COTT, *supra* note 20, at 148-50.

<sup>102</sup> See generally *id.* at 146-48.

<sup>103</sup> See Amy L. Elson, *The Mail Order Bride Industry and Immigration: Combating Immigration Fraud*, 5 IND. J. GLOBAL LEGAL STUD. 367, 368-69 (1997).

<sup>104</sup> The Bureau of Immigration has undergone numerous name changes in the last century. It is now referred to as United States Citizenship and Immigration Services (USCIS). *Immigration Updates*, RENSSELEAR POLYTECHNIC INST., <http://www.rpi.edu/web/iss/Immigration/update2.html> (last visited Oct. 2, 2010); see also Jacob Sapochnick, *Name Changes Again?—DHS Issues Notice of Name Change for ICE and CBP*, VISA LAW. BLOG (Apr. 20, 2007), [http://www.visalawyerblog.com/2007/04/name\\_changes\\_again\\_dhs\\_issues.html](http://www.visalawyerblog.com/2007/04/name_changes_again_dhs_issues.html) (describing immigration department name changes).

<sup>105</sup> COTT, *supra* note 20, at 148-49.

<sup>106</sup> *Id.* at 149.

<sup>107</sup> *Id.*

of “picture brides” entering America.<sup>108</sup> These picture brides—the early twentieth-century equivalent of today’s “mail order bride”<sup>109</sup>—entered the country after a proxy marriage to an American husband, typically without even having met him before landing on American soil.<sup>110</sup> Asian immigrants were again the suspect class here, with particular scrutiny applied to marriages involving Japanese and Korean immigrants.<sup>111</sup> Throughout much of the twentieth century, Asian cultures generally accepted the idea of arranged marriage,<sup>112</sup> valuing “economic bargaining” and building “kinship networks” through marriage.<sup>113</sup> Such motives for marriage, however, were antithetical to the American culture of the time, which had already fully committed to the idea of purely love-based marriage.<sup>114</sup> Regarding picture brides, “the whiff of compulsion of the couple by extended family members, the possible instrumentalism of the marriage choice, and the importance of monetary considerations all ran against the American grain. An arranged marriage represented coercion.”<sup>115</sup> Thus, proxy marriage began to be viewed as a means of skirting societal norms surrounding marriage.

Though fear was at its peak, it is still unclear precisely how much abuse of the proxy-marriage doctrine and its resulting immigration benefits actually existed. Newspaper headlines of the time “screamed out . . . ‘Japanese Picture Brides Are Swarming Here.’”<sup>116</sup> But when “[p]ressed by the Japan Association of America, the Bureau of Immigration conceded that only 865 proxy brides landed in San Francisco during the year from June 1914 to June 1915. The California population at the time numbered nearly 3 million.”<sup>117</sup> Still, due to concerns over prostitution and the motives of those marrying by proxy, in the early 1920s, American officials took the substantial step of declaring that “any marriage performed when one of the parties was in the United States and the other in a foreign country was invalid for immigration purposes.”<sup>118</sup> The rule was exceptionally broad, as it seemed to disapprove of all proxy marriages no matter where perfected, at least so long as they were relied upon

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<sup>108</sup> *Id.* at 150-51.

<sup>109</sup> See generally Elson, *supra* note 103, at 367; Eddy Meng, *Mail Order Brides: Guilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 200 (1994).

<sup>110</sup> Alice Yun Chai, *Picture Brides: Feminist Analysis of Life Histories of Hawaii's Early Immigrant Women from Japan, Okinawa, and Korea*, in SEEKING COMMON GROUND: MULTIDISCIPLINARY STUDIES OF IMMIGRANT WOMEN IN THE UNITED STATES 123-38 (Donna Gabaccia ed., 1992); see also COTT, *supra* note 20, at 151.

<sup>111</sup> COTT, *supra* note 20, at 151.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 149.

<sup>114</sup> *Id.* at 150.

<sup>115</sup> *Id.* at 151.

<sup>116</sup> *Id.* at 154.

<sup>117</sup> *Id.* at 153.

<sup>118</sup> *Id.* at 154.

to confer immigration status. By 1924, then, the view of proxy marriage began to morph, and sentiment disfavoring the doctrine became overwhelming, even if confined to the immigration context.

To be sure, American servicemen stationed abroad continued to use proxy marriage to perfect unions with their American brides even after 1924 and continuing through both world wars.<sup>119</sup> Such unions posed no immigration complications. But in view of the previous uncertainty over the legality of these marriages, the move toward the rejection of proxy marriage as a viable means of perfecting a legal union—if only in the immigration context—signaled an important shift in American thinking. By the late 1920s, proxy marriage was viewed, at best, as a necessity in only the most exceptional circumstances, and even then, through skeptical lenses.<sup>120</sup> Although proxy marriage peaked again briefly during World War II, it became “dormant” shortly afterwards.<sup>121</sup>

### B. *A Dying Institution?: The Status of Proxy Marriage Today*

Today, proxy marriage enjoys mixed levels of acceptance around the globe. In the United States, rather widespread tolerance of the doctrine faded quickly after the Second World War.<sup>122</sup> During peace time, a period in which American society was less mobile,<sup>123</sup> the doctrine of proxy marriage fell into desuetude. It has not yet been completely extinguished from the legal landscape in this country, but its recognition is a rarity at best.

Internationally, the reception of proxy marriage as a valid means of creating the spousal relationship has enjoyed far more longevity. Greater European acceptance of proxy marriage became evident in the early 1960s, when the United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages declined to require the presence of both parties at a marriage ceremony in order to create a marriage that brings about “the natural and fundamental group-unit of society’: the family.”<sup>124</sup> The United Nations’ refusal to prohibit proxy marriage was one of the most

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<sup>119</sup> See *Comments, supra* note 97, at 181.

<sup>120</sup> *Id.* at 184.

<sup>121</sup> *Id.* at 181 (“In the wake of the Second World War, there has appeared, once again, an influx of cases involving proxy marriages.”); Annotation, *Proxy Marriages*, 170 A.L.R. 947 (1947) (“After Congress adopted a statute denying recognition to proxy marriages for immigration purposes the question became dormant; but during World War II several thousand proxy marriages occurred, principally between resident women and members of the armed forces who could not be physically present at a marriage ceremony.”).

<sup>122</sup> See Moore, *supra* note 16, at 313; Schwelb, *supra* note 37, at 367.

<sup>123</sup> Moore, *supra* note 16, at 313.

<sup>124</sup> Schwelb, *supra* note 37, at 365 (citing G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948)).

controversial family law issues of the Convention, with a number of jurisdictions strongly advocating on each side of the issue.<sup>125</sup>

Indeed, the United Nations' debate over proxy marriage "made it clearer than the consideration of any other issue to what extent . . . the world was still divided on the concept of marriage."<sup>126</sup> Even forty years after those initial United Nations discussions, divisions persist. The American view of the impermissibility of proxy marriage is simply not one shared globally.<sup>127</sup>

### 1. Limited American Law Recognition

These days, the possibility of perfecting a valid proxy marriage in the United States has grown remote. Only a handful of states approve the practice,<sup>128</sup> and most do so on a very limited basis. Moreover, even in states that rather liberally sanction the creation of a marital relationship by proxy, little reported litigation exists to flesh out the details of the law.

All but one of the five states allowing proxy marriage does so expressly by statute. Kansas statutes provide perhaps the least clarity on the issue. In its legislation detailing the solemnization requirements of a Kansas marriage, proxy marriage is not mentioned at all.<sup>129</sup> Kansas simply requires a marriage license and a particular type of officiant.<sup>130</sup> The statute neither sanctions nor prohibits marriages conducted by proxy.<sup>131</sup> Nonetheless, in response to requests for guidance from state district judges, the Kansas Attorney General has issued a number of opinions on the validity of proxy marriages in the state, and every Attorney General opinion on this issue since the first in 1944 is consistent.<sup>132</sup> In the absence of an express legislative prohibition, proxy marriages are legal in Kansas.<sup>133</sup> The requirement is simply that the person who will not attend the marriage ceremony give a valid power of attorney to the proxy.<sup>134</sup>

Texas statutes provide slightly more guidance. Persons "unable to appear for [a marriage] ceremony" are authorized to

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<sup>125</sup> *Id.* at 365-66.

<sup>126</sup> *Id.* at 365.

<sup>127</sup> *See infra* Part I.B.2.

<sup>128</sup> Those states include California, Colorado, Kansas, Montana, and Texas. *See sources cited supra* note 19.

<sup>129</sup> KAN. STAT. ANN. § 23-104a (2010).

<sup>130</sup> The officiant requirement is dispensed with if the parties make "mutual declarations that they take each other as husband and wife in accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties belong." KAN. STAT. ANN. § 23-104a(c) (2010).

<sup>131</sup> *Id.*

<sup>132</sup> 80 Op. Att'y Gen. 261, 1980 WL 117668 (Kan. A.G.) (1980).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

appoint a proxy by affidavit.<sup>135</sup> The statute is broad, insofar as it does not limit the availability of proxy marriage to any particular class of persons.<sup>136</sup> Setting ceremonial requirements aside, Texas even allows parties to act by proxy in seeking a marriage license,<sup>137</sup> but only if the party seeking the license by proxy is “on active duty as a member” of the state or federal armed forces or “confined in a correctional facility.”<sup>138</sup> The Texas Attorney General has opined, in response to a district attorney’s question, that the use of a proxy to obtain a marriage license in Texas may even permit double proxies.<sup>139</sup> Specifically, the Attorney General expressed that two inmates would be permitted to obtain a marriage license while incarcerated, each using his own proxy.<sup>140</sup>

No Texas authority extends the *double* proxy rule to participation in the marriage ceremony. Nonetheless, Texas law rather liberally permits proxy marriage in allowing any person to utilize a proxy for the ceremony rather than limiting its use to members of the armed forces or those incarcerated.<sup>141</sup> The statute requires only that the person using the proxy execute an affidavit with detailed information about the applicant and an “appointment of any adult . . . to act as proxy for the purpose of participating in the ceremony.”<sup>142</sup> No reported Texas appellate opinion applies the Texas statute or discusses the Attorney General opinion, and thus, the pragmatic state of Texas law on proxy marriage remains unclear.

The rules in Colorado and Montana are nearly identical. Both states’ statutes provide,

If a party to a marriage is unable to be present at the solemnization, such party may authorize in writing a third party to act as such party’s proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, such person may solemnize the marriage by proxy. If such person is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.<sup>143</sup>

Thus, both states appear to provide *any party* a right to marry by proxy, for any reason, so long as he has properly appointed an agent.

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<sup>135</sup> TEX. FAM. CODE ANN. § 2.203(b) (West 2006).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 2.006(c).

<sup>138</sup> *Id.*

<sup>139</sup> Op. Att’y Gen. GA-0024, 2003 WL 396062 (Tex. A.G. 2003). A marriage by “double proxy” occurs when both spouses to the marriage are not at the marriage ceremony over which the officiant presides. *See id.*

<sup>140</sup> *Id.*

<sup>141</sup> TEX. FAM. CODE ANN. § 2.203(b) (West 2006).

<sup>142</sup> *Id.* § 2.007.

<sup>143</sup> COLO. REV. STAT. ANN. § 14-2-109(2) (West 2005); MONT. CODE ANN. § 40-1-301(2) (2009). The only distinctions between the two statutes are minor and largely semantic.

However, in April 2007, Montana departed from Colorado law when it adopted a more stringent limitation on eligibility to marry by proxy. Specifically, Montana limited the use of proxy marriage to military personnel.<sup>144</sup> Yet, even with this limitation, Montana is notorious for having the most liberal proxy-marriage scheme in the country—the only state allowing double proxies for the marriage ceremony.<sup>145</sup>

Finally, California expressly allows for the perfection of a valid proxy marriage.<sup>146</sup> California's proxy marriage statute is both more detailed and more stringent than those found in other states.<sup>147</sup> The legislation allows a marriage by agent only for a member of the United States armed forces who is "stationed overseas and serving in a conflict or a war and is unable to appear" for the marriage ceremony.<sup>148</sup> Moreover, the party stationed overseas must execute a power of attorney in writing, which must be notarized or witnessed by two officers of the United States armed forces.<sup>149</sup> The California proxy does not allow the absent spouse's agent to merely present himself for the first time as a representative at the ceremony. Rather, to procure the marriage license, the person appointed must personally appear with the nonabsent spouse.<sup>150</sup> When the marriage license is obtained, the power of attorney is presented to the clerk, and it becomes part of the marriage certificate thereafter.<sup>151</sup>

Although no reported appellate decision exists applying California's proxy marriage statute, a recent California case suggests that state law *may* sanction proxy marriage even for nonmilitary personnel. In *People v. Tami*, in which defendant Tami was prosecuted for "filing a false or forged marriage license in a public office," a California appellate court reversed the defendant's conviction on grounds of insufficient evidence to demonstrate that she knowingly filed a false or forged document.<sup>152</sup> Interestingly, the reversal of Tami's conviction rests almost entirely on the lack of clarity in California law with respect to marriage ceremonies

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<sup>144</sup> MONT. CODE ANN. § 40-1-301(4) (2009) ("One party to a proxy marriage must be a member of the armed forces of the United States on federal active duty or a resident of Montana at the time of application for a license and certificate . . .").

<sup>145</sup> Because Colorado law is phrased almost identically, one would assume Colorado allows for double proxies as well. But no authority exists to that effect.

<sup>146</sup> CAL. FAM. CODE § 420 (West Supp. 2010). In 2004, the statute was amended to apply only to members of the Armed Services. 2004 Cal. Legis. Serv. Ch. 476 (S.B. 7).

<sup>147</sup> Compare CAL. FAM. CODE § 420 (West Supp. 2010), with COLO. REV. STAT. ANN. § 14-2-109 (West 2005); MONT. CODE ANN. § 40-1-301 (2009); TEX. FAM. CODE ANN. § 2.203(b) (West 2006); and 80 Op. Att'y Gen. 261, 1980 WL 117668 (Kan. A.G.) (1980).

<sup>148</sup> CAL. FAM. CODE § 420(b) (West Supp. 2010).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> No. A099263, 2003 WL 22235337, at \*1 (Cal. Ct. App. Sept. 30, 2003).

completed outside of the physical presence of both spouses and an officiant together in the same room.<sup>153</sup>

*Tami* did not involve the traditional circumstances giving rise to proxy marriage (i.e., two parties separated by a great distance, likely for employment reasons, with one authorizing a close friend or relative to “stand in” as a result of the temporary absence). Quite to the contrary, *Tami* sought to marry a man living nearby.<sup>154</sup> Nonetheless, it was not possible for both *Tami* and her intended spouse to participate in a ceremony before a qualified officiant in the same room because her fiancé was incarcerated in the San Quentin State Prison.<sup>155</sup>

*Tami* sought a marriage license from the Napa County Recorder’s Office and told the clerk that her fiancé was “not available” to appear.<sup>156</sup> The clerk then gave her an affidavit of inability to appear, advising her that she and her fiancé would need to sign the appropriate forms and that their officiant would need to accompany her to obtain the license.<sup>157</sup> *Tami* signed her fiancé’s name, with his authorization, by tracing his signature from other documents.<sup>158</sup> *Tami* and her officiant, a Universal Life church minister, then went to a house where *Tami*, the officiant, and several witnesses conducted a phone ceremony.<sup>159</sup> The intended groom participated by telephone from prison.<sup>160</sup> Defendant *Tami* then submitted a marriage certificate, bearing the signatures of all the necessary parties, for filing with the county recorder.<sup>161</sup> When California prosecuted *Tami* for knowingly offering a false or fraudulent document to be filed in the public records, *Tami* responded that “a ‘proxy marriage’ performed with one party ‘represented by an agent’ or present by telephone rather than ‘physically present at the ceremony’ is valid in California.”<sup>162</sup>

In reversing *Tami*’s conviction, the court made no effort to distinguish this case from a traditional proxy marriage case or to determine whether this was even a case involving proxy marriage at all. In one sense, a telephone marriage ceremony may seem very different from a traditional marriage by proxy. In a telephone marriage, the parties do not truly intend for one of them to be represented by an agent. Rather, a party’s phone presence *is* his

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<sup>153</sup> *Id.* at \*3-4.

<sup>154</sup> *Id.* at \*1-2.

<sup>155</sup> *Id.* at \*1.

<sup>156</sup> *Id.* *Tami* and her fiancé did have a marriage “ceremony” two months before she sought this license, with both parties appearing in person, but *Tami* knew it was invalid because they obtained no license in advance. *See id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at \*2.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

participation; no other person need “stand in” for him. On the other hand, both a traditional proxy scenario and a telephone ceremony raise the same core question: can the California statutory requirement that parties declare their consent “in the physical presence of the person solemnizing the marriage and necessary witnesses” be met in any manner other than a personal physical presence of all necessary persons in the same room at the same time?<sup>163</sup> Because that core issue is the same whether the marriage is one of a serviceman represented by an agent or a prisoner participating by telephone, the court focused its discussion on the validity of proxy marriage in California.<sup>164</sup>

Unfortunately, the *Tami* court declined to decide whether proxy marriages are legal in California.<sup>165</sup> Rather, because the crime of which Tami was convicted required a “knowing” violation of the law, the court focused on what Tami knew or should have known about the validity of a California proxy marriage.<sup>166</sup>

The *Tami* court cited three prior decisions bearing on the validity of proxy marriage in California. In one of these decisions, *Barrons v. United States*,<sup>167</sup> the United States Court of Appeals for the Ninth Circuit actually applied Nevada law to a California resident.<sup>168</sup> But, in so doing, the *Barrons* court first found that Nevada law sanctioning proxy marriage does not violate any strong public policy in California.<sup>169</sup> The Ninth Circuit went on to say that proxy marriages are really no different from more traditional marriages; proxy marriages, the *Barrons* court noted, do not necessarily present any serious questions of consent and are occasionally necessary for equitable reasons.<sup>170</sup> Twelve years later, in *Bustamante v. Haet*,<sup>171</sup> a California appellate court cited *Barrons* and seemed to approve of California proxy marriages in a legal malpractice case.<sup>172</sup> Finally, another California appellate court decision, *In re Marriage of Dajani*,<sup>173</sup> assumed the validity of a Jordanian proxy marriage in deciding whether to enforce a dowry contract.<sup>174</sup> Viewing these three

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<sup>163</sup> See CAL. FAM. CODE § 420 (West Supp. 2010). At the time of the *Tami* decision, the question of the whether proxy marriages met the requirements of § 420 was even more controversial, as the statute then required only that parties declare consent “in the presence” of the officiant and witnesses. See CAL. FAM. CODE § 420 (West 2004).

<sup>164</sup> *Tami*, 2003 WL 22235337, at \*2-6.

<sup>165</sup> See *id.* at \*3-5.

<sup>166</sup> *Id.* at \*4-5.

<sup>167</sup> 191 F.2d 92 (9th Cir. 1951).

<sup>168</sup> *Tami*, 2003 WL 22235337, at \*4 (citing *Barrons*, 191 F.2d at 95-96).

<sup>169</sup> *Barrons*, 191 F.2d at 95.

<sup>170</sup> *Id.* at 95-96.

<sup>171</sup> 35 Cal. Rptr. 176 (Cal. Ct. App. 1963).

<sup>172</sup> *Tami*, 2003 WL 22235337, at \*5 (citing *Bustamante*, 35 Cal. Rptr. at 178).

<sup>173</sup> 251 Cal. Rptr. 871 (Cal. Ct. App. 1988).

<sup>174</sup> *Tami*, 2003 WL 22235337, at \*5 (citing *In re Marriage of Dajani*, 251 Cal. Rptr. at 871). For a definition of and origins of the dowry contract, see Purna

cases together, the *Tami* court described California law on the validity of proxy marriage as “unsettled.”<sup>175</sup> The court went on to hold that defendant Tami’s conviction could not be upheld because there was insufficient proof that she knew her telephone marriage was invalid, particularly in light of the “public policy objective to promote and protect the marriage relationship.”<sup>176</sup>

The *Tami* court’s reliance on at least two of three precedents to suggest that proxy marriage is generally acceptable in California is noticeably flawed. That California would recognize the legality of a proxy marriage perfected in Nevada or Jordan does not mean that such a marriage is legally sanctioned by *California* law. It is common under principles of full faith and credit, and comity for one state to give effect to a marriage validly perfected in another jurisdiction.<sup>177</sup> Nonetheless, the court’s reluctance to state that proxy marriage is not generally permitted in California and its description of the law as “unsettled” certainly suggest that California courts may be more receptive to arguments urging the validity of proxy marriage outside the military context than the plain language of California’s statute implies.<sup>178</sup>

The cases demonstrate that California law with regard to proxy marriage is clear on at least one front: marriage by proxy is expressly and clearly sanctioned by statute for certain members of the armed services. For ordinary citizens, *Tami* signals that state law on proxy marriage may be in flux.

Even beyond the five states that expressly allow it, however, proxy marriage has significant legal effects. In states that require both spouses to be physically present at the marriage ceremony and do not allow spouses to use agents to perfect a ceremonial marriage,<sup>179</sup> proxy marriages are almost always recognized and given legal effect if they are perfected in a state that permits them.<sup>180</sup> As a result, the impact of the legality of proxy marriage is felt throughout the United States.

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Manchandia, *Practical Steps Towards Eliminating Dowry and Bride-Burning in India*, 13 TUL. J. INT’L & COMP. L. 305, 311-12 (2005).

<sup>175</sup> *Tami*, 2003 WL 22235337, at \*5.

<sup>176</sup> *Id.*

<sup>177</sup> U.S. CONST. art. IV, § 1; *see also Marriage by Proxy—Conflict of Laws*, 2 N.Y. L. REV. 343, 343 (1924) (“It is general rule that the validity of a marriage, insofar as it depends upon the manner or form of its celebration, is governed by the *lex loci celebrationis*. Hence, a marriage solemnized according to the law of the jurisdiction where it takes place will generally be regarded as valid everywhere.” (citation omitted)).

<sup>178</sup> *See Tami*, 2003 WL 22235337, at \*5.

<sup>179</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-125 (2007); NEB. REV. STAT. § 42-109 (2008); WASH. REV. CODE ANN. § 26.04.070 (West 2005).

<sup>180</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-112; WASH. REV. CODE ANN. § 26.04.020; *Gibson v. Gibson*, 39 N.W. 450, 466 (Neb. 1888); *Hardin v. Davis*, No. A90955, 1945 WL 5519, at \*3 (Ohio Ct. C.P. May 18, 1945); *State v. Bragg*, 163 S.E.2d 685, 687-88 (W. Va. 1968).

## 2. More Fulsome Recognition Abroad

Outside of the United States, proxy marriage is far better recognized, particularly in Central and South American countries. Brazil,<sup>181</sup> Argentina,<sup>182</sup> Colombia,<sup>183</sup> Bolivia,<sup>184</sup> Peru,<sup>185</sup> Uruguay,<sup>186</sup> Venezuela,<sup>187</sup> Ecuador,<sup>188</sup> Panama,<sup>189</sup> El Salvador,<sup>190</sup> Costa Rica,<sup>191</sup> Mexico,<sup>192</sup> and Cuba<sup>193</sup> all permit a party to fulfill the requirements of a ceremonial marriage through the use of an agent.<sup>194</sup> It is perhaps not so surprising that these countries share in the acceptance of

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<sup>181</sup> CÓDIGO CIVIL art. 201 (Braz.), *translated in* CIVIL CODE OF BRAZIL 53-54 (Joseph Wheless trans., 1920) (“The marriage may be celebrated by power of attorney containing special powers to the mandatary to receive, in the name of the grantor, the other party.”).

<sup>182</sup> CÓDIGO CIVIL art. 173 (Arg.), *translated in* CIVIL CODE OF ARGENTINA 37 (Julio Romañach, Jr., trans., 2008) (“Marriage at a distance is one in which the absentee party expresses his consent before the competent authority to officiate at marriage ceremonies at the place where he is. The documentation verifying the absentee’s consent can only be offered within ninety days of the date when it was granted.”).

<sup>183</sup> CÓDIGO CIVIL art. 114 (Colom.).

<sup>184</sup> CÓDIGO DE FAMILIA art. 55 (Bol.).

<sup>185</sup> CÓDIGO CIVIL art. 264 (Peru).

<sup>186</sup> CÓDIGO CIVIL art. 100 (Uru.).

<sup>187</sup> CÓDIGO CIVIL art. 67 (Venez.).

<sup>188</sup> CÓDIGO CIVIL art. 101 (Ecuador).

<sup>189</sup> CÓDIGO DE LA FAMILIA art. 47 (Pan.), *translated in* THE CIVIL CODE OF PANAMA 294-95 (Julio Romañach, Jr., trans., 2009) (“Marriage can be contracted by the appearance before the official and two witnesses, without legal impediment, by one of the parties and the person to whom the other party has awarded a special power of attorney, by notarial act; provided that the person that is domiciled or is a resident at the place of officiating of the official that is to celebrate the marriage is always necessary. The power of attorney must express the name of the person with whom the marriage is to be performed, and basic informational facts for identifying the person, and the marriage shall be valid unless the revocation of the power of attorney has been given to the empowered agent, in due form, prior to the celebration of the marriage.”).

<sup>190</sup> CÓDIGO DE FAMILIA art. 30 (El Sal.).

<sup>191</sup> CÓDIGO DE FAMILIA art. 30 (Costa Rica).

<sup>192</sup> CÓDIGO CIVIL FEDERAL art. 102 (Mex.), *translated in* FEDERAL CIVIL CODE OF MEXICO 17 (Julio Romañach, Jr., trans., 2003) (“The parties or their specially empowered agents, constituted in the manner provided in Article 44, as well as two witnesses to each of the parties that verify their identity, must be present before the Civil Registry judge at the place, day and hour designated for the celebration of the marriage.”); *id.* art. 44 (“When the interested parties cannot personally appear, they can be represented by a mandatary (agent) specially empowered for the act, whose appointment must be made at least by private writing made before two witnesses. In cases involving marriage . . . a power of attorney given by notarial act or mandate (agency) given by private writing signed by the principal and two witnesses, the signatures being ratified before a notary public, a family court judge, a juvenile court judge, or a justice of the peace is required.”).

<sup>193</sup> CÓDIGO DE LA FAMILIA art. 10 (Cuba).

<sup>194</sup> *See, e.g.,* CÓDIGO DE LA FAMILIA art. 47 (Pan.), *translated in* THE CIVIL CODE OF PANAMA, *supra* note 189, at 294-95 (“Marriage can be contracted by the appearance before the official and two witnesses, without legal impediment, by one of the parties and the person to whom the other party has awarded a special power of attorney, by notarial act . . .”).

proxy marriage, as they are all civilian jurisdictions with legal systems derived from Roman law,<sup>195</sup> which always permitted marriages by proxy.<sup>196</sup> These countries simply carried forward the Roman law allowing the use of agents in perfecting a marital contract.<sup>197</sup> Much of Europe still permits marriages perfected by proxy as well, and likely for the same historical reasons. The doctrine still exists in France,<sup>198</sup> Spain,<sup>199</sup> Italy,<sup>200</sup> and Poland.<sup>201</sup> Finally, virtually all of the countries governed by Islamic law sanction proxy marriage<sup>202</sup> and do so very broadly, allowing double proxies<sup>203</sup> and often giving the proxy “unlimited discretion” to enter into marriage contracts, including the power to choose a mate on behalf of the principal.<sup>204</sup>

Overall, the global community is far more liberal in permitting the application of agency principles to the marital relationship.<sup>205</sup> And this widespread acceptance of proxy marriage is significant because it bleeds into America. Even if we refuse to recognize proxy marriages celebrated within American borders, we do give effect to such marriages validly perfected abroad.<sup>206</sup> Thus, the general legal attitude

<sup>195</sup> Hans Kirchberger, *The Significance of Roman Law for the Americas and Its Importance to Inter-American Relations*, 1944 WIS. L. REV. 249, 255.

<sup>196</sup> See *supra* Part I.A.1.

<sup>197</sup> See *supra* Part I.A.1.

<sup>198</sup> CODE CIVIL art. 96-1 (Fr.) (only for “servicemen, sailors of the State, or persons employed to follow the armies or on board State vessels” (author’s translation)).

<sup>199</sup> CÓDIGO CIVIL art. 87 (Spain), translated in CLIFFORD STEVENS WILSON, *THE CIVIL LAW IN SPAIN AND SPANISH-AMERICA* 141 (1900) (“Marriages shall be celebrated personally or by a proxy to whom a special power has been granted; but the presence of the contracting party who is domiciled or resides in the district of the Judge who is to authorize the marriage shall always be necessary. The name of the person with whom the marriage is to be celebrated shall be expressed in the special power, and such power shall be valid if, before its celebration, the person so authorized should not have been notified in an authentic form of the revocation of power.”).

<sup>200</sup> Only members of the armed forces may marry by proxy under Italian law or those in extraordinary circumstances. CODICE CIVILE art. 111 (It.) (“The military and persons who by reason of their duties are attached to the armed forces can celebrate marriage by proxy in war time. Celebration of marriage by proxy can also take place if one of the future spouses resides abroad and serious reasons exist, to be appraised by the tribunal in whose jurisdiction the other future spouse resides.” (author’s translation)).

<sup>201</sup> FAM. CODE art. 6 (Pol.).

<sup>202</sup> See C.M. SHAFQAT, *THE MUSLIM MARRIAGE, DOWER AND DIVORCE* 35-36 (1955).

<sup>203</sup> See Schwelb, *supra* note 37, at 368.

<sup>204</sup> *Id.*

<sup>205</sup> See *id.* at 365-68. England, however, ended its long-lasting approval of proxy marriages in 1844 with the case of *Regina v. Millis* in which the English House of Lords declared that it has never been the English law that a marriage contracted without a ceremony was a valid marriage. Lorenzen, *supra* note 41, at 482 (citing *Regina v. Mills*, (1844) 8 Eng. Rep. 844 (H.L.)); see also 2 POLLOCK & MAITLAND, *supra* note 62, at 370.

<sup>206</sup> See *Cosulich Societe Triestina Di Navigazione v. Elting*, 66 F.2d 534 (2d Cir. 1933) (describing a willingness of many American courts to recognize proxy marriages that are valid where they are contracted); *Silva v. Tillinghast*, 36 F.2d 801 (Mass. Dist. Ct. 1929); *Kane v. Johnson*, 13 F.2d 432 (Mass. Dist. Ct. 1926); *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927 (E.D. La. 1925); *Ex parte Suzanna*, 295 F.

toward the use of agents to perfect the marriage contract around the globe is important in shaping American policy.

## II. AGENCY IN INTIMATE RELATIONSHIPS

Since the start of agency theory's recognition thousands of years ago, the powers permissibly delegated to an agent have been exceptionally broad.<sup>207</sup> Traditionally, a valid agency relationship could be created for any lawful purpose.<sup>208</sup> The only remaining question was whether the principal himself had the authority to do what he appointed an agent to do.<sup>209</sup> Indeed, there are generally only two exceptions to the theory that an agent can be appointed to do anything that the principal himself can do.<sup>210</sup> First, agency authority may not be created for the performance of an act that is unlawful or otherwise violates public policy.<sup>211</sup> Second, the nondelegable-acts doctrine<sup>212</sup> prohibits agency delegation of acts that are exceptionally "personal in . . . nature."<sup>213</sup>

Precisely what falls within the nondelegable-acts doctrine has been a tricky question for courts and legal scholars. The theory is clear enough: acts that rest upon some special skill or personal quality of the principal must be performed by the principal alone, and their performance may not be delegated to another.<sup>214</sup> In practice, however, it has been nearly impossible to determine precisely where the line between intimate, nondelegable acts and those for which agency principles may freely apply should be drawn.<sup>215</sup> Still, agency scholars have spoken rather confidently for years about a select few intimate relationships.<sup>216</sup> Because "[i]t is expected that [a] testator will exercise his own judgment concerning his relationship [with his would-be] donees, their needs, his obligations to them, and the like," proxy will-making has long been considered precisely the type of transaction covered under the nondelegable-acts doctrine.<sup>217</sup> Creation of custodial rights over a child has also been viewed as an intimate

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713 (Mass. Dist. Ct. 1924); *United States ex rel. Aznar v. Comm'r of Immigration*, 298 F. 103 (S.D.N.Y. 1924).

<sup>207</sup> Mark Fowler, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1015 (1984).

<sup>208</sup> MECHEM, *supra* note 14, § 80.

<sup>209</sup> RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (2006).

<sup>210</sup> *Id.* § 3.05 cmt. b.

<sup>211</sup> MECHEM, *supra* note 14, § 81.

<sup>212</sup> *See* Fowler, *supra* note 207, at 1010 (defining the "nondelegable acts doctrine").

<sup>213</sup> *See* MECHEM, *supra* note 14, § 81.

<sup>214</sup> *Id.*

<sup>215</sup> *See* RESTATEMENT (THIRD) OF AGENCY § 3.04 (2006); Fowler, *supra* note 207, at 1010 ("The basic policy underlying the nondelegable acts doctrine is that some decisions should be made personally—or not made at all.")

<sup>216</sup> *See* MECHEM, *supra* note 14, § 126.

<sup>217</sup> *Id.*; *see also* Fowler, *supra* note 207, at 1009.

act unsuitable for agency's application.<sup>218</sup> Medical decision-making historically was excluded from the domain of agency.<sup>219</sup> And, of course, taking marriage vows by proxy is not generally tolerated.<sup>220</sup>

With the sole exception of marriage, however, in the last thirty years, legal thinking on the propriety of agency law's application to each of these intimate relationships has changed drastically. While once described as "doubtless" nondelegable acts,<sup>221</sup> proxy will-making,<sup>222</sup> contracts to transfer child custody,<sup>223</sup> and grants of authority to another to make health care decisions<sup>224</sup> are now all permissible. Only marriage remains an intimate transaction not yet reevaluated under the nondelegable-acts doctrine.

A. *Will-Making by Proxy: A "Notably New Development"*<sup>225</sup>

Much like the contract of marriage, the making of a will "holds a unique and revered position in our collective psyche."<sup>226</sup> A will is among the most personal and significant legal acts in which a person engages.<sup>227</sup> Nonetheless, the use of agents in will-making has long been recognized as a means of carrying out necessary will formalities.<sup>228</sup> In the last twenty years, the use of agency principles in the will context has increased to such a degree that, for the first time in history, an agent may even make dispositions, essentially creating an entire will on the testator's behalf.<sup>229</sup> The acceptance of proxy will-making has progressed slowly and is continuing still, but it signals a substantial erosion of the theory that agency principles are necessarily inappropriate for application to intimate affairs.

When considering a person's ability to legally use a proxy in creating a will, the distinction between a "proxy signature" and a true "proxy will" must be closely observed. The two have been treated

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<sup>218</sup> See MECHEM, *supra* note 14, § 126 (describing consent to an adoption as an act too personal to be done with the use of agency).

<sup>219</sup> See Fowler, *supra* note 207, at 1010 (describing scholarly speculation that medical decisionmaking was an act too personal to be delegated).

<sup>220</sup> See MECHEM, *supra* note 14, § 126.

<sup>221</sup> *Id.*

<sup>222</sup> See *infra* Part II.A.

<sup>223</sup> See *infra* Part II.B.

<sup>224</sup> See *infra* Part II.C.

<sup>225</sup> Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 105 (2009).

<sup>226</sup> *Id.* at 93.

<sup>227</sup> See *In re Estate of Hart*, 295 P.2d 985, 1002 (Wyo. 1956) ("It is, and for many centuries has been, a common thought in our economic system, that to execute a last will and testament is the most solemn and sacred act of a man's life."); I.J. Hardingham, *The Rule Against Delegation of Will-Making Power*, 9 MELB. U. L. REV. 650, 651 (1974) ("It has been argued that the power to make a will, to exclude next of kin, is a personal privilege which may be delegated to no other.")

<sup>228</sup> See *infra* text accompanying note 230.

<sup>229</sup> See *infra* text accompanying notes 239-64.

differently for centuries, with the idea of a proxy signature in a will being far more accepted.<sup>230</sup>

It is often possible that a testator unable to comply with will-making form requirements (perhaps because he is physically incapable of signing his will) may use an agent to execute a will in proper form.<sup>231</sup> Typically, state laws require that the infirm testator signify that the instrument at issue is, in fact, his testament and then direct a proxy to sign his name.<sup>232</sup> Even the Uniform Probate Code, which clearly prefers a will signed by the testator himself, allows a will to be signed instead “by some other individual in the testator’s conscious presence and by the testator’s direction.”<sup>233</sup>

Such a proxy transaction differs from proxy marriage in one significant way. In the wills context, the testator himself is present when the agent signs,<sup>234</sup> while the very purpose of sanctioning proxy marriage is to allow marriages to take place between parties at a distance.<sup>235</sup> Nonetheless, both situations involve nothing more than the legal acceptance of an alternate means of complying with a form requirement—in the case of a will, typically the signature of two witnesses or acknowledgment before a notary,<sup>236</sup> and in a marriage, a ceremonial declaration of consent.<sup>237</sup> That the law has sanctioned use of an agent to comply with will formalities suggests that the formalities a party must accomplish to enter into the marriage contract should be permissibly accomplished with the aid of an agent as well.

Even more compelling is the recent shift toward applying agency principles to allow a person not only to sign a will on the

<sup>230</sup> See UNIF. PROBATE CODE § 2-502 (amended 2008).

<sup>231</sup> See Brashier, *supra* note 225, at 92.

<sup>232</sup> See, e.g., LA. CIV. CODE ANN. art. 1578 (2009).

<sup>233</sup> UNIF. PROBATE CODE § 2-502. The Uniform Probate Code has been adopted in part by two states, and in its entirety (with some modifications) by the following sixteen states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. ALASKA STAT. §§ 13.06.005-.36.390 (2007); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7308 (2005 & Supp. 2008); COLO. REV. STAT. ANN. §§ 15-10-101 to -17-103 (West 2005); FLA. STAT. ANN. §§ 655.82, 711.50-.512, 731.005-735.302, 737.101-.627 (West 2004 & Supp. 2009); HAW. REV. STAT. §§ 539-1 to -12, 560:1-101 to 560:8-101 (2006); IDAHO CODE ANN. §§ 15-1-101 to -7-308 (2006 & Supp. 2008); ME. REV. STAT. tit. 18-A §§ 1-101 to 8-401 (1998 & Supp. 2009); MICH. COMP. LAWS ANN. §§ 700.1101-.8102 (West 1995 & Supp. 2008); MINN. STAT. ANN. §§ 524.1-101 to 524.8-103 (West 2002 & Supp. 2008); MONT. CODE ANN. §§ 72-1-101 to 72-6-311 (2007); NEB. REV. STAT. §§ 30-2201 to -2902 (1995); N.M. STAT. ANN. §§ 45-1-101 to -7-522 (West 2003); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1996 & Supp. 2005); S.C. CODE ANN. §§ 35-6-10 to -100, 62-1-100 to -7-604 (1987 & Supp. 2007); S.D. CODIFIED LAWS §§ 29A-1-101 to -8-101 (2004 & Supp. 2008); UTAH CODE ANN. §§ 75-1-101 to -8-101 (West 2004 & Supp. 2008).

<sup>234</sup> UNIF. PROBATE CODE § 2-502.

<sup>235</sup> See Moore, *supra* note 16, at 313 (“[I]t 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.”).

<sup>236</sup> UNIF. PROBATE CODE § 2-502(a)(3)(B).

<sup>237</sup> See *supra* notes 11-12 for ceremonial requirements of marriage.

principal's behalf but to actually decide upon dispositions for the principal, essentially creating an entire will for him. Historically, it was impossible to create a valid will by proxy. Roman law dating back to the sixth century rejected the practice,<sup>238</sup> viewing a will made by anyone other than the testator as a will that could not be regarded as the testator's will at all.<sup>239</sup> Agency theory was well recognized in both early Roman and English law;<sup>240</sup> it simply was not applied in the wills context.<sup>241</sup> Will-making was viewed as an "inalienable right" early in the law's development.<sup>242</sup> And many centuries later, that view generally persists both in the United States and abroad.<sup>243</sup>

However, in seven states and under the Uniform Probate Code, recent changes allow the conservator of an incapacitated person to make a will on the incapacitated's behalf.<sup>244</sup> Though the rule applies only in situations involving conservatorship, agency principles are the backbone of this legal development.<sup>245</sup> A conservator-agent makes a

<sup>238</sup> ROSCOE POUND, READINGS IN ROMAN LAW 26 (1906) (describing the impermissibility of proxy wills in the time of Justinian's Digest).

<sup>239</sup> See Brashier, *supra* note 225, at 63 n.2 (describing the testator himself as the only person with the ability to design and implement his own plan); cf. MIN SHANG FA SHIWU YANJIU: JICHENG JUAN [A STUDY OF CIVIL AND COMMERCIAL LAW PRACTICE: INHERITANCE VOLUME] 103 (Yang Zhenshan ed., 1993) (proxy wills enforced in China as formally defective wills that make dispositions to "worthy" family members).

<sup>240</sup> See Tony Weir, *Contracts in Rome and England*, 66 TUL. L. REV. 1615, 1627-28 (1992).

<sup>241</sup> See POUND, *supra* note 238, at 26 (describing the impermissibility of proxy wills at Roman law); Hardingham, *supra* note 227, at 652 ("It would seem to be true to say that, in England at least, the rule is 'simply a rule that no settlor and no testator may by means of either power or trust delegate to others the selection of beneficiaries from a limited but uncertain class' for uncertainty has been the vice in all cases wherein the rule has been applied.") (citing I.D. Campbell, *The Enigma of General Powers of Appointment*, 7 RES JUDICATAE 244, 252-53 (1955-1957)).

<sup>242</sup> See Statute of Wills, 1540, 32 Hen. 8, c. 1, § 4 (Eng.) ("[E]very person . . . shall have full and free liberty, power and authority to give, dispose, will and devise . . . at his free will and pleasure . . ."); *In re Runals' Estate*, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972); *In re Nagle's Estate*, 317 N.E.2d 242, 245 (Ohio Ct. App. 1974). *But see* J.C. Shepherd, *When the Common Law Fails*, 9 EST. & TR. J. 117, 129 (1989) ("Over-all, it is important to understand that the power to decide on the disposition of your own private property is a power delegated by society to individuals as those in the best position to make the most reasonable disposition of the property. It is not some sort of inalienable right. Indeed, the whole principle of giving testatory power to individuals arose during a time when only a small portion of one's private property could be passed on in a discretionary way. The vast majority of one's estate would normally pass by operation of law to one's heirs, and will-making was often a supplementary activity.")

<sup>243</sup> See, e.g., Hardingham, *supra* note 227, at 652 (comparative discussion of the rule against delegation of will-making power in England and Australia).

<sup>244</sup> CAL. PROB. CODE § 2580(b)(13) (West 2009); COLO. REV. STAT. § 15-14-411(1)(g) (West 2008); HAW. REV. STAT. ANN. § 560:5-411(a)(7) (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 190B, § 5-407(d)(7) (West Supp. 2010); MINN. STAT. ANN. § 524.5-411(a)(9) (West Supp. 2008); NEV. REV. STAT. ANN. § 159.078(1)(a) (West 2009); S.D. CODIFIED LAWS § 29A-5-420(8) (2004); UNIF. PROBATE CODE § 5-411(a)(7), (b) (amended 2008).

<sup>245</sup> See Brashier, *supra* note 225, at 102-03.

will on behalf of his principal when the principal is incapacitated and therefore unable to act personally.<sup>246</sup>

The idea of a conservator as proxy will-maker is a new one. Conservators hold great power to act on behalf of the incapacitated persons they protect.<sup>247</sup> But even so, a conservator's power to act on behalf of a protected party has historically excluded will-making authority.<sup>248</sup> It is only in the last twenty years that states have begun to accept the conservator's making of a will for the incapacitated party.<sup>249</sup> And, as of 2008, the Uniform Probate Code now even sanctions the conservator's power to make, amend, or revoke a will on behalf of a protected person.<sup>250</sup>

The theory legitimizing such conduct is one of "substituted judgment."<sup>251</sup> Proxy wills made by conservators are said to "reflect a substituted judgment of what the protected person would want had he retained capacity."<sup>252</sup> Moreover, the extension of will-making power to a conservator has increasingly been deemed necessary as a matter of equity given the breadth of a conservator's authority.<sup>253</sup> Conservators already have the power to dispose of their protected persons' property in a substantial way by "engag[ing] in inter vivos estate planning through will substitutes,"<sup>254</sup> and thus, granting will-making power to conservators does not represent a severe extension of the powers they already hold over the property of the protected person.<sup>255</sup> Perhaps more importantly, allowing a conservator to draft a will may be the only way to accomplish what the incapacitated person needs or clearly desires—whether that is revoking a disposition, changing a beneficiary, or creating a will from scratch to avoid the disposition rules of intestate succession.<sup>256</sup> "[W]hy should a conservator not be able to accomplish directly by will precisely what the protected person would have accomplished had she retained testamentary capacity?"<sup>257</sup> Responding sympathetically to that

<sup>246</sup> *Id.* at 92.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> CAL. PROB. CODE § 2580(b)(13); COLO. REV. STAT. ANN. § 15-14-411(1)(g); HAW. REV. STAT. ANN. § 560:5-411(a)(7); MASS. GEN. LAWS ANN. ch. 190B, § 5-407(d)(7); MINN. STAT. ANN. § 524.5-411(a)(9); NEV. REV. STAT. ANN. § 159.078(1)(a); N.H. REV. STAT. ANN. § 464-A:26-a (West 2010).

<sup>250</sup> UNIF. PROBATE CODE § 5-411(a)(7) (amended 2008).

<sup>251</sup> See Brashier, *supra* note 225, at 87-89.

<sup>252</sup> *Id.* at 68. More recently, states have gone beyond the substituted judgment doctrine, in the face of much scholarly criticism, and approved wills made by conservators if they make reasonable dispositions in the best interest of the protected party. *Id.* at 88-89.

<sup>253</sup> *Id.* at 68.

<sup>254</sup> *Id.* at 92.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

question, the developing trend in state law is to allow proxy wills by conservator, with protections to minimize the risk of abuse.<sup>258</sup>

Still, the reality of increasing acceptance for proxy will-making by conservators does not equate to widespread acceptance of proxy will-making in general. Outside the conservatorship context, when a testator remains fully capable of making his own will, his ability to delegate that power to an agent is less clear. The Uniform Probate Code, which expressly sanctions will-making by conservator, is silent on the application of agency principles to will-making absent conservatorship.<sup>259</sup> The Uniform Power of Attorney Act, which provides default rules regarding the creation and scope of powers of attorney, likewise takes no stance on proxy will-making by agents generally.<sup>260</sup>

At least two states have been more explicit. California legislation provides that “[a] power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal’s will.”<sup>261</sup> In Arkansas, an appellate decision stated in dicta that agency principles could not support an agent’s making of a will on behalf of the principal, describing “the decision of who, what, when, and how one’s property is to be distributed upon death” as a personal one that may be made only by the testator himself.<sup>262</sup> Elsewhere, state law remains mute on proxy will-making by agent.

It may well be that will-making by a nonconservator agent is never fully accepted by state law, but the recent extension of will-making powers to conservators—which would not have been sanctioned in any state twenty years ago—certainly signals a change in our view of will-making as a task too personal for the application of

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<sup>258</sup> See UNIF. PROBATE CODE § 5-411 (amended 2008). Section 5-411 states that “[a]fter notice to interested persons and upon express authorization of the court, a conservator may . . . make, amend or revoke the protected person’s will.” *Id.* § 5-411(a)(7). Not only must the conservator comply with the state’s formalities for executing wills, but

[t]he court, in exercising or in approving a conservator’s exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made . . . [and also] shall consider (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors; (2) possible reduction of income, estate, inheritance, or other tax liabilities; (3) eligibility for governmental assistance; (4) the protected person’s previous pattern of giving or level of support; (5) the existing estate plan; (6) the protected person’s life expectancy and the probability that the conservatorship will terminate before the protected person’s death; and (7) any other factors the court considers relevant.

*Id.* § 5-411(c).

<sup>259</sup> Brashier, *supra* note 225, at 101-02.

<sup>260</sup> UNIF. POWER OF ATTORNEY ACT §§ 104, 114 (2006).

<sup>261</sup> CAL. PROB. CODE § 4265 (West 2009); *see also* Brashier, *supra* note 225, at 101-02. Louisiana law provides similarly. LA. CIV. CODE ANN. art. 1571 (2010) (prohibiting testaments “executed by a mandatary for the testator”).

<sup>262</sup> *In re Estate of Garrett*, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003); *see also* Brashier, *supra* note 225, at 102.

agency principles. At least where the equities shift in favor of allowing someone other than the testator to make his will because the testator can no longer do so himself, concerns over the intimate nature of will-making have been shoved aside. One scholar has persuasively argued that the evolution of the law on will-making by conservators does, and indeed should, begin to compel movement in state law toward accepting wills made through agents more generally.<sup>263</sup> As someone “personally selected by the protected person and presumably . . . in the best position to know what the protected person would desire,” an agent is even better suited to make a will on his principal’s behalf than is a conservator.<sup>264</sup> With protections for the testator—perhaps including a requirement that authority to make a will be given expressly—even proxy will-making by agent may garner more widespread approval.

And even if proxy will-making by agent is never fully accepted, the “notably new development” of affording conservators the power to make wills on behalf of the parties they protect has significant implications in the marital context.<sup>265</sup> The penetration of agency rules into will-making, even by conservator, more heavily intrudes into a personal province than does the creation of a marriage by proxy. A conservator or agent making a will for the person he represents makes exceptionally detailed and intimate decisions, necessarily identifying objects of bounty for the testator and selecting the terms of his dispositions.<sup>266</sup> By contrast, an agent in a proxy marriage merely carries out the necessary formalities of a contract, the details of which the principal has already expressed his approval. In contrast to the proxy will-maker, then, there is no real discretion to be exercised by an agent in the marriage context. The law’s recognition of the need to allow will-making by proxy highlights the logic of also recognizing marriages by proxy, particularly because the manner in which an agent is used in proxy marriage and his function in that context is comparatively minor and ministerial.

### B. *Delegating a Child’s Care, Custody, and Control*

The relationship between parent and child is viewed as one of the most sacred under the law. The law serves to protect that bond in myriad ways,<sup>267</sup> and interference with parental decision-making for children must tread lightly or risk trampling a parent’s *Troxel-*

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<sup>263</sup> Brashier, *supra* note 225, at 102.

<sup>264</sup> *Id.* at 101. Brashier deftly discusses potential problems raised by the distinction between conservator and agent will-making and provides a rationale for extending will-making powers to both groups. *Id.* at 101-04.

<sup>265</sup> *Id.* at 105.

<sup>266</sup> *See id.* at 92-93.

<sup>267</sup> *See* Michael D. Moberly, *Children Should Be Seen and Not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. ST. L.J. 515, 538 (2003).

recognized constitutional rights.<sup>268</sup> The mere existence of a biological link between parents and children creates not only parental rights, but also substantial responsibilities. Parents are required to support their children, to provide for their care—even to educate them<sup>269</sup> and to foster their well-being.<sup>270</sup> These duties generally cannot be abdicated,<sup>271</sup> and the government takes Herculean steps to ensure that parents respect the relationship by fulfilling their legal responsibilities toward their children.<sup>272</sup> The parent-child relationship, then, is most certainly a heavily protected one, regulated in large part because of its highly intimate nature.<sup>273</sup> The law of contract would seem to have little application in this intimate context. But even here, agency principles permeate the relationship in a significant way.

Most notably, agency doctrine encroaches upon the very personal parent-child relationship in the custody context. In every state, custody is viewed through the lens of the best interest of the child.<sup>274</sup> Natural parents generally exercise custody unless a court

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<sup>268</sup> *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (although court-ordered visitation may be the only way to protect a child from severe psychological harm in circumstances where a child has enjoyed a substantial relationship with a non-parent, a Washington statute authorizing court-ordered visitation was unconstitutional because it allowed courts to order visitation on a mere “best interests” standard, i.e., without necessary regard to the wishes of the parents). For a discussion of *Troxel*, see David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1135-37 (2001).

<sup>269</sup> See, e.g., LA. CIV. CODE ANN. art. 227 (2009) (“Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children.”).

<sup>270</sup> See Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 340 (2002) (“[A]dherents of modernity in the domestic arena also generally value traditional goals—affectionate, committed families, raising secure, happy children.”).

<sup>271</sup> See, e.g., *In re Gates’ Adoption*, 85 N.E.2d 597 (Ohio App. 1948); *In re Wilcox Adoption*, 349 P.2d 862 (Or. 1960); *Whitton v. Scott*, 144 A.2d 706 (Vt. 1958).

<sup>272</sup> See LeAnn Larson LaFave, *Origins and Evolution of the Best Interests of the Child Standard*, 34 S.D. L. REV. 459, 486-88 (1989) (arguing that despite the law’s rule that custody determinations are based on the “best interests of the child,” both statutes and jurisprudence encourage parents in a custody battle to show who is the better parent and not necessarily the best interests of the child).

<sup>273</sup> See Moberly, *supra* note 267, at 538.

<sup>274</sup> See, e.g., ALA. CODE § 30-3-1 (1998); ALASKA STAT. § 25.24.150 (2007); ARIZ. REV. STAT. ANN. § 25-403 (2007 & Supp. 2008); ARK. CODE ANN. § 9-13-101 (West 2009); CAL. FAM. CODE § 3040 (West 1986 & Supp. 2009); COLO. REV. STAT. ANN. § 14-10-124 (West 2007 & Supp. 2008); CONN. GEN. STAT. ANN. § 46b-56 (West 2004 & Supp. 2008); DEL. CODE ANN. tit. 13, § 728 (2006 & Supp. 2010); D.C. CODE § 16-914 (2001); FLA. STAT. ANN. § 61.13 (West 1997 & Supp. 2009); GA. CODE ANN. § 19-9-3 (West 2003 & Supp. 2008); HAW. REV. STAT. § 571-46 (2005 & Supp. 2007); IDAHO CODE ANN. § 32-717 (2006 & Supp. 2008); 750 ILL. COMP. STAT. ANN. 5/602 (West 2002 & Supp. 2009); IND. CODE ANN. § 31-17-2-13 (West 2008); IOWA CODE ANN. § 598.41 (West 2001 & Supp. 2008); KAN. STAT. ANN. § 60-1610 (2000); KY. REV. STAT. ANN. § 403.270 (West 2006); LA. REV. STAT. ANN. § 9:335 (2008); MD. CODE ANN., FAM. LAW § 9-105 (1994); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1998 & Supp. 2005); MICH. COMP. LAWS ANN. § 722.27 (West 2002 & Supp. 2008); MINN. STAT. ANN. § 518.17 (West 2002 & Supp. 2008); MISS. CODE ANN. § 93-5-24 (West 2007); MO. ANN. STAT. § 452.375 (West

finds that such an arrangement is not in the child's best interest.<sup>275</sup> And when a nonparent is embroiled in a custody dispute with a parent, a court not only considers the child's best interest, but also must typically make a finding that custody in a parent would result in substantial harm to the child before awarding custody to a nonparent.<sup>276</sup> The heightened standard is, again, a function of the notion that the parent-child relationship is an important one that must suffer minimal intrusion.<sup>277</sup> The court serves as gatekeeper of the intimate relationship between parent and child. Even so, in the last fifteen years, the law has begun to rather freely recognize the right of a parent to utilize agency principles to confer custody of a minor child, albeit temporarily, to an agent.

Agency principles have begun to apply rather purely, even in the heavily regulated custody regime, through doctrines alternatively dubbed "provisional custody by mandate," "custodial power of attorney," or "standby guardianship." In provisional custody by mandate, a parent with custody—or both parents, if married—designate a mandatary or agent<sup>278</sup> to "provide for the care, custody, and control of a minor child."<sup>279</sup> The agent's authority is merely

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2007); MONT. CODE ANN. § 40-4-212 (2007); NEB. REV. STAT. ANN. § 42-364 (LexisNexis 2004); NEV. REV. STAT. ANN. § 125.480 (West 2008); N.H. REV. STAT. ANN. § 169-C:23 (2000); N.J. STAT. ANN. § 2A:34-23.2 (1998); N.M. STAT. ANN. § 40-4-9 (West 2003); N.Y. DOM. REL. LAW § 240 (McKinney 1999 & Supp. 2010); N.C. GEN. STAT. ANN. § 50-13.2 (West 2000 & Supp. 2007); N.D. CENT. CODE § 14-09-05.1 (2004); OHIO REV. CODE ANN. § 3109.04 (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 43, § 112 (West 2001 & Supp. 2009); OR. REV. STAT. ANN. § 107.169 (West 2003 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 5303 (West 2001 & Supp. 2008); R.I. GEN. LAWS § 15-5-16 (2006); S.C. CODE ANN. § 20-3-160 (1985 & Supp. 2007); S.D. CODIFIED LAWS § 25-4-45 (2004); TENN. CODE ANN. § 36-6-101 (West 2005 & Supp. 2007); TEX. FAM. CODE ANN. § 153.002 (West 2006); UTAH CODE ANN. § 30-3-10 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15, § 665 (2007); VA. CODE ANN. § 20-124.2 (West 2001); WASH. REV. CODE ANN. § 26.10.100 (West 2005); W. VA. CODE ANN. § 48-9-101 (West 2004); WIS. STAT. ANN. § 767.41 (West 2001 & Supp. 2008); WYO. STAT. ANN. § 20-2-201 (2007).

<sup>275</sup> See, e.g., LA. CIV. CODE ANN. art. 131 (2009).

<sup>276</sup> See, e.g., DEL. CODE ANN. tit. 13, § 727 (2008) ("The Court shall not restrict the rights of a child or a parent under this subsection unless it finds, after a hearing, that the exercise of such rights would endanger a child's physical health or significantly impair his or her emotional development.").

<sup>277</sup> See Dolgin, *supra* note 270, at 387-88 ("The invocation of *Meyer* and *Pierce* by the plurality in *Troxel* serves two contradictory ends. It reflects the law's commitment to protect familial relationships from excessive state intervention that is presumed by revisionists to be the popular conception of Justice McReynolds's decisions in those cases. But the invocation also reflects a vision of family that values hierarchy and the 'isolation' of the child from a community of extended kin." (citing Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the *Child* as *Property*, 33 WM. & MARY L. REV. 995, 997-98 (1992))).

<sup>278</sup> Mandate is the civil law's terminology for the agency contract. See LA. CIV. CODE ANN. art. 2989 (2009). In the mandate relationship, the person to whom authority is conferred is known as the mandatary, and the person conferring authority, as in the common law, is called the principal. Thus, "provisional custody by mandate" is nothing more than civilian terminology for the conference of custody by agency contract. See LA. REV. STAT. ANN. § 9:951.

<sup>279</sup> LA. REV. STAT. ANN. § 9:951.

temporary under these contractual delegations of custody.<sup>280</sup> Louisiana, which has perhaps the most detailed statutory scheme, allows a parent to grant custody to an agent by contract for a maximum period of one year and provides that the contract may terminate even earlier for prescribed causes, including revocation of agency authority, renunciation by the agent, or lapse of time after the death of the principal.<sup>281</sup> Other states' statutory schemes are less comprehensive but largely provide for the same contractual agency relationship. In the District of Columbia, a child's parent may grant another person a "revocable custodial power of attorney" to provide for the child's care.<sup>282</sup> In Pennsylvania, standby guardianship rules—which, in most states, act as a "springing guardianship" to allow a parent to name a guardian who will assume authority for a child only upon the parent's death and after court approval<sup>283</sup>—extend to permit the mere written designation of a standby guardian to take effect immediately upon execution.<sup>284</sup> The standby guardian can act as the guardian of the minor without the direction of the court for a period of sixty days, after which the guardian must file a petition for approval to continue.<sup>285</sup> In each of these cases, then, parents confer the most sacred of rights to an agent by mere execution of a contract and without court oversight or control.

Parents have used these rules to transfer temporary custody to agents, most frequently grandparents and aunts,<sup>286</sup> for a variety of reasons ranging from illness and hospitalization to military deployments overseas to changes of residency for purposes of enrolling in a better public school.<sup>287</sup> While the conferment of rights and duties as serious as those inherent in the parent-child relationship may seem inappropriately delegated through simple contract, the law recognizes such transfers out of perceived necessity. No other legal device allows parents to retain custody—and thereby avoid relinquishing it entirely on a permanent basis—while still

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<sup>280</sup> See, e.g., *id.* § 9:952.

<sup>281</sup> *Id.*

<sup>282</sup> D.C. CODE § 21-2301 (2007); see also Laura Weinrib, *Kinship Care Reform: A Proposal for Consent Legislation in Massachusetts*, 87 MASS. L. REV. 23, 23 n.6 (2002) (describing power of attorney's use to "accommodate kinship caregivers").

<sup>283</sup> See, e.g., CAL. PROB. CODE § 1502 (West 2002).

<sup>284</sup> 23 PA. CONS. STAT. ANN. § 5612 (West 2001 & Supp. 2008).

<sup>285</sup> *Id.* § 5613 (West 2001).

<sup>286</sup> See Lenore M. Molee, *The Ultimate Demonstration of Love for a Child: Choosing a Standby Guardian New Jersey Standby Guardianship Act*, 22 SETON HALL LEGIS. J. 475, 496 (1998) (citing Carol Levine et al., *In Whose Care and Custody? Placements and Policies for Children Whose Parents Die of AIDS*, Final Report to the United Hospital Fund (The Orphan Project, New York, N.Y.), Nov. 7, 1994, at 4 (recommending that the custodial parent select an individual known and trusted by the child, such as a grandparent or aunt)).

<sup>287</sup> Greg Garland, *Pointe Coupee to Amend Enrollment*, ADVOCATE, May 12, 2009, at 2B, available at <http://2theadvocate.com/news/44759202.html?showAll=y&c=y>.

providing for the care of a child when they cannot, or perhaps do not wish to, do so.

Once again, equity permits the intrusion of agency principles into a bond perhaps even more intimate than that between spouses. Agency is even used in this context to *create* a relationship whereby a person exercises care, custody, and control over a minor child.

Logic and consistency compel a reevaluation of the creation of a marital relationship through agency as well. Such a reevaluation is particularly appropriate considering that an agent exercising custody makes many significant and repeated decisions for the child's welfare, typically unguided by the wishes of the principal. In the proxy marriage context, by contrast, the proxy makes no significant choices on behalf of the principal. The decision to enter into the marital relationship is made even before the proxy's appointment and the proxy's role is merely to serve as a stand-in to fulfill a form requirement. If agency has application in creating far more significant and personal custodial relationships, it should apply to create spousal relationships as well.

### C. *Death by Agent*

At common law, it has been frequently observed that "no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."<sup>288</sup> The right to autonomy over one's body is rooted in a constitutional right of privacy and has been held to extend to freedom in approving of or rejecting medical treatment.<sup>289</sup> Consistent with that right, American courts in the last thirty years have gradually recognized an individual's right not only to make medical decisions for himself, but to appoint an agent for that purpose, even where the decision making involves critical questions implicating life and death.

Legal recognition of the applicability of agency principles in medical decision-making has come about rather slowly. Traditionally, agency doctrine could not apply to most health care situations in which it was truly needed. At common law, an agency relationship terminated automatically at the incapacity of the principal.<sup>290</sup> Since the help of another in engaging in medical decision-making is

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<sup>288</sup> Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

<sup>289</sup> Fowler, *supra* note 207, at 988-89.

<sup>290</sup> MECHEM, *supra* note 14, § 677. For a justification of this rule, see *id.* § 676 ("The act of every agent exercising a bare power or authority necessarily presupposes, as has been seen, the existence of a principal competent to perform the same act himself in his own behalf. It is his will that is being carried out through the medium of the agent. If for any reason, therefore, the principal becomes incapable of acting and exercising an intelligent will in regard to the transaction, it is evident that an essential element in the relation is lacking, and while that element remains absent, the further exercise of the relation must be suspended.").

typically needed only when the interested party himself is incapacitated and thus unable to personally make those decisions,<sup>291</sup> prior agency appointments were virtually useless in conveying decision-making authority for critical health care matters.<sup>292</sup> However, this result was not viewed as exceptionally problematic to scholars in the early twentieth century, as there was much speculation at the time that “medical decision-making might fall within [the] narrow category of actions too personal to be delegated.”<sup>293</sup>

Beginning in the 1970s, however, the power of attorney was gradually revolutionized to allow agency authority to persist beyond the principal’s incapacity.<sup>294</sup> States, and even the Uniform Probate Code in 1969, began to recognize the “durable power of attorney”—durable in the sense that it would endure past the incapacity of the principal and up to the moment of his death.<sup>295</sup> Such a power of attorney could, in accordance with the state law and the desires of the principal, either come into effect immediately upon execution or “spring” into effect upon the occurrence of a triggering event such as the principal’s incapacity,<sup>296</sup> without the need for any court approval or proceeding.<sup>297</sup> In either event, the durable power of attorney was a useful extension of traditional common law agency principles because it allowed the agent to continue to act with respect to the principal’s affairs—managing his finances and buying and selling property—when the principal was unable to do so himself.<sup>298</sup> As a result, the durable power of attorney has long been viewed as a logical and equitable extension of agency law insofar as it gives a trusted person exercising substituted judgment the authority to act in a manner that the principal likely would have desired.<sup>299</sup> By 1984, the durable power of attorney was a part of the law in all fifty states.<sup>300</sup>

Still, the clear extension of the durable power of attorney to medical decision-making has come about more slowly as a result of the perception that the authority to make life and death decisions on behalf of another might just be a “nondelegable” act outside the ambit of agency law.<sup>301</sup> The concern, of course, is that the agent wields

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<sup>291</sup> Fowler, *supra* note 207, at 1012 n.174.

<sup>292</sup> *Id.* at 1014-15.

<sup>293</sup> *Id.* at 1009.

<sup>294</sup> *Id.* at 1012 n.174.

<sup>295</sup> UNIF. PROBATE CODE § 5-501 (amended 2008).

<sup>296</sup> *Legal Problems of the Aged and Infirm—The Durable Power of Attorney—Planned Protective Services and the Living Will*, 13 REAL PROP. PROB. & TR. J. 1, 3 (1978).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 7.

<sup>299</sup> Fowler, *supra* note 207, at 1002 (“[T]he agency approach would permit the patient to choose the person he most trusts to represent his interests—someone who shares, or would at least be faithful to, the patient’s views . . .”).

<sup>300</sup> *Id.* at 1009.

<sup>301</sup> *Id.* at 1009-10.

“extraordinary power” in these circumstances,<sup>302</sup> and “the basic policy underlying the nondelegable acts doctrine is that some decisions should be made personally—or not made at all.”<sup>303</sup> Even in the wake of the creation of the durable power of attorney, agency scholars and lawyers questioned whether health care decisions were of the sort that simply should not be made at all if they could not be made by the affected person himself.<sup>304</sup>

Today, the power of attorney has evolved such that it is clear it may be used as a device to permit the appointment of an agent for medical decision-making.<sup>305</sup> Despite the intimate nature of the choices made by the agent in the face of the principal’s incapacity, the right to make such choices is now widely recognized as falling within agency authority.<sup>306</sup> The history of the durable power of attorney itself helped states reach that conclusion. It is evident from writings of the committee of the National Conference of Commissioners on Uniform State Laws—the committee charged with drafting a model durable power of attorney law—that the purpose of its creation was to provide incompetents with “assistance in caring for their property rights or

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<sup>302</sup> *Id.* at 1007.

<sup>303</sup> *Id.* at 1010.

<sup>304</sup> *Id.* at 1009.

<sup>305</sup> Twenty-nine states and the District of Columbia have statutes specifically authorizing health-care powers of attorney while six others allow medical decision-making authority under a general durable power of attorney. ALASKA STAT. § 13.52.010 (2005); CAL. CIV. CODE §§ 2430-2444 (West 1993 & Supp. 2010); COLO. REV. STAT. ANN. §§ 15-14-501 to -502 (West 2005); CONN. GEN. STAT. ANN. § 81-43 (West 2004 & Supp. 2008); D.C. CODE §§ 21-2201 to -2213 (2001); FLA. STAT. ANN. § 709.08 (West 2007); GA. CODE ANN. §§ 31-36-1 to -13 (West 2003 & Supp. 2010); IDAHO CODE ANN. §§ 39-4501 to -4509 (2007); 20 ILL. COMP. STAT. ch. 110½, §§ 804-1 to -12 (West 2002); IND. CODE ANN. §§ 30-5-1 to -10 (West 1994 & Supp. 2008); IOWA CODE ANN. §§ 144B.1-.12 (West 2008); KAN. STAT. ANN. §§ 58-625 to -632 (2009); KY. REV. STAT. ANN. §§ 311.970-.986 (West 2006); LA. CIV. CODE ANN. art. 2997 (2009); ME. REV. STAT. ANN. tit. 18A, § 5-501 (1998 & Supp. 2008); MASS. GEN. LAWS ANN. ch. 201D, §§ 1-17 (West 1998 & Supp. 2005); MICH. COMP. LAWS ANN. § 700.496 (West 2002 & Supp. 2008); MISS. CODE ANN. §§ 41-41-151 to -183 (West 2007); MO. ANN. STAT. §§ 404.700-.735 (West 2001 & Supp. 2008); NEV. REV. STAT. ANN. §§ 449.800-.860 (West 2000); N.H. REV. STAT. ANN. §§ 137-J:1 to -J:16 (LexisNexis 2005 & Supp. 2008); 1991 N.J. Laws 1367; N.M. STAT. ANN. §§ 45-5-501 to -502 (West 2003 & Supp. 2008); N.Y. PUB. HEALTH LAW §§ 2980-2994 (McKinney 2007 & Supp. 2010); 1991 N.D. Laws ch. 266 (H.B. 1384); OHIO REV. CODE ANN. §§ 1337.11-.17 (West 2004 & Supp. 2008); OR. REV. STAT. ANN. §§ 127.505-.585 (West 2009); 20 PA. CONS. STAT. ANN. §§ 5601-5607 (West 2005 & Supp. 2008); R.I. GEN. LAWS §§ 23-4.10-1 to -2 (2010); S.C. CODE ANN. §§ 44-66-10 to -80 (2002 & Supp. 2007); S.D. CODIFIED LAWS §§ 34-12C-1 to -8 (2004 & Supp. 2008); TENN. CODE ANN. §§ 34-6-201 to -214 (West 2007); TEX. REV. CIV. STAT. ANN. art. 44590h-1 (West 2006); UTAH CODE ANN. §§ 75-2-1101 to -1118 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 14, § 3451 (2007); VA. CODE ANN. §§ 37.1-134.4 (West 2005); WASH. REV. CODE ANN. §§ 11.94.010-.900 (West 2006 & Supp. 2008); W. VA. CODE ANN. §§ 16-30A-1 to -20 (West 2008); WIS. STAT. ANN. §§ 155.01-.80 (West 2006 & Supp. 2008); WYO. STAT. ANN. § 33-5-201 (2007).

<sup>306</sup> See *supra* text accompanying note 255.

*personal affairs*, or for protecting their property or *personal rights*.<sup>307</sup> Slowly, the view has come to predominate that the drafters of durable-power-of-attorney statutes *must* have contemplated the making of health care decisions as precisely one of those acts for which authority could be, and most often would be, conveyed to an agent.<sup>308</sup>

There is no doubt that the decisions made by an agent under a durable power of attorney, at least with regard to the health care of the principal, are complex and personal. The agent needs to “assess risks and costs, speak to friends and relatives . . . , consider a variety of therapeutic options, seek the opinions of other physicians, evaluate the . . . condition and prospects for recovery”—in short, make exactly the kind of tough choices the principal himself would be required to make absent the power of attorney.<sup>309</sup> Still, the law has come to recognize the principal’s right to select a proxy to speak for him in making life and death decisions. Where the charge placed upon the agent would be much less severe—merely carrying out a form requirement rather than *making* critical decisions—the same possibilities should be extended to principals seeking to perfect ceremonial marriage requirements by proxy.

### III. THE EVOLVING CASE FOR PROXY MARRIAGE<sup>310</sup>

#### A. *Equitable Necessity in the Twenty-First Century*

The legality of proxy marriage certainly seems to be nothing more than an academic inquiry. After all, marrying with the use of representatives is exceptionally unromantic.<sup>311</sup> And in an age in which marriage is viewed almost exclusively as the outcome of romantic love,<sup>312</sup> one might assume that so few couples would choose to marry by proxy that its legality would be almost irrelevant. In fact, precisely the opposite is true. Contemporary demand for proxy marriage is startlingly strong, brought about in large part by the many advantages afforded to married persons that their unmarried counterparts do not share.

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<sup>307</sup> Fowler, *supra* note 207, at 1016 (citing MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT (1964), *reprinted in* NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, HANDBOOK AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 273 (1964) [hereinafter HANDBOOK]).

<sup>308</sup> See HANDBOOK, *supra* note 307, at 275.

<sup>309</sup> Fowler, *supra* note 207, at 1001.

<sup>310</sup> The inspiration for this title was drawn from Marvin Moore’s 1962 piece entitled *The Case for Proxy Marriage*, cited *supra* note 16.

<sup>311</sup> See Jennifer H. Svan, *Married in Montana: Servicemembers Take Advantage of State’s Double-Proxy Law*, STARS & STRIPES (May 26, 2009), <http://www.stripes.com/articleprint.asp?section=104&article=62928>.

<sup>312</sup> See COTT, *supra* note 20, at 150.

### 1. The Groups That Stand to Benefit from Proxy Marriage

In Montana, the only American state to allow marriages by double proxy,<sup>313</sup> county officials were so overwhelmed with proxy-marriage applications—nearly thirty per month in Flathead County alone—that they changed state law in 2007 to restrict proxy marriage to situations in which one spouse is either a Montana resident or a member of the armed forces.<sup>314</sup> County clerks complained that they simply could not otherwise handle the sheer volume of proxy-marriage requests.<sup>315</sup> The change may not have brought about its intended effect. Three years later, even with a very narrow proxy-marriage rule, Montana officials in Flathead County report that they process as many as eighty *double* proxy marriages each month.<sup>316</sup>

Demand for proxy marriage among American citizens is strong, brought about, in large part, by the sheer number of armed forces stationed away from home. That number approached 300,000 in 2008.<sup>317</sup> While at first blush that figure seems to pale in comparison to the four million men that served in the armed forces during World War I,<sup>318</sup> the lengthy duration of America's continued occupation of Afghanistan and Iraq means that the number of troops who have served abroad in the last decade is approaching the number serving during the period when proxy marriage was viewed as a necessity.<sup>319</sup>

Of course, military personnel are not the only group for whom proxy marriage might be an attractive option. Any couple separated by a substantial distance might find the doctrine useful. In fact, the history of Montana's proxy-marriage law demonstrates that it grew not out of a demand among members of the armed forces, but rather from an influx of miners to the Montana area in the 1860s; they typically came from out of state and desired to wed their "far-flung fiancées."<sup>320</sup> Today, and particularly in the current troubled economy, far more Americans are forced to seek employment and remain far from home or their significant others for a lengthy period.<sup>321</sup> Thousands of American citizens find themselves in such a situation,

<sup>313</sup> MONT. CODE ANN. § 40-1-301 (2009).

<sup>314</sup> Maurice Possley, *Marriage by Proxy Booming in Montana*, MONT. LAW., June/July 2007, at 32.

<sup>315</sup> *Id.*

<sup>316</sup> Svan, *supra* note 311 ("Flathead County district court processes from six to 20 double proxy marriage licenses per week . . .").

<sup>317</sup> U.S. DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (2008), available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0803.pdf>.

<sup>318</sup> See Gordon, *supra* note 91, at 32.

<sup>319</sup> Rod Powers, *The Cost of War*, ABOUT.COM (Jun. 19, 2010), <http://usmilitary.about.com/od/terrorism/a/iraqdeath1000.htm> (describing the duration of United States' military operations in Afghanistan and Iraq).

<sup>320</sup> Svan, *supra* note 311.

<sup>321</sup> See Broadway, *supra* note 22, at 112-14; *Government Jobs Overview*, *supra* note 24. See generally Briffault, *supra* note 21.

and while the number of those persons desiring to perfect a proxy marriage is certainly just a small fraction of those who work away from home, modern employment conditions, namely, increasing long-distance employment over the last century, have no doubt significantly bolstered demand for proxy marriage.<sup>322</sup>

Finally, the number of same-sex individuals in committed relationships, who often desire the rights and responsibilities of marriage, and who might take advantage of proxy rules in a state allowing same-sex marriage, has also increased dramatically since proxy marriage was born in this country.<sup>323</sup> In the 1920s and 1930s, gay and lesbian culture was just beginning to take hold in the United States.<sup>324</sup> Today, there are reportedly 710,000 acknowledged homosexual Americans,<sup>325</sup> and the 2010 census figures are expected to report a substantial increase in the number of those persons involved in committed relationships.<sup>326</sup> Because gay and lesbian couples can legally marry in only a few American jurisdictions, their sole option for perfecting a valid marriage is to endure the hardship of traveling to a jurisdiction that recognizes same-sex marriage and does not restrict its application to residents.<sup>327</sup>

Constituents of all of the above-described groups are likely to desire to marry by proxy at levels not yet seen before, stemming from the fact that they cannot perfect a ceremonial marriage. The availability of the proxy-marriage option would confer a panoply of advantages that no other legal status can bring, both to the spouses themselves and to their children.<sup>328</sup>

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<sup>322</sup> Jennifer Levitz, *Unemployed Hit the Road to Find Jobs*, WSJ.COM (June 25, 2009), <http://online.wsj.com/article/SB124587593994649417.html>.

<sup>323</sup> The 1990 census in Minnesota counted gay couples for the first time and, by 2000, nearly 10,000 gay couples statewide were living in Minnesota; many already considered themselves to be married simply by cohabitation. By 2007, that number had increased to 13,000. Jason Hoppin, *Same-Sex Couples Glad to be Counted in U.S. Census*, ST. PAUL PIONEER PRESS (Minn.), Mar. 15, 2010, at A1. See Lavery, *supra* note 27 (describing how “e-marriage” may be beneficial to same-sex couples); see also Candeub & Kuykendall, *supra* note 27.

<sup>324</sup> MARY BETH NORTON ET AL., *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES: SINCE 1865*, at 641 (2009).

<sup>325</sup> *2000 Census Information on Gay and Lesbian Couples*, GAY DEMOGRAPHICS, <http://www.gaydemographics.org/USA/USA.htm> (last visited Feb. 15, 2010).

<sup>326</sup> Hoppin, *supra* note 323.

<sup>327</sup> Even this strategy may prove ineffective in giving gay and lesbian couples the legal advantages they desire. The federal Defense of Marriage Act allows states to refuse recognition of a same-sex marriage valid in the place of perfection. Mary L. Bonauto, *DOMA Damages Same Sex Families and Their Children*, 32 FAM. ADVOC. 10, 11-12 (2010). Thus, upon returning to a home state that does not permit same-sex marriage, the couples described would not have gained much in the way of legal advantage.

<sup>328</sup> See NAT'L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 22 (July 2007).

## 2. The Benefits of Proxy Marriage

Perhaps foremost among the rights a party might seek through a proxy marriage are immigration benefits. A controversial English case that recently made headlines provides an instructive example. Two English residents, a Polish citizen and a Brazilian citizen, were married by double proxy in Brazil while they remained in London.<sup>329</sup> The marriage made the Brazilian husband the spouse of a European Union citizen, thus granting him the right to remain in England permanently.<sup>330</sup> British immigration officials acknowledged the validity of the couple's proxy marriage in Brazil but argued that the couple had used proxy marriage to circumvent English immigration policy,<sup>331</sup> which would have denied immigration effects to a marriage perfected in England because the intended husband was in the country on only a temporary visa.<sup>332</sup> Immigration officials essentially bemoaned the spouses taking advantage of what they described as a "loophole" in immigration policy by engaging in a proxy marriage.<sup>333</sup> When the husband was denied United Kingdom resident status, he sued, arguing that a refusal to grant him residency violated his human rights.<sup>334</sup> A lower court immigration judge agreed, and the House of Lords ended the controversy in late 2008 when it ruled that further investigating the motives of the couple's Brazilian proxy marriage would be a breach of their human rights.<sup>335</sup> The parties to this proxy marriage insisted that their marriage is "genuine" and "not a sham," and that they strongly desired to marry but simply could not bear the cost and complication of traveling to Poland or Brazil to do so.<sup>336</sup> Proxy marriage was their only option—and an option that conferred substantial immigration advantages on the husband.

In a high-profile case closer to home, an American resident claimed permanent resident status based on a proxy marriage to a deceased Marine.<sup>337</sup> Hotaru Ferschke, a Japanese citizen, married an American serviceman by proxy in Japan after he deployed for service

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<sup>329</sup> See Dan Newling, *The Wedding with No Bride and No Groom as Brazilian Marries Pole "By Proxy" to Stay in Britain*, DAILY MAIL (Dec. 12, 2008), <http://www.dailymail.co.uk/news/article-1094306/The-wedding-bride-groom-Pole-Brazilian-marry-proxy-stay-Britain.html>.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Visitors of the UK are not permitted to apply for a visa on the basis of marriage if not a European citizen, not married to a person present, and not settled in the UK. See *Fiancé/e of an UK Citizen, Permanent Resident or EU Citizen*, WORKPERMIT.COM, <http://www.workpermit.com/uk/fiance.htm> (last visited Oct. 2, 2010).

<sup>333</sup> Newling, *supra* note 329.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> See Kristin M. Hall, *Proxy Wedding Means Marine's Widow, Baby Unwelcome*, KNOXNEWS.COM (Sept. 17, 2009), <http://www.knoxnews.com/news/2009/sep/17/proxy-wedding-means-marines-widow-baby-unwelcome>.

in Iraq and she learned she was pregnant with his child.<sup>338</sup> One month after the proxy marriage, Ferschke's husband was killed during a house raid in Iraq.<sup>339</sup> Ferschke sought to obtain permanent residency in the United States for herself and her son, as the spouse and child of an American citizen.<sup>340</sup> The federal government denied her request because the parties' marriage was perfected by proxy.<sup>341</sup> And while the United States government recognizes, for immigration purposes, proxy marriages valid in the jurisdiction in which they were contracted, it imposes the additional requirement of consummation before a proxy marriage can confer immigration status.<sup>342</sup> Because Ferschke and her husband did not live together or engage in sexual activity *after* their marriage, she was denied permanent residency.<sup>343</sup> Immigration officials have expressed distress over the case, noting the sacrifices of Ferschke's family for this country, but believe the law allows no other outcome.<sup>344</sup> Ferschke sought the help of three United States congressmen, who introduced a private bill to aid her.<sup>345</sup> That bill passed in the House on November 15, 2010, but it is unknown when or if the Senate will act.<sup>346</sup> Ferschke's status remains unresolved.<sup>347</sup> She returned to Japan in January 2010.<sup>348</sup>

It is obvious from the Ferschke story that not all attempts to use proxy marriage to obtain immigration advantages are successful. Still, the two stories together demonstrate the potential advantages of a proxy marriage to better the immigration status of foreign residents, often in deserving cases.

In addition to immigration status, marriage confers a staggering array of property rights upon the parties to it. The right to succeed from a deceased spouse who leaves no will,<sup>349</sup> the right to an

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*; see also Charlie Reed & Chiyomi Sumida, *Immigration Law Aimed at Troops' Foreign Spouses Passes House*, STARS & STRIPES (Nov. 17, 2010), <http://www.stripes.com/news/pacific/immigration-law-aimed-at-troops-foreign-spouses-passes-house-1.125703>.

<sup>340</sup> Hall, *supra* note 337.

<sup>341</sup> *Id.*

<sup>342</sup> 8 U.S.C. § 1101(a)(35) (2006); see also SARAH IGNATIUS & ELISABETH S. STICKNEY, NAT'L LAWYERS GUILD, IMMIGRATION LAW & FAMILY § 4:13 (2009). Some states, even outside the immigration context, require consummation of a marriage on penalty of nullity. See, e.g., GA. CODE ANN. § 19-3-1 (2010).

<sup>343</sup> Hall, *supra* note 337.

<sup>344</sup> *Id.*

<sup>345</sup> Robert Norris, *Marine Widow Ferschke and Son, 'Mikey,' Return to Japan*, THE DAILY TIMES.COM (Jan. 6, 2010), <http://www.thedailytimes.com/article/20100106/NEWS/301069985>.

<sup>346</sup> See Marine Sergeant Michael H. Ferschke, Jr. Memorial Act, H.R. 3697, 111th Cong. (2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-6397>.

<sup>347</sup> See *id.*; see also Reed & Sumida, *supra* note 339.

<sup>348</sup> Norris, *supra* note 345.

<sup>349</sup> See UNIF. PROBATE CODE § 2-102 (amended 2008).

elective share when a spouse dies with a will,<sup>350</sup> life insurance benefits, pension payments, health insurance coverage, and a whole host of other entitlements are given to spouses alone.<sup>351</sup> In the military context, there are a number of more particular advantages provided to spouses of active-duty servicemembers, particularly when they are killed in combat.<sup>352</sup> For instance, the United States government pays a “death gratuity” of \$100,000 to the surviving spouse of a member of the armed forces who dies on active duty.<sup>353</sup> Both inside and outside the military context, then, marriage provides substantial property entitlements to its parties. And when they are unable to undergo a ceremonial marriage because of impossibility or exceptional inconvenience, proxy marriage is the only means of conferring the advantages of marriage that both parties so desire.

Finally, children may have much at stake in the recognition of their parents’ proxy marriage. While children born both inside and outside of marriage are now generally recognized, on constitutional grounds, to have the same rights and duties vis-à-vis their parents,<sup>354</sup> the ease with which they may assert these rights still differs based on their parents’ marital status.<sup>355</sup> Children born during the marriage of their parents, or within a reasonable period after the dissolution of their parents’ marriage, enjoy a legal presumption of filiation.<sup>356</sup> The child born to a *married* American servicemember on duty overseas, for instance, would not have to suffer the expense and inconvenience of proving paternity before receiving legal recognition as the

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<sup>350</sup> See *id.* § 2-202.

<sup>351</sup> Spouses of military servicemembers, for example, are entitled to the following benefits: Death Gratuity (a one-time non-taxable payment to help surviving family members deal with the financial hardships that accompany the loss of a servicemember); Veteran’s Death Pension (pension for surviving spouses of deceased veterans); Dependency and Indemnity Compensation (a monthly benefit paid to eligible survivors of certain deceased veterans); Survivors’ and Dependents’ Education Assistance Program (provides education and training opportunities to eligible dependents of certain veterans; offers up to forty-five months of education benefits; benefits may be used for degree and certificate programs, apprenticeship, and on-the-job training); Gold Star Lapel Button (widows and widowers entitled to Gold Star Lapel Button); Survivor Health and Dental Benefits (surviving spouses can continue to receive health and dental benefits); TRICARE Eligibility (a health benefit program). See *Understanding Survivor Benefits*, MILITARY.COM, <http://www.military.com/benefits/survivor-benefits> (last visited Oct. 2, 2010).

<sup>352</sup> See *id.*

<sup>353</sup> See *Death Gratuity*, MILITARY.COM, <http://www.military.com/benefits/survivor-benefits/death-gratuity> (last visited Oct. 3, 2010).

<sup>354</sup> See *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that a provision of the Illinois Probate Act which allowed children born outside of marriage to inherit by intestate succession from their mothers only, although children born of a marriage may inherit by intestate succession from both parents, denies equal protection to children born outside of marriage).

<sup>355</sup> But see *Tricare Eligibility*, MILITARY.COM, <http://www.military.com/benefits/tricare/tricare-eligibility> (some military health insurance benefits may be available to children born outside of marriage) (last visited Oct. 2, 2010).

<sup>356</sup> See, e.g., LA. CIV. CODE ANN. art. 185 (2009).

servicemember's descendant. The law would presume him the servicemember's son and treat him as such unless a party with a contrary interest proved otherwise.<sup>357</sup> But the protections of a filiative presumption depend upon marriage of the child's parents. And again, when parents are unable to perfect a ceremonial marriage, a proxy marriage may be the only means of creating presumptions that aid children in establishing the parent-child relationship.

In short, the need for a narrow doctrine legalizing proxy marriage is great, brought about by a more geographically diverse society. Law- and policymakers must recognize that a changing culture demands a new look at whether rules that exclude the use of agents in the marriage ceremony continue to effect equity in the twenty-first century.

### B. *The Protective Mechanisms of the Power of Attorney*

Perhaps one of the most significant obstacles that has prevented American courts and legislatures from widely recognizing the validity of proxy marriages all these years is nothing more than fear. Fear of the limitations of agency to effect justice in an intimate context is palpable. As one scholar has noted, "there is always the possibility that an agent will make an irrational decision that needlessly" harms the principal.<sup>358</sup> Fear of the application of agency principles to the marriage contract should not overshadow the potential for equitable gains, however. General agency law includes a multitude of mechanisms designed to protect both principals and agents, which are particularly helpful when analyzed in the marital context.<sup>359</sup> Moreover, the basic principles of agency can be slightly tailored with little difficulty where necessary to better fit the marriage contract. Essentially, by divesting the proxy of nearly all discretion and requiring exceptional specificity in a writing creating the agency relationship, a regime can be created that permits proxy marriage but, at the same time, allays the fears that have posed hurdles to its recognition for so many years.

#### 1. The Straightjacket of Form

As a general matter, agency relationships need not be created in writing.<sup>360</sup> The principal-agent relationship, which is a contractual one, may come about by mere oral agreement or perhaps even tacitly.<sup>361</sup> Nonetheless, the law has long recognized the need for more solemnity in the creation of an agency relationship for certain

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<sup>357</sup> *Id.*

<sup>358</sup> Fowler, *supra* note 207, at 1005.

<sup>359</sup> See *infra* Parts III.B.1-4.

<sup>360</sup> See RESTATEMENT (THIRD) OF AGENCY § 3.02 cmt. b (2006).

<sup>361</sup> See *id.* § 3.01.

significant transactions.<sup>362</sup> The common law equal-dignity rule appropriately regulates the form necessary for a document creating an agency relationship by requiring the power of attorney to be in writing if a writing is required for the underlying transaction for which the agent is given authority to act.<sup>363</sup> Therefore, a power of attorney to alienate property on behalf of the principal or bind the principal as a surety must be in writing and must expressly confer authority to undertake specific action rather than generally grant the agent responsibility for handling all the affairs of the principal.<sup>364</sup> Some states have gone beyond the pure common law formulation of the equal-dignity rule to require that the agency contract not only be in writing, but also in whatever particular form is required of the underlying transaction.<sup>365</sup> Still others require particular types of agency contracts to assume the law's highest form requirements; the durable power of attorney, for instance, frequently must be executed before a notary and two witnesses.<sup>366</sup>

In the marriage context, application of the most restrictive equal-dignity rule would lead to absurd results. Requiring a power of attorney for a proxy marriage to be perfected before a qualified officiant, typically a religious official or judicial officer,<sup>367</sup> for instance, makes little sense. The law has recognized as much in the corporate context or "when an agent acts only as an amanuensis who signs at the principal's request," where the equal-dignity doctrine has been set aside as illogical.<sup>368</sup>

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<sup>362</sup> The power of attorney is the "written instrument by which one person . . . confirms the authority of another . . . to perform specified actions on [his] behalf." Fowler, *supra* note 207, at 1013-14. It is not a prerequisite to the creation of an agency relationship, but it "serves as an objective manifestation to third parties that such an agency has been created." *Id.* at 1014.

<sup>363</sup> RESTATEMENT (THIRD) OF AGENCY § 3.02 cmt. b (2006); *see also* Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate & Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1122 (1999).

<sup>364</sup> RESTATEMENT (THIRD) OF AGENCY § 3.02 cmt. b.

<sup>365</sup> Holmes & Symeonides, *supra* note 363, at 1122.

<sup>366</sup> RICHARD C. MILSTEIN, *THE FLORIDA BAR, FLORIDA WILLS (FOR MODEST ESTATES), POWERS OF ATTORNEY, AND HEALTH CARE ADVANCE DIRECTIVES* 84 (2007).

<sup>367</sup> *See, e.g.*, LA. REV. STAT. ANN. § 9:202 (2008) ("A marriage ceremony may be performed by (1) A priest, minister, rabbi, clerk of the Religious Society of Friends, or any clergyman of any religious sect, who is authorized by the authorities of his religion to perform marriages, and who is registered to perform marriages; (2) A state judge or justice of the peace.").

<sup>368</sup> RESTATEMENT (THIRD) OF AGENCY § 3.02 cmt. c. For example, corporate officers are agents who enter into transactions on behalf of the corporation. However, corporate officers typically are granted authority to act on the corporation's behalf in the articles of incorporation, by-laws, or a board resolution. It would thus be illogical and cumbersome to apply the equal-dignity doctrine and require an individual writing granting authority for nearly every act undertaken by the agent. *See id.*

Still, the evidentiary and cautionary functions of ceremonial marriage requirements<sup>369</sup> could be served by requiring that a power of attorney to marry be executed in writing, at a minimum. Requiring even more—the presence of a notary or witnesses—would also be consistent with agency principles in the intimate area of the durable power of attorney<sup>370</sup> and would be a reasonable demand to make of those desiring to perfect a proxy marriage.<sup>371</sup>

## 2. Specificity and Duration Limitations

Form requirements aside, a number of foreign jurisdictions that sanction proxy marriage have imposed additional mandates on a power of attorney to marry that the United States could borrow in a manner consistent with American agency principles. Most Central and South American countries, for example, require that the “other party to the marriage . . . be clearly and unmistakably designated by name in the document appointing the proxy [and] that the marriage can be concluded with this person only and with nobody else.”<sup>372</sup> Other jurisdictions require a specification of the “place, day, and hour designated for the celebration of the marriage.”<sup>373</sup> Some countries even

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<sup>369</sup> See John H. Wade, *Void and De Facto Marriages*, 9 SYDNEY L. REV. 356, 360 (1981) (“Courts dealing with property disputes had for centuries before 1753 suggested that a ceremonial marriage was far easier to prove in court than merely a *de facto* one. Thus then, as today, formalized marriages were especially desirable for evidentiary reasons. But ethics certainly played at least a subsidiary role in the emergence of the legal requirement of ceremony. For public ceremony hopefully gave time for reflection about the serious nature of marriage, perhaps delayed impulsive passion, scared off fortune hunters in search of heiresses, and allowed time for social approval and advice.”). *But see* D.E. Engdahl, *Medieval Metaphysics and English Marriage Law*, 8 J. FAM. L. 381, 382 (1968) (arguing that validity requirements in marriage laws are often barriers to justice).

<sup>370</sup> See MILSTEIN, *supra* note 366, at 84.

<sup>371</sup> Mexican law currently requires that a grant of agency authority to marry be made before a notary and two witnesses. CÓDIGO CIVIL FEDERAL art. 44 (Mex.), *translated in* FEDERAL CIVIL CODE OF MEXICO, *supra* note 192, at 17.

<sup>372</sup> Schwelb, *supra* note 37, at 368. *But see id.* (describing Islamic law, wherein the proxy is given authority even to choose the bride for the principal).

<sup>373</sup> See CÓDIGO DE LA FAMILIA art. 47 (Pan.), *translated in* CIVIL CODE OF PANAMA, *supra* note 189, at 294-95 (“Marriage can be contracted by the appearance before the official and two witnesses, without legal impediment, by one of the parties and the person to whom the other party has awarded a special power of attorney, by notarial act; provided that the person that is domiciled or is a resident at the place of officiating of the official that is to celebrate the marriage is always necessary. The power of attorney must express the name of the person with whom the marriage is to be performed, and basic informational facts for identifying the person, and the marriage shall be valid unless the revocation of the power of attorney has been given to the empowered agent, in due form, prior to the celebration of the marriage.”); CÓDIGO CIVIL FEDERAL art. 102 (Mex.), *translated in* FEDERAL CIVIL CODE OF MEXICO, *supra* note 192, at 17 (“The parties or their specially empowered agents, constituted in the manner provided in Article 44, as well as two witnesses to each of the parties that verify their identity, must be present before the Civil Registry judge at the place, day and hour designated for the celebration of the marriage . . .”).

limit the maximum duration of a power of attorney to marry to a relatively short period.<sup>374</sup> In Italy, for instance, a proxy marriage must be celebrated within 180 days of the grant of agency authority.<sup>375</sup> Such specificity and duration restrictions would allow American courts to recognize the equitable need for proxy marriage while, at the same time, limiting the breadth of the authority granted to the agent.

### 3. The Possibility of Revocation

Principles of revocation, which may arise in any agency contract, can also play a role in protecting principals to proxy marriages. An agency contract is typically revocable at the will of the principal,<sup>376</sup> and this general rule should apply in the marital context as well. Indeed, scholars have long observed that the revocable nature of the power of attorney is a consideration that strongly militates against legally recognizing proxy marriage.<sup>377</sup> The worry is that the ability of the principal to revoke his proxy's authority at any time may result in marriages that do not meet with the principal's changed desires.<sup>378</sup>

Agency law is already well equipped to deal with the familiar problem of revocation, however. Because a revocation may have substantial effects on third parties, it is not effective in withdrawing the agent's authority until the agent receives notice of the revocation.<sup>379</sup> The burden placed upon the principal is slight; he must simply communicate his change of heart to the agent before the hour he designated for his act arrives.<sup>380</sup> In the marital context, the application of this general rule adequately protects the principal, who would be bound only to marriages to which he specifically consented and that were contracted before he gave his duly appointed agent notice of his changed intent.

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This form of regulation is not wholly unknown to American law, as agency theorists have long distinguished between "general agents" and "special agents," the latter being authorized to conduct only a single transaction on the principal's behalf. RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. d.

<sup>374</sup> See *supra* note 182.

<sup>375</sup> CODICE CIVILE art. 111 (It.); see also THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION (Mario Beltramo, Giovanni E. Longo & John H. Merryman trans., Oxford Univ. Press 2009) (1991).

<sup>376</sup> RESTATEMENT (THIRD) OF AGENCY § 3.06.

<sup>377</sup> See *Apt (otherwise Magnus) v. Apt*, [1947] P.D. 127 (Eng.), available at 1947 WL 10609; Recent Cases, 10 B.U. L. REV. 378, 403 (1930).

<sup>378</sup> 52 AM. JUR. 2D *Marriage* § 15 (2009).

<sup>379</sup> RESTATEMENT (THIRD) OF AGENCY § 3.10.

<sup>380</sup> Spain's proxy marriage legislation provides a contemporary example of the application of agency revocation principles in the marital context. CÓDIGO CIVIL art. 87 (Spain), translated in WALTON, *supra* note 199, at 141 (agency power "shall be valid if, before [the marriage's] celebration, the person so authorized should not have been notified in an authentic form of the revocation of power").

#### 4. The Discretionless Power of Attorney

The confines of American agency law are, in all of the ways set out above, already well designed to serve the parties to a proxy marriage. The specificity that could be required in the power of attorney and the fact that all the agent really does is stand-in to meet a form requirement means that the “proxy” in a proxy marriage is not a proxy, or true agent, at all. Rather, “[t]he proxy is . . . nothing but a messenger, a ‘porte-parole,’ ‘nuntius,’ ‘Bote.’ He has no authority whatsoever to inject himself into the legal sphere of the party who appointed him. The proxy’s own will does not enter into the picture.”<sup>381</sup> The role of the proxy and the power of attorney’s protective mechanisms provide comfort, then, in ensuring that entry into one of the law’s most intimate relationships is made by will and intention of the principal himself. And because the law already sanctions the application of agency principles in other intimate areas—including will-making, transferring child custody, and creating durable powers of attorney—all of which give the agent substantially more decision-making authority than proxy marriage,<sup>382</sup> the modest role of an agent in a proxy marriage should be easily tolerated.

#### IV. TOWARD A WEDDING WITH NO BRIDE AND NO GROOM<sup>383</sup>

Proxy marriage fails to conform well to today’s wedding fairy tale. It requires none of the trappings that have come to be considered traditional.<sup>384</sup> At best, it is a wholly unromantic way to perfect the contract of marriage. But it is a useful, even necessary, avenue to marriage for many couples that want to undertake the lifetime of rights and duties associated with marriage but are unable to fulfill typical ceremonial marriage requirements.

Fear and consternation associated with a departure from strict adherence to the requirements of traditional ceremonial marriage is misplaced. By allowing common law marriage, the law in many American jurisdictions has already gone rather far in creating inroads to the requirement that a marriage be celebrated formally with both spouses physically present in the same room at the same

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<sup>381</sup> Schwelb, *supra* note 37, at 368. “Porte-parole” is French for “spokesman, mouthpiece.” J.E. MANSION, 2 HARRAP’S NEW STANDARD FRENCH AND ENGLISH DICTIONARY 77 (R.P.L. Ledesert & Margaret Ledesert eds., 1973). “Nuntius” is Latin for “messenger, bearer of news.” LEXICON OF THE LATIN LANGUAGE 578 (F.P. Leverett ed., 1850). “Bote” is German for “messenger, courier, bearer.” GERMAN-ENGLISH ENGLISH-GERMAN DICTIONARY 126 (Cassell’s rev. ed. 1978).

<sup>382</sup> See *supra* Part II.

<sup>383</sup> Inspiration for this title was drawn from Newling, *supra* note 329.

<sup>384</sup> But see Dan Barry, *Trading Vows in Montana, No Couple Required*, N.Y. TIMES, Mar. 10, 2008, at A11 (describing the “sugary vows written by the absentee bride and groom” that two Montana proxies once delivered to each other).

time.<sup>385</sup> Allowing spouses to celebrate a marriage with the assistance of agents is perhaps even less troubling, particularly considering that the law already endorses the use of agents in other intimate transactions, such as will-making, transferring child custody, and even making end-of-life decisions. In fact, we often view agency law as *designed* to do precisely what we fear in the marriage context, namely, allow the principal to authorize an agent to act for him in a significant, often personal, transaction.<sup>386</sup>

Creating symmetry in agency law by sanctioning proxy marriage is simply the next logical step in the evolution of agency law as applied to intimate relationships. It is a step that can be taken confidently, given that the agent in a proxy marriage may be granted far less discretion and decision-making responsibility than he is afforded in other personal dealings, and given the strong foundation of protection that American agency rules already affords principals through form requirements, duration restrictions, and revocation rules. In short, agency principles are ripe for application to the contract of marriage, and the idea of a proxy marriage—a groomless, perhaps even brideless, wedding—should be embraced.

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<sup>385</sup> See *supra* note 9.

<sup>386</sup> Fowler, *supra* note 207, at 1016 (describing the creation of a national committee to study ways in which a power of attorney might aid individuals in managing their most personal affairs).