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As we proceed further into the second half of the Twentieth Century, rapid changes are occurring in all aspects of our society. Even the honorable and ancient laws of marriage are not immutable. Professor Rames, in a series of articles which will culminate in a proposed act, reviews, criticizes and suggests revision of the Wyoming marriage statutes. Specifically, in Part I the author discusses in detail twenty-one sections of the Wyoming statutes concerning the creation of the marriage relationship. Professor Rames' analysis of these sections progresses from a discussion of their present apparent meaning to a recommended meaning which will be incorporated into a proposed act.

## AN ANALYSIS OF WYOMING MARRIAGE STATUTES, WITH SOME SUGGESTIONS FOR REFORM--PART I

*John O. Rames\**

### INTRODUCTORY

Most of the Wyoming statutes dealing directly with the subject of marriage appear as Sections 20-1 to 20-21 of the current compilation. Many of these 21 sections were enacted during Territorial days and have been brought forward unchanged from the Compiled Laws of 1876. This observation is not intended as a criticism, per se, since marriage is an ancient and honorable institution the outward forms of which have not changed much through the years. However, the existing marriage statutes are unsatisfactory in numerous important respects; it will be the object of this series of articles to point out deficiencies and to make specific suggestions for legislative correction.

The changes which will be suggested relate to both form and substance. There is a need for clarification of the meaning of some of the existing statutes; the statutes should be supplemented in certain respects; and some of them are obsolete or obsolescent in the light of modern legal and socio-

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logical ideas. Other states have recognized the need for revision of their marriage statutes; the most recent complete revision is the Wisconsin "Family Code," enacted by the legislature of that state in 1961. California is in the process of modernizing its domestic relations statutes; a proposed revision was partially enacted into law by the 1965 legislature in California, and the remainder is now receiving serious study and consideration.

We shall first analyze, in order, Sections 20-1 to 20-21, after which all other statutes directly pertaining to marriage will be considered. The object of the analysis is to point out defects and to identify problems; solutions will be offered at this stage only incidentally, as where a problem is identified through pointing out how other states have handled the particular point in a manner different from Wyoming. After having analyzed our marriage statutes we will undertake to suggest changes which seem desirable.

#### ANALYSIS OF SECTIONS 20-1 TO 20-21

Section 20-1 provides that "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." This is the truth, although it is not the whole truth. Marriage has certain aspects of a commercial contract, and among them is the necessity of valid consent by parties capable of contracting. In other respects, e.g., the lack of legal power to agree to its modification or termination, the contract of marriage differs from a commercial contract. It seems unnecessary to specify in a statute the respects in which the contract of marriage is similar to, and the respects in which it differs from, an ordinary commercial contract. It is certainly allowable, even desirable, for the legislature to emphasize (as it did in Section 20-1) the necessity of valid consent by parties legally capable of giving it, and that in the eyes of the law marriage is a civil contract rather than, for example, a religious sacrament.

Nowhere does the statutory law of Wyoming declare that so-called common-law marriages formed in Wyoming are invalid. We might conclude from a reading of Section 20-1 as it now stands that, by implication, common-law marriages

contracted in Wyoming are valid, since the emphasis is on the consensual nature of marriage. Such a contention was evidently made *In re Robert's Estate*,<sup>1</sup> Justice Blume, who wrote the opinion in that case, in rejecting such an approach said,<sup>2</sup> with reference to Section 20-1, "Too much stress should not be laid upon the first section of the act alone." The court in the *Robert's Estate* case and in the companion case of *In re Reeves' Estate*,<sup>3</sup> held that common-law marriages entered into in Wyoming are invalid. Although it is unlikely that the Wyoming Supreme Court will depart from its holdings in the *Robert's Estate* and *Reeves' Estate* cases, it would be sound practice to codify those holdings. The logical way in which to do so would be by adding language to that effect to existing Section 20-1. Such language will be found in the proposed legislation to be set out in the conclusion in this series of articles.

Furthermore, it would be well to specify in Section 20-1 which provisions of our marriage statutes are to be considered mandatory, so that compliance with them would be essential to a valid marriage, and which are directory only, with the result that non-compliance would not affect the validity of the marriage at all or at worst would render it voidable. We know that common-law marriages entered into in Wyoming are void, and we know from reading Sections 20-1 to 20-21 what the numerous requirements are for ceremonial marriages, but (with a few exceptions such as Section 20-33) the statutes do not delineate the status of marriages in which some, but not all, of the ceremonial marriage requirements were for some reason not followed. These uncertainties should be remedied.

To illustrate, in *Connors v. Connors*,<sup>4</sup> a marriage license had been issued and a proper marriage ceremony performed, but the marriage certificate had not subsequently been recorded as required by what is now Section 20-13. The court held the statutory requirement, that the county clerk "shall record all such returns," to be directory only despite the use of the

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1. 58 Wyo. 438, 133 P.2d 492 (1943).

2. *Id.* at 500.

3. 58 Wyo. 432, 133 P.2d 503 (1943).

4. 5 Wyo. 433, 40 Pac. 966 (1895).

word "shall." It added, by way of dictum,<sup>5</sup> that the marriage would have been valid "whether any license was obtained from the county clerk or not." According to this dictum, the statutes requiring an application for and issuance of a license would be merely directory. All this points up the desirability of a legislative declaration along the lines indicated in the preceding paragraph. Many rights and liabilities depend upon the validity of marriages, hence it is desirable that our "marriage code" be as specific as possible with respect to what *must* take place in order to constitute a valid marriage, and what the status of the union is in the event that a requirement is not met.

A later case, *In re Trent's Claim*,<sup>6</sup> regarded the *Robert's Estate* case as holding that the requirement of obtaining a license is mandatory, thus repudiating the *Connors* dictum. In the *Robert's Estate* case the court referred to the mandatory-directory problem, noting that there is a distinction

between marriages which are void because of total absence of compliance with the statutes, and marriages in connection with which some irregularity merely appears . . . . In many instances some statutory provisions may be mandatory, and others, on the same subject, may be directory. A result which is reasonable is sought.<sup>7</sup>

Enough has been said to indicate the desirability of a legislative declaration in this regard. Working toward that end, we may first note that Sections 20-1 to 20-21 impose the following requirements or conditions for ceremonial marriages performed in Wyoming:<sup>8</sup>

- (1) Minimum marriageable ages [20-2];
- (2) Parent's consent to marriage of minors [20-3];
- (3) Application for a license [20-5];
- (4) Issuance of license [20-4];
- (5) Health certificate, report of serological test, etc. [20-7];

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5. *Ibid.*

6. 68 Wyo. 146, 231 P.2d 180 (1951).

7. *In re Robert's Estate*, *supra* note 1, at 459-60, 133 P.2d at 499.

8. The numbers in brackets are section numbers. For convenience these requirements or conditions will be referred to as "requirements" only.

- (6) Performance of a ceremony by an authorized celebrant [20-10];
- (7) Minimum formalities for the ceremony [20-11]; or
- (8) Marriage in accordance with the rites and customs of a religious society to which the parties belong [20-20];
- (9) Certificate of marriage, issued "on request" by the celebrant [20-12];
- (10) Recording of "returns" of marriages by county clerk [20-13].

Which of these requirements were intended to be mandatory, and which were intended to be directory only? If the latter, what is the result of non-compliance: will the marriage be voidable, or will it be completely valid? The statutory language may provide some guide, and there are Supreme Court decisions settling these questions as to a few of the ten requirements just enumerated.

Respecting language, words such as "must" and "shall" are normally mandatory in character.<sup>9</sup> We find such words with respect to requirements (1),<sup>10</sup> (3),<sup>11</sup> (4),<sup>12</sup> (5),<sup>13</sup> (7),<sup>14</sup> and (10);<sup>15</sup> however, the situation concerning requirements (9) and (10) is somewhat uncertain. Section 20-12 does not require that in *all* cases the person solemnizing the marriage shall or must issue a marriage certificate, but only that he do so "on request" of the parties. A hiatus exists between this section and the succeeding section 20-13 which provides that "The county clerk . . . shall record all such returns of marriages in a book to be kept for that purpose . . . ." In actual practice, the celebrant issues marriage certificates to both parties in all cases and executes and returns an additional marriage certificate to the county clerk in all cases.<sup>16</sup> The county clerk enters the facts pertaining to the marriage

9. 82 C.J.S. *Statutes* § 380 (1953).

10. ". . . the male must be of the age of eighteen years . . . ."

11. "Application for a marriage license shall be made . . . ."

12. ". . . a license . . . must be obtained . . . ."

13. "Every male and female person securing a marriage license must produce a certificate . . . ."

14. ". . . the parties shall solemnly declare . . . ."

15. "The county clerk . . . shall record all such returns . . . ."

16. Personal interview with Rev. Otis Jackson, Dean of St. Matthews (Episcopal) Cathedral, Laramie, Wyoming, on August 23, 1966.

in a "marriage book," endorses the marriage certificate, and sends it to the Division of Vital Statistics of the Wyoming Department of Public Health<sup>17</sup>—an excellent method of making marriages matters of public record, but to some extent extra-statutory. The statutes should be clarified so as to reflect what is done in actual practice. If this is done, mandatory language should be retained in expressing requirement (9), and the "on request" phrase should be deleted.

Turning now to Supreme Court decisions, it has already been observed that *Connors v. Connors*<sup>18</sup> held that requirement (10) is directory, and that *In re Robert's Estate*,<sup>19</sup> as interpreted by *In re Trent's Claim*,<sup>20</sup> determined that requirement (4) is mandatory. Logically, no license should be issued unless a proper application therefore has previously been made; without the application the county clerk could not know whether the parties were entitled to a license. Thus, if the license is mandatory the application should be equally so, hence requirement (3) should be considered mandatory.

Research has not disclosed any Supreme Court decisions throwing light on the mandatory-directory problem with respect to requirements (1), (2), (5), (6), (7), (8) and (9). Each of these will now be analyzed in terms of statutory language and evaluation by authority construing similar requirements outside Wyoming.

Requirement (1): Minimum marriageable ages [20-2]. Language of a mandatory character is used in this statute; the male *must* be of the age of 18 or upwards, and the female of the age of 16 or upwards. In this instance, however, the word "must" cannot be interpreted as mandatory because Sections 20-33 to 20-35 recognize "under-age" marriages as voidable. Accordingly, the use of the word "must" in Section 20-2 is misleading and undesirable. This section is closely connected with the succeeding Section 20-3, which expresses requirement (2) *re* parent's consent to marriages of minors. The two may well be combined, since both relate to the age

17. Personal interview with Miss Minnie Pearson, County Clerk of Albany County, Wyoming, on August 23, 1966. See also WYO. STAT. § 35-72 (1957).

18. *Connors v. Connors*, *supra* note 4.

19. *In re Robert's Estate*, *supra* note 1.

20. *In re Trent's Claim*, *supra* note 6.

factor. It would then be well to consider the nature of requirement (2) before arriving at a decision involving a re-wording of Section 20-2. Is the requirement of parent's consent to the marriage of a minor mandatory, or is it only directory? If the latter, what is the effect of non-compliance on the marriage?

In 55 C.J.S. *Marriage* § 23, at 855 (1948) it is stated:

Although the rule was otherwise at common law, frequently by statute provision is made for the consent of parents or guardians as a preliminary to the marriages of infants. As a general rule, however, unless the statute declares a marriage contracted without the prescribed consent to be a nullity, it is construed as only directory in this respect, so that such a marriage is valid where the essentials of a valid marriage otherwise exist, although disobedience of the statute may entail penalties, as, for example, where the statute provides for or requires the consent of parents or guardian before the issuance of a license to marry to persons under a specified age or before the solemnization of a marriage between such persons, and imposes a penalty for disobedience of the statute.

In support of this statement as to the directory character of the requirement, cases are cited from lower federal courts, California, the District of Columbia, Illinois, New Jersey, Ohio, Pennsylvania, South Dakota, Texas and Virginia. Similarly, the annotator in 61 A.L.R.2d 847, 859-60 (1958) states:

The largest group of cases involving wrongfully obtained marriage licenses dealt with the situation where licenses have been issued to minors who made false representations as to age, not being entitled to marry without parental consent. These cases generally hold that if the minor is of marriageable age, the fact that the license was procured by such false representations does not invalidate the marriage in the absence of a statutory declaration expressly nullifying a marriage contracted without the requisite parental consent.

In addition to the jurisdictions listed by the C.J.S. writer, the annotator in A.L.R.2d lists Arizona, Arkansas, Idaho,



Indiana, Kentucky, Maryland, Michigan, Montana, Nebraska, New York, North Carolina, Washington, West Virginia and Wisconsin. It will be noted that in C.J.S. it is stated that such marriages are *valid*, while the A.L.R.2d statement could include *voidable* as well as valid marriages.

The Wyoming statute, Section 20-3, does not expressly declare that marriages are void where parental consent is required but is not obtained; it merely provides that "no license shall be granted" without such consent. The failure to produce a parental consent when one is required is not expressly made criminal, as are numerous other failures to comply with the marriage statutes, e.g., Sections 20-9 and 20-15. However, an applicant who falsely represents his age in the application, so that parental consent appears unnecessary, would probably be guilty of perjury since the application is made under oath.

All in all, it would seem sensible to take the position that the failure to produce parental consent when one is required should render a marriage *voidable* in Wyoming. Such a position would harmonize with Sections 20-33 to 20-35. These last mentioned statutes provide that under-age marriages (male under 18, female under 16, or both) may be annulled, and are therefore voidable. Section 20-35 expressly gives parents power to bring such annulment suits. By a parity of reasoning, a parent whose consent was required but was not validly obtained to the marriage of a minor over the marriageable age should be given power to seek annulment of such a marriage. This could be done by expanding the language of Section 20-35. Such a result should be an acceptable compromise between declaring the marriage *void* because of the lack of parental consent (which seems too harsh) and declaring it completely valid and thus in practical effect emasculating the requirement of parental consent.

A few jurisdictions seem to have taken this position.<sup>21</sup> *Turner v. Turner*<sup>22</sup> will serve as a good illustration. In this

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21. *Turner v. Turner*, 167 Cal. App. 2d 636, 334 P.2d 1011 (1959); *Matturo v. Matturo*, 117 N.Y.S.2d 523 (1952); *Lyndon v. Lyndon*, 69 Ill. 43 (1873); *Robertson v. Cole*, 12 Tex. 356 (1854). More recent Illinois and Texas cases appear to hold that the marriage is completely valid.

22. *Turner v. Turner*, *supra* note 21.

case, a father brought suit to have his written consent to the marriage of a son then under 18 years of age cancelled, on the ground of fraud, and to have the marriage annulled. The District Court of Appeal granted the relief sought. Apparently the case went no further. The plaintiff's son and a young woman represented that they had already been married in Mexico, that she was pregnant, and that the son was the father of her unborn child. Through these representations they induced the father to consent to a California marriage. In fact they had not been married in Mexico, and the girl's pregnancy was by another man. The court found the representations materially false, decreed cancellation of the consent, and granted annulment under a statute expressly giving a parent the right to obtain an annulment of a marriage of a minor child who for any reason was incapable of validly consenting to marry. (Another statute provided that a male under 18 was not capable of validly consenting, unless his parent also consented.) In holding the marriage voidable, and therefore subject to annulment, the court expressed the following philosophy:<sup>23</sup>

Since the consent to the marriage was obtained by fraud, the marriage is voidable. [citing California cases] . . .

The purpose of a statute providing that a marriage license shall not be issued to a person under age without the consent of a parent is to permit the parent to exercise control and discipline over a child until marriage and to that end prevent him, if possible, from contracting an ill-advised marriage. *Lundstrom v. Mample*, 205 Minn. 91, 285 N.W. 83, 84. The father and mother of a legitimate unmarried minor child are entitled to its custody, services and earnings. Civ. Code, § 197. The right of a fit and proper parent to his child's custody is somewhat in the nature of a property right, and is paramount, in a sense, to the child's theoretical welfare and best interests . . . . The parents are the natural guardians of their child, and are responsible to the state for the child's well-being. 37 Cal. Jur. 2d 145, § 7. The parent has authority to control the child, and to administer restraint and punishment, in order to

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23. *Id.*, 334 P.2d at 1014-15.

compel obedience to reasonable and necessary directions . . . . The authority of a parent ceases on the marriage of a child. Civ. Code, § 204.

A marriage entered into by a male under the age of 18 years without the written consent of one of his parents is subject to annulment at the instance of his parent. [citing cases.]

The court then discussed with approval the case of *Vaughan v. Gideon*<sup>24</sup> which it characterized as being "squarely in point." By way of dictum the *Turner* opinion pointed out that under California law the annulment would not bastardize a child which had been born after the marriage.

As a matter of fact the *Vaughan* case is not squarely in point, because in that case the minor was below the minimum marriageable age, which in and of itself would render the marriage voidable and subject to annulment. Under those circumstances it is really immaterial whether the parent consents or not. There are many such cases.

It is reassuring to note that a well-known authority in the field of Domestic Relations, in drafting a proposed model act on annulment, adopted the position here urged.<sup>25</sup> Section 12(A) of Professor Vernon's model act reads as follows:

A marriage is annulable if, at the time of the marriage, the male party is eighteen, nineteen or twenty years old or the female party is sixteen or seventeen years old, unless consent to the marriage is given by a parent, guardian or persons in charge of the underage party.<sup>26</sup>

The minimum marriageable ages suggested by Professor Vernon are 18 for males and 16 for females, and marriages are annulable regardless of parental consent when either party is below minimum marriageable age, as in Wyoming.

Returning, at last, from the long excursion upon which we have embarked, what have we concluded as to the mandatory character of requirements (1) *re* minimum marriageable

24. 56 Cal. App. 2d 158, 132 P.2d 529 (1942).

25. Vernon, *Annulment of Marriage: A Proposed Model Act*, 12 J. PUB. L. 143, 180 (1963). The author, David H. Vernon, was then Associate Professor of Law at the University of New Mexico School of Law.

26. *Id.*, § 13(A), at 181.

ages, found in Section 20-2 and (2) *re* parental consent, found in Section 20-3? We have concluded (a) that the word "must" is misleading and should be changed, since it is not mandatory that the male be at least 18 years old and the female at least 16; (b) that, similarly, Section 20-3 requiring parental consent to the marriage of a minor should not be considered mandatory; and (c) that the absence of parental consent, where one is required, should make the marriage annulable at the suit of the parent (only) in like manner and with like effect as in the case of under-age marriages. In the light of these conclusions, Section 20-3 should be combined with Section 20-2, and Sections 20-33 to 20-35 should be amplified to include lack of parental consent as a ground for annulment by parent.

Requirement (2): Parent's consent to marriage of minors [20-3], we have just disposed of.

Requirement (5): Health certificate, report of serological test, etc. [20-7]. Language of a mandatory character is used in this statute: persons securing a marriage license *must* produce a certificate of freedom from venereal disease in communicable form; the certificate *shall* include or be accompanied by a report of a serological test for syphilis and by a report of laboratory examination for other venereal disease indicated by the physical examination. Most jurisdictions have held that statutory requirements for serological tests (as we shall call these requirements for the sake of brevity) are directory only, even if couched in mandatory language, and that the marriage is valid, or at worst voidable, when the requirements have not been met.<sup>27</sup> *Christensen v. Christensen*<sup>28</sup> is perhaps typical of the majority decisions. There, the Supreme Court of Nebraska held the marriage voidable, saying with reference to the Nebraska statute:

While the purpose and intent of the provisions relied upon . . . was undoubtedly to protect the innocent, prevent the spread of infectious social disease, and

27. *Woodward Iron Co. v. Dean*, 217 Ala. 530, 117 So. 52 (1928); *Boysen v. Boysen*, 301 Ill. App. 573, 23 N.E.2d 231 (1939); *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944); *Heller v. Heller*, 68 N.Y.S.2d 545 (1947); *Berenson v. Berenson*, 98 N.Y.S.2d 912 (1950); *Lyannes v. Lyannes*, 171 Wis. 381, 177 N.W. 683 (1920). *Contra* (requirement mandatory, marriage void if not observed) *Fisher v. Sweet & McLain*, 154 Pa. Super. 216, 35 A.2d 756 (1944) (dictum). Annot., 127 A.L.R. 421, 427 (1940).

28. *Christensen v. Christensen*, *supra* note 27.

safeguard posterity, we find no provision in the statutes of this state applicable here which expressly declares that a marriage by such a person is void . . . . In the absence of express statutory invalidation, this court has held that the fact that the license required was wrongfully or fraudulently procured may subject the parties to the pains and penalties of the law for violation thereof, but it does not alone affect the validity of the marriage itself. [citing cases] . . . . We decide that the marriage in the case at bar is voidable only . . . .<sup>29</sup>

As with some of the other requirements, the question arises whether the failure to comply with the serological test requirements should make the marriage voidable, or whether it should be considered entirely valid. The latter position would virtually rob the statute of all practical effect; it would leave an innocent party with no remedy except the possible one of annulment for fraud (which will be discussed later), and would defeat the object of the statute, which is to insure healthy marriages and healthy offspring so far as venereal disease is concerned. As with the parental consent requirement, to declare the marriage void for failure to obtain the health certificate seems for obvious reasons too harsh. It therefore seems desirable that the marriage be considered voidable, and that this be expressly provided by statute.

Requirement (6): Performance of a ceremony by an authorized celebrant [20-10]. The language used in this statute is permissive in nature rather than mandatory: judges, court commissioners, justices of the peace and ministers of the gospel *may* perform the marriage ceremony. This statute, together with Section 20-11 relating to the form of the ceremony, is fleshed out by Section 20-20 which provides that marriages performed according to the rites and customs of "any religious society" shall be lawful, *i.e.*, valid. We must also take into account that portion of Section 20-11 which provides that at the ceremony the parties must make certain affirmations "in the presence of the person performing the ceremony." Even though the word "may" is used in Section 20-10, logic dictates that (except as may be modified by Section 20-20) there *must* be a person performing a ceremony,

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29. *Id.*, 14 N.W.2d at 615-16.

and that *only* such persons as are specified in Section 20-10 may lawfully perform a marriage ceremony. So, in Section 20-10 we have a permissive word, "may," which should be construed to have a mandatory effect—the antithesis of Sections 20-3 and 20-7, where words of a mandatory nature should be construed to have a directory meaning! Surely the sine qua non of a "ceremonial marriage," as contrasted with a common-law or consensual marriage, is that there shall be a *ceremony*, performed by one of a specified class of persons.

There seems to be a dearth of authority stating that the performance of a ceremony is essential to a ceremonial marriage: perhaps a statement to that effect would be *reductio ad absurdum*. However, the whole thrust of the *In re Robert's Estate* opinion<sup>30</sup> is to this effect. Justice Blume referred with approval to a federal decision which construed a statute very similar to our Section 20-11; he said of this decision:

The court stated that the section was strongly indicative of the mandatory nature of the marriage laws. Our present statute . . . is similar . . . . The phrase "and in any case there shall be at least two witnesses beside the minister or magistrate present at the ceremony," leaves little room for construction. To hold that in spite of this, no witnesses and no minister and no magistrate need be present, and that a simple contract between the parties suffices . . . would seem to be the merest mockery.<sup>31</sup>

There may be some doubt whether the classes of persons authorized by Section 20-10 to perform marriages (the celebrants) are exclusive. It is said in *American Jurisprudence*:

An act which merely provides that certain persons may solemnize marriages does not prevent the solemnization by others in the absence of positive statutory enactment, and this has been held to be true even though the statute declares that no other person or persons should solemnize marriages, except those mentioned in it.

. . . Performance of a marriage ceremony by an unauthorized person does not generally render a marriage invalid.<sup>32</sup>

30. *In re Robert's Estate*, *supra* note 1.

31. *Id.* at 462-63, 133 P.2d at 500-01.

32. 35 AM. JUR. *Marriage* § 26, at 197 (1941).

Several old cases are cited in support of these statements.<sup>33</sup> In all of these cases the basis of decision was that since common-law marriages were valid in the jurisdiction, it was immaterial whether the celebrant (and in some of the cases there was no celebrant) was or was not within the classes of persons authorized by the statute to perform marriage ceremonies. Against this background the *American Jurisprudence* statement should not be viewed as supporting the proposition that the authorization of certain persons to perform marriages is not exclusive or mandatory. In any event, the Wyoming statute should make it clear that a marriage ceremony is mandatory, and that it can be validly performed only by those authorized in the statute to act as celebrants. Section 20-20 (marriage according to the rites and customs of religious societies) and Section 20-16 (want of jurisdiction or authority of justice of the peace or minister) would not be affected, and would continue to mitigate the severity of Sections 20-10 and 20-11.

Requirement (7) : Minimum formalities for the ceremony [20-11]. There is language in this statute which is mandatory in nature; the parties *shall* solemnly declare in the presence of the celebrant and the attending witnesses that they take each other as husband and wife, and there *shall* be at least two witnesses. What we have said about the preceding requirement, represented by Section 20-10, applies in large part also to Section 20-11: a *ceremony* of some kind is the very heart of ceremonial marriage. Section 20-11 specifies certain minimum requirements for the ceremony, and to that limited extent should be considered mandatory.

Requirement (8) : Marriage in accordance with the rites and customs of a religious society to which the parties belong [20-20]. By its very nature this requirement is permissive rather than mandatory.

Requirement (9) : Certificate of marriage, issued "on request" by the celebrant [20-12]. As it now stands this requirement seems to be 'directory only, since the certificate

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33. *Farley v. Farley*, 94 Ala. 501, 10 So. 646 (1892); *Dyer v. Bannock*, 66 Mo. 391 (1877); *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802 (1896); *London-derry v. Chester*, 2 N.H. 268 (1820).

is given only on request; nonetheless, the next succeeding Section 20-13 requires the county clerk to record "all such returns of such marriages," which implies that after all marriage ceremonies the celebrant must execute a marriage certificate and transmit it to the county clerk, whether or not the parties have requested such certificate. What is now implied should be made explicit in Section 20-12. The requirement should not be mandatory, since a marriage certificate is only evidence that a marriage was performed and not part of the ceremony or the prerequisites to the ceremony. Moreover, the parties to the marriage have no way of controlling the actions of the celebrant or those of the county clerk with respect to the marriage certificate, hence it would be unjust if the validity of the marriage were affected by their derelictions. And finally, if the *recording* of a marriage certificate is only a directory requirement, as held in the *Connors* case,<sup>34</sup> the *issuance* of such a certificate by the celebrant should not be regarded as of greater importance.

This conclusion seems to be in accord with authority. The writer in *American Jurisprudence* states that:

Statutes relating to the solemnization of marriages usually provide for the issuance of a certificate of marriage and for the registration or recording of marriages . . . . Generally speaking, the registration or recording of a marriage is not essential to its validity, the statute being addressed to the officials issuing the license, certifying the marriage, and making the proper return and registration or recording.<sup>35</sup>

And in *Corpus Juris Secundum* it is stated that "a failure or deficiency in the return or record does not affect the validity of the marriage . . . ."<sup>36</sup>

No decisions contra to these statements could be found. A fairly recent case supporting them is *Rea v. Fornan*,<sup>37</sup> an Ohio case interpreting the marriage statutes of Arizona, where the court in a dictum made the following observations respecting those statutes:

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34. *Connors v. Connors*, *supra* note 4.

35. 35 AM. JUR. *Marriage* § 27, at 197-98 (1941).

36. 55 C.J.S. *Marriage* § 33, at 865 (1948).

37. 46 N.E.2d 649 (Ohio), *rehearing denied*, 46 N.E.2d 664 (1942), *appeal dismissed*, 140 Ohio St. 546, 45 N.E.2d 600 (1942), *cert. denied*, 320 U.S. 774 (1943).



It is also a requirement that the individual performing the ceremony shall have the contracting parties sign at the proper place and he shall certify the fact of their marriage and return the certificate to the clerk's office where it shall be recorded in a permanent record.

While the different sections of the Arizona Code provide much detail in the interest of having and preserving records, yet, as we view it, the only thing essential to constitute a ceremonial marriage was the issuing of a license to the contracting parties and the performing of the ceremony by a designated person under the statute. While the performance of all the ministerial duties would be important to all couples marrying in the state, yet the failure to perform mere ministerial duties would not void a ceremonial marriage if, in fact, it was duly performed.<sup>38</sup>

Other cases with holdings to the same effect are cited in the footnote.<sup>39</sup> It seems evident that the execution and delivery of the marriage certificate to the parties by the celebrant should be considered directory only. This position would be in harmony with the *Connors* case,<sup>40</sup> holding that Requirement (10), recording of returns of marriages by the County Clerk, is merely directory.

This completes the analysis of the ten requirements for ceremonial marriages set out in Sections 20-1 to 20-21 of the Wyoming statutes, with respect to whether each is (or should be considered) mandatory, or directory only. Including the construction placed by the Supreme Court of Wyoming on requirements (4) and (10), we have reached the conclusion that the only mandatory requirements should be numbers (3), application for a marriage license, (4) issuance of a license, (6) performance of a ceremony by an authorized celebrant, and (7), minimum formalities required at the ceremony. The remaining six requirements would be directory. Of these, non-compliance with requirements (1), minimum marriageable ages, (2), parent's consent to marriage of minors, and (5), health certificate, serological test, etc., would

38. *Id.*, 46 N.E.2d at 655.

39. *McDonald v. Employers Mut. Cas. Co.*, 73 F. Supp. 198 (W.D. La. 1947); *Reynolds v. Coles*, 83 N.Y.S.2d 608 (1948).

40. *Connors v. Connors*, *supra* note 4.

render the marriage voidable; non-compliance with requirements (8), marriage in accordance with the rites and customs of a religious society, (9), certificate of marriage issued by the celebrant, and (10), recording of marriage certificate by county clerk, would not affect the validity of the marriage at all. Changes in statutory provisions necessary to implement these conclusions have been incorporated in the proposed legislation set out at the end of this article.

Having laid the mandatory-directory problem to rest, let us return to further analysis of Sections 20-1 to 20-21. Enough has been said for the moment about Sections 20-1 and 20-2. The parental consent statute, Section 20-3, could be improved. The term "minor" has not been defined by a statute of general applicability in Wyoming, and presumably the common law definition would apply: "a person who has not reached the age, usually twenty-one years, at which the law recognizes a general contractual capacity."<sup>41</sup> But the Wyoming legislature provided in 1943 that "Minors above the age of nineteen years, where it shall appear to their material advantage, may have their disabilities of minority removed and be thereafter held for all legal purposes of full age, except as to the right to vote."<sup>42</sup> And we know that minors may be emancipated in various other ways.<sup>43</sup> In order to avoid problems of interpretation of the term "minor" as used in Section 20-3, it would be well to substitute the term "under twenty-one years of age."

Secondly, the giving of a verbal consent by a parent, as authorized by Section 20-3, invites trouble. In actual practice, as indicated by the printed form of application for marriage license, the county clerk obtains the written consent of a parent of a minor. It is therefore suggested that the language permitting verbal consents be deleted, and that written consents be obtained whether the parent is present when the license is applied for, or absent.

As a matter of policy, should the consent of *both* parents be required? The legislature seems to have answered the

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41. *BALLENTINE, LAW DICTIONARY* 820 (2nd ed. 1948).

42. *WYO. STAT.* § 14-1 (1957).

43. For example, marriage ordinarily effects emancipation of a minor. See 67 *C.J.S. Parent and Child* § 89(c), at 816 (1950).

question in the negative, and this decision seems wise; in many instances parents may not agree on this subject. The purpose of the statute is to provide a check on impetuous and ill-advised youthful marriages, and if at least one parent is willing to consent this purpose will have been served. Since the father normally carries the primary financial burden of support of his children, it seems fair enough to leave the decision to him.

What if the father has deserted his family and is presumably living but cannot be located? What if the parents are divorced, and the minor child who wishes to be married is in the legal custody of the mother? There is an ambiguity in the meaning of the statute as applied to such situations. Read one way, if the father is living he alone can consent. Read another way, the guardian or person, under whose care and government such minor may be, can consent, regardless of whether the father is living. This should be clarified. We suggest the utilization of a procedure connected with the "gin marriage law" which the legislature set up in 1931 and later repealed: an order by a district judge when an exception seems desirable.<sup>44</sup> The pertinent portion of the statute would then read:

the written consent of the father, if living; provided, however, that the judge of the district court of the county in which the application for the marriage license is made may, upon a finding of special circumstances, direct the county clerk by order in writing to accept the written consent of some person other than the father. If the father is not living, then the county clerk shall before issuing the license obtain the written consent of the mother, guardian, or other person whose care and government the applicant under twenty-one years of age may be.

Some further observations with respect to the parental consent statute: Section 20-3 requires that the written consent "shall be proved by the testimony of at least one competent witness." The word "testimony" imports the presence of an oath, and there seems no reason why the witness should sign under oath when no oath is required of the consenting parent.

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44. See WYO. REV. STAT. §§ 68-106 (1931).

But more than that, little or nothing is gained by requiring that the parent have his signature witnessed by some other unidentified person, and the requirement should therefore be eliminated entirely. It would make much better sense simply to require the parental consent to be made in writing and under oath, and such a requirement will be added in the proposed revision of Section 20-3. Ideally, some proof of parentage should be required, but this would present so many difficulties as to be impractical. A criminal penalty for submitting a fraudulent parental consent might not be of great deterrent value, but seems about the most that can be done under the circumstances.

Section 20-4, requiring a marriage license, is a brief, one-sentence statute which seems to be very well expressed. To allow the applicants to apply for a license anywhere in the state may tend to encourage elopements and secret marriages but is desirable where both parties are non-residents of the state. Some states require that the application be made in the county of residence of one of the parties, if one or both parties are residents of the state. Certainly we cannot say that the legislative choice on this question is wrong. If the place of making application were restricted and if the parties desired a secret marriage, the restriction could easily be avoided by going to another state to obtain the license and be married, which would give rise to additional problems.

Section 20-5, covering the application for and the issuance of the license, can be improved in a number of respects. The overall objective of the application should be to elicit all information necessary to enable the county clerk to determine whether the applicants are qualified, under Wyoming law, to be married in this state. To this end, the information should negate the possibility that the marriage would be either void or voidable if performed in Wyoming. The statute is presently inadequate to accomplish this objective. In addition, information appropriate to establish the identity of the applicants should be required. Furthermore, the burden which Section 20-5 now places on the clerk to determine "whether there be any legal impediment to the parties entering into the marriage contract, according to the laws of the state

of their residence" should be deleted so far as it pertains to the laws of states other than Wyoming; Wyoming has no obligation to enforce the laws of other states relating to the qualifications of their residents to marry. We have difficulty enough making sure that our own laws are being complied with. County clerks usually are not lawyers. Even if they were, it would be an intolerable burden to require them to determine whether an applicant for a Wyoming marriage license who resided in, say, Connecticut would be in violation of Connecticut marriage laws if married in Wyoming. Wyoming has no marriage evasion statute, and our Supreme Court has refused to adopt a marriage evasion policy by decision,<sup>45</sup> hence we are under no reciprocal duty to enforce Connecticut marriage laws so far as Wyoming marriages of Connecticut residents are concerned.

With some hesitation we suggest still another change in Section 20-5: would it not be preferable to have the statute require that *both* parties sign the application, under oath, rather than (as now) permitting one party only to apply for the license? If we are trying to insure accuracy of information through the sanction of a perjury prosecution when false information is given, it would obviously be preferable to have each party swear to the information about himself. If such a change were made both parties would have to appear at the county clerk's office during a business day to sign the application. This might be slightly inconvenient when one party is a non-resident and plans to come to Wyoming for a marriage ceremony to be performed on a week end or a holiday. One way to eliminate that problem would be to permit applications to be made by mail; but if that were done the present *modus operandi* of the county clerk's office would be considerably altered, because at present the applicant signs the application form and it is immediately bound into the "marriage book." The reaction of the county clerks to

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45. *Hoagland v. Hoagland*, 27 Wyo. 178, 193 Pac. 843 (1920). In this case a woman who resided in Wyoming had been divorced here. She then went to Nebraska and married a second man. At the time, a Wyoming statute forbade re-marriage in Wyoming within a year following a divorce. Nebraska had no similar statute, and the woman married in Nebraska in order to evade the Wyoming statute, thereafter returning to Wyoming where she resided with her new husband. Held, the Nebraska marriage was nonetheless valid.

the suggestion that both parties should be required to sign the application should be sought.

The statutes of the seven Rocky Mountain states (Arizona, Colorado, Idaho, Montana, New Mexico, Utah and Wyoming) on this subject were examined.<sup>46</sup> Two of these states, Idaho and Wyoming, require that only one party sign the application, although the Idaho statute is not very clear about it. The Utah statute does not cover the point at all. The other states (Arizona, Colorado, Montana, and New Mexico) require both parties to sign. It will be noted that Section 20-5 requires that two people sign the application under oath—the applicant and “some competent witness”—which was probably thought to afford added assurance of the truth of the statements in the application. No doubt the “competent witness” often swears to the truth of information which is entirely hearsay so far as he is concerned. Why not eliminate him?

A final suggestion for modification of Section 20-5 has to do with the problems of determining the ages of the parties applying for the license. A good deal of falsification about age probably goes on, especially in cases requiring parental consent where the man is over 18 but under 21 and/or the woman is over 16 but under 21. As the statute now stands, the county clerk has no authority to require proof of age and, in practice, accepts the representations of the applicants as to ages. Since only one party need apply, the clerk often does not have an opportunity for on-the-spot evaluation of the age of both applicants, which might help. Hence, Section 20-5 should empower the clerk to require proof of age. Although it might be too drastic to require both certificates in all cases, the Montana statute<sup>47</sup> requiring each applicant to submit “a certified copy of a birth certificate or other uncontrovertible evidence of age” seems a fair compromise. In Georgia the requirement is that birth certificates be furnished, or in lieu thereof the affidavits of at least two persons

46. ARIZ. REV. STAT. ANN. § 25-121 (1956); COLO. REV. STAT. ANN. § 90-1-4 (1963); IDAHO CODE ANN. § 32-403 (1963); MONT. REV. CODES ANN. § 48-144 (Supp. 1965); N.M. STAT. ANN. § 57-1-16 (1953); UTAH CODE ANN. § 30-1-8 (1953); WYO. STAT. § 20-5 (1957). It will be noted that the Montana and New Mexico statutes set out the application forms verbatim.

47. MONT. REV. CODES ANN. § 48-144 (Supp. 1965).

other than the parties.<sup>48</sup> The Montana solution seems preferable.

As stated above, the application for the marriage license should require information sufficient to negative the possibility that the prospective marriage would be either void or voidable if performed in Wyoming. No attempt will presently be made to specify exactly what this information should be, but a form of application for marriage license will be included in the proposed legislation hereinafter set out.

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PART II of this article will begin with an analysis of Section 20-6, which details the circumstances under which the county clerk is directed to refuse to issue marriage licenses.

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48. See *Maryland Cas. Co. v. Teele*, 70 Ga. App. 259, 28 S.E.2d 193 (1943).