

November 10, 1950

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ARIZONA ATTORNEY GENERAL

Richard E. O'Brien, Chief  
Legal Assistance Branch  
Headquarters, Japan Logistical Command  
Office of the State Judge Advocate  
APO 343, c/o Postmaster  
San Francisco, California

7/12

My dear Mr. O'Brien:

This acknowledges receipt of your letter of October 26th received in this office on November 3rd in which you ask for an opinion on four questions.

Your first question is:

1. "Will you please advise as to the legal efficacy or lack thereof of marriages contracted in Japan between the citizens of your state and Japanese national females?"

It is answered by Section 63-108 ACA 1939, which provides:

"Marriages contracted in another state.--  
Marriages valid by the laws of the place where contracted, are valid in this state; provided, that marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, and parties residing in this state can not evade its laws as to marriage by going into another state or country for the solemnization of the marriage ceremony."

Notwithstanding the provision forbidding the evasion of marriage laws by going into another state, such marriage is valid, if valid in the state where celebrated.

Horton v. Horton, 22 Ariz. 490  
198 Pac. 1105

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The reasoning in this case is that since the legislature has not declared void the marriage of parties domiciled in Arizona who go into another state or country to evade the restriction upon remarriage after divorce, no penalty being attached to the so-called evasion, the marriage contracted in the foreign state is recognized as valid in Arizona.

"A marriage valid under the laws of the country where contracted is valid everywhere, \* \* \*" (Gracias v. Gracias, 51 Ariz. 35, 74 Pac. 2d 53)

Your second question (numbered 1 in your postscript)

is:

2. "Would your state laws permit your courts to take jurisdiction over one or more of its citizens, who are temporarily residing in Japan, by reason of a Department of the Army assignment, in an adoption matter, where your legal resident desires to adopt a child who has never been in the United States, and who in fact, is not a United States citizen, and is of tender years. In view of the fact that your statutes require a pre-adoption investigation to be conducted by State Welfare Board, Juvenile Division, etc., may this pre-adoption investigation, in cases arising in Japan, be delegated to the Army Chief of Chaplains, who have assured us that a most thorough and diligent investigation as required by your statutes will be conducted and a report will be given directly to the proper court."

The Answer is found in Section 27-202 ACA 1939, which provides that a person who desires to adopt a child "may petition the Superior Court of the county in which a child resides for leave to adopt such child."

It is obvious therefore that the child who is the subject of the intended adoption must reside in the county wherein the petition for leave to adopt is filed. It is equally clear that in the problem you present, the child in question, never having been in the United States and not being within the jurisdiction of the court, could not be the subject of adoption in Arizona.

The single fact that the child is not a citizen of the United States is not alone a bar to its adoption since the statute does not prohibit the adoption of a child who is a citizen of a foreign country. (See Rizo v. Burrue, 23 Ariz. 137, 202 Pac. 234, 19 A.L.R. 823).

In a proper case there would seem to be no prohibition against the court's directing the Army Chief of Chaplains to make the pre-adoption investigation since under Section 27-205 (a), ACA 1939, as amended, the court may direct any "discreet and competent person" to make the investigation.

Your third question (numbered 2 in your postscript) is:

3. "Are proxy and/or contract marriage authorized by your statutes, and if so, the prerequisites of same?"

Proxy marriages are not specifically authorized by the statutes of Arizona. By "contract" marriages, we presume you mean non-ceremonial or common law marriages.

Section 63-110 ACA 1939 provides:

"Witnesses--Certificate of marriage.--  
The marriage ceremony shall be performed in the presence of the parties, of the officiating officer and at least two (2) witnesses of lawful age, and a certificate of such marriage shall be signed by at least two (2) such witnesses." (Emphasis supplied)

It would seem perfectly clear then that the presence of both parties to the marriage ceremony is essential to effecting a valid marriage.

Section 63-111 ACA 1939 provides that a marriage may not be contracted by agreement without marriage ceremony, thus so-called common law marriages are not recognized as valid in Arizona. Please refer to our letter to you of August 17, 1950, on that subject.

Your fourth question (numbered 3 in your postscript) is:

4. "In the matter of a change of name of one of your legal residents, do your statutes permit same to be accomplished without the petitioner being personally present?"

Provisions for change of name are found in Section 27-501 ACA 1939. It is in part as follows:

"Application to superior court--Judgment--Minor.-- When any person desires to change either his christian or surname, or both, and to adopt another name instead thereof, he may file his application in the superior court of the county of his residence, setting forth the reasons for the change of name and the name he wishes to adopt; and the court may enter judgment that the adopted name of the party shall be substituted for the original name. \* \* \*"

There would seem to be no impediment to the court's entertaining a petition for change of name of a legal resident of Arizona without requiring him to be physically present before the court. He may file his application for change of name in the superior court of the county where he maintains his legal residence and, following the provisions of Section 27-501, supra, may obtain a judgment changing his name. The application could be supported by affidavits or by deposition.

The term "legal residence" does not necessarily mean "actual residence". The definitions of the term "legal residence" are numerous and somewhat confusing. However, we feel that legal residence in the instant matter, means more than actual residence and

" \* \* \* is that place to which a man's rights and obligations are referred and by which his legal status, public and private, is determined."

"The rule is well settled that the terms 'residence,' 'residing,' or equivalent terms, when used in statutes, or actions, or suits relating to taxation, right of suffrage, divorce, limitations of actions, and the like, are used in the sense of 'legal residence'; that is to say, the place of domicile or permanent abode, as distinguished from temporary residence. Herron v. Passailaigue, Fla. 110 So. 539, 543,"  
(Words and Phrases, Vol. 37,  
pages 260, 261)

So, then, the applicant for change of name may submit himself to the jurisdiction of the court of the county of his legal residence by filing his application.

It is therefore the opinion of this office that:

1. A valid marriage may be contracted between a citizen of the State of Arizona and a Japanese national female if the law of Japan recognizes such a marriage as valid.

2. A child who is not physically present in the county where adoption proceedings might be initiated cannot properly be the subject of adoption proceedings.

3. Proxy marriages are not specifically authorized by the statutes of Arizona and are in fact not authorized at all.

4. The statutes of Arizona permit a change of name by a person who is not physically present in the county in the superior court of which he files his application.

Please accept our thanks for your kind letter of September 7, 1950, in answer to the letter above referred to sent you on August 17th.

Sincerely yours,

FRED O. WILSON  
Attorney General

PHIL J. MUNCH  
Assistant Attorney General

PJM: hw