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North Carolina's Uniform Premarital Agreement Act: A Contract Perspective

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NORTH CAROLINA'S UNIFORM PREMARITAL AGREEMENT ACT
A CONTRACT PERSPECTIVE

RICHARD A. LORD*

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I. INTRODUCTION

The Uniform Premarital Agreement Act became effective in North Carolina July 1, 1987.1 The Commissioners on Uniform State Laws promulgated the Act in 1983.2 By the end of 1988 the legisla-

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tion had been enacted in thirteen jurisdictions. The Act effects a number of important changes in the North Carolina Law. The Act is likely to have a substantial impact in North Carolina on the parties to premarital agreements, their counsel, and the courts.

Premarital agreements are by their nature contractual. However, because of the subject matter, marital and post-marital relationships, the state has an important if not compelling interest in governing premarital agreements to a far greater degree than ordinary commercial or non-commercial contracts. That state interest is manifested in a concern for not only procedural and substantive fairness in the agreement itself, but in the impact of that agreement on the entire marital and post-marital relationship. Thus, the Premarital Agreement Act imposes itself not only upon the law of contract but upon the law generally of domestic relations.

This Article will explore the likely impact the Uniform Premarital Agreement Act will have in North Carolina from a contractual perspective. First, the Article provides a thumbnail overview of the Act's provisions. Then, the Article considers the effect of the Act on North Carolina law and practice. Finally, the Article explores some of the more important and basic practical problems caused by the Act and suggests tentative solutions.

The principal goal is to acquaint the North Carolina practitioner with the Act and some of its practical intricacies. In doing so, this Article will sidestep many of the interesting philosophical and theoretical concerns that have arisen in recent years. Those concerns are adequately addressed in a substantial volume of available literature. Although important and certainly deserving of at-

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5. Much of the literature considers the extent to which the parties may, in the absence of legislation, be able to dictate the terms of their relationship, consistent with the existing public policy of a jurisdiction and developing mores. Others have addressed in a far reaching manner the ways in which American soci-
tention, these concerns are largely beyond the scope of this Article.

II. Overview

North Carolina legislative history surrounding the Uniform Premarital Agreement Act is scanty. However the Official Comments and Prefatory Note to the statute make clear the purposes behind the legislation. The Act clearly establishes the parties’ contractual freedom to define their obligations and rights under a premarital agreement. According to the Prefatory Note, it does so...
against the backdrop of an increase in the number of marriages where each party will pursue an individual career and where American society as a whole is becoming more mobile. According to the drafters, this career pursuit and mobility necessitates a certain and uniform approach to premarital agreements. Section 52B-2 of the Act defines premarital agreement. The Act offers a restrictive definition and limits the situations to which the Act will apply. The Act defines a premarital agreement as an agreement between prospective spouses made in contemplation of marriage which will become effective upon marriage. Therefore, the legislation has no effect on postnuptial agreements, including separation agreements entered into between married persons contemplating divorce, or contracts between cohabiting partners. Because of the Section 52B-3 writing requirement, the Act does not affect oral premarital agreements. Thus, the Act's scope is initially quite narrow.

The Act's narrow scope, however, belies the breadth of the premarital agreement itself. Section 52B-4 specifically permits the parties to contract with respect to eight listed, and an infinite number of unlisted, matters. The only real bridle on the parties is

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10. Id.
12. Id.
14. N.C. GEN. STAT. § 52B-3 (1987) ("A premarital agreement must be in writing and signed by both parties.")
15. (a) Parties to a premarital agreement may contract with respect to:
   (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
   (2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest and mortgage, encumber, dispose of, or otherwise manage and control property;
   (3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
   (4) The modification or elimination of spousal support;
   (5) The making of a will, trust, or other arrangement to carry out the provisions of the agreement;
   (6) The ownership rights in and disposition of the death benefit from a life insurance policy;
   (7) The choice of law governing the construction of the agreement;
that they may not, by their agreement, adversely affect a child's right to support. The parties may however, contract with respect to their property and property rights, including their rights to manage and control property. The parties may contract with respect to the disposition of property upon the occurrence of any event, including separation, marital dissolution and death. The parties may contract to modify or eliminate spousal support. The parties may contract with respect to the making of a will, trust or other arrangement. The parties may contract with respect to interests and rights in any death benefit from a life insurance policy. They may choose the law which will govern their agreement. Finally and most broadly, the parties may contract with respect to any other matter so long as it does not violate public policy or a criminal statute. In short, although the legislation is only triggered by a premarital agreement as defined by the statute, once the parties come within the statutory definition, they are essentially free to contract according to any terms upon which they mutually agree.

Section 52B-5 states what might be thought to be implicit in the definition of premarital agreement within the Act, that the agreement becomes effective only upon marriage. Section 52B-6 makes it clear that following marriage, a premarital agreement may be amended or revoked, without the need for consideration. However this amendment or revocation must be contained in a signed, written agreement.

(8) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
(b) The right of a child to support may not be adversely affected by a premarital agreement.

18. Id. at (a)(3).
19. Id. at (a)(4).
20. Id. at (a)(5).
21. Id. at (a)(6).
22. Id. at (a)(7).
23. Id. at (a)(8). N.C. Gen. Stat. § 52B-4 (1987) permits a wide range of subject matters about which the parties may contract. However, subsection (b) of both the Model Act and § 52B-4 make clear that the agreement may not adversely affect a child's right to support.
26. Id. See text accompanying notes 98-103 infra.
Section 52B-7 is captioned enforcement. However, this section really deals with circumstances under which the agreement is not enforceable. The statute contains two principal grounds for avoiding the effect of a premarital agreement. First, the premarital agreement will not be enforceable against any party who did not voluntarily execute the agreement. This voluntariness prerequisite codifies those cases dealing with duress, coercion and undue influence, and provides a major policing tool for the courts. Secondly, the premarital agreement will not be enforced against a party if the agreement was unconscionable when it was executed and prior to the agreement's execution, that party was not provided a fair and reasonable disclosure of the other party's property or financial obligations, did not voluntarily and expressly waive that disclosure or did not have or reasonable could not have had adequate knowledge of the other party's property of financial obligations.

Unfortunately, the Act fails to define unconscionable. The Official Comment makes clear that unconscionability comes from the Uniform Marriage and Divorce Act and is a direct outgrowth

28. Id.
29. Id.
30. Id. at (a)(1), See, e.g., Lutgert v. Lutgert, 338 So. 2d 1111 (Fla. 1976) (husband surprised wife with antenuptial agreement and demanded that she sign it within 24 hours of the wedding, after all wedding arrangements had been made, and threatened that if she did not sign the agreement there would be no wedding; held, agreement was not voluntary and wife was entitled to avoid agreement).
31. N.C. GEN. STAT. § 52B-7(a)(2).
32. Id., See, e.g., In re Estate of Benker, 416 Mich. 681, 331 N.W.2d 193 (1981) (wife waived all rights to any inheritance from the husband; husband lived a very modest lifestyle but was a man of considerable means; wife was apparently unaware of the financial status of the husband at the time of entering into the agreement; held, agreement was invalid; there must be full and fair disclosure of assets by both parties).
33. N.C. GEN. STAT. § 52B.
34. UPAA § 6, Official Comment; N.C. GEN. STAT. § 52-B7, Official Comment. The test of unconscionability is drawn from § 306 of the Uniform Marriage and Divorce Act (UMDA) (1970) (amended 1971, 1973), which itself adopts the concept from §2-302 of the Uniform Commercial Code. The Commissioner's note to § 306 states that "[i]n order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party." Uniform Marriage and Divorce Act § 306, § 9A U.L.A. 217 (1987). The Commissioner's note references § 2-302 of the Uniform Commercial Code (UCC).
of the unconscionability standard in commercial law.\(^{36}\) Unconscionability standing alone is grounds for avoidance in commercial law.\(^{36}\) However, unconscionability as a ground for avoidance in premarital agreements must be accompanied by an absence of fair and reasonable disclosure.\(^{37}\) Thus, at least in theory, this provision changes the law and bridles the court's ability to refuse enforcement of a premarital agreement. Section 52B-7(c) makes clear that the question of unconscionability is to be decided by the court as a matter of law.\(^{38}\) This accords with unconscionability in a commer-

Official Comment of § 2-302 of the UCC indicates that there are two different kinds of unconscionability, "unfair surprise" and "oppression." Presumably, since referenced, the UCC definition is the same as the § 52B definition.

A substantial body of case law and commentary has developed with respect to unconscionability under the UCC, and, although the context, a marital relationship, rather than a commercial relationship, is markedly different, it is likely and, indeed appropriate that the courts should resort to that body for guidance under the North Carolina version of the UPAA. This would include the concepts of procedural unconscionability, where the agreement is arrived at through unfair means, as well as substantive unconscionability, where the agreement itself is oppressive or unfair. See generally Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485 (1967); Murray, The Standardized Agreement Phenomena in the Restatement (Second) of Contracts, 67 CORNELL L. REV. 735 (1982).

37. Like the UCC, § 52B-7(2) provides that, for avoidance, the agreement must be unconscionable when made. However, there are two important differences between the Act and the UCC. First, § 52B provides that if its requirements are met, the agreement will be unenforceable. The UCC, by contrast, provides the court with three options: (1) refusal to enforce the agreement; (2) enforcement of the contract without the unconscionable clause; or (3) limitation of the application of any unconscionable clause so as to avoid an unconscionable result. Second, unconscionability is a ground for contract avoidance by itself in general contract law and under the UCC. See generally, Braucher, The Unconscionable Contract or Term, 31 U. PITT. L. REV. 337 (1970); Murray, Unconscionability: Unconscionability, 31 U. PITT. L. REV. 1 (1969); J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3 (3d ed. 1988); J. CALAMARI AND J. PERILLO, CONTRACTS, § 9-37 to-40 (3d ed. 1987). However, § 52B-7 requires also that there be defective financial disclosures in conjunction with unconscionability before avoidance can occur. In general contract law, nondisclosure where there is a confidential relationship acts as an independent means of contract avoidance. See RESTATEMENT (SECOND) OF CONTRACTS § 161(d) (1981); 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1499 (W. Jaeger 3d ed. 1957); J. CALAMARI AND J. PERILLO, CONTRACTS, § 9-20 (3d ed. 1987). See also Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967).
38. N.C. GEN. STAT. § 52B-7(c) and Official Comment.
cial context, where the issue is also treated as legal, not factual. 39

Finally, the enforcement provision specifically addresses the situation where a premarital agreement modifies or eliminates spousal support. 40 If a premarital agreement provision modifying or eliminating spousal support causes the dependent spouse to be eligible for public assistance at the time of separation or dissolution, a court may disregard the terms of the agreement and order support to the extent necessary to avoid the eligibility for public assistance. 41 The obvious purpose of the provision is to prevent the parties from exercising freedom of contract in the premarital agreement to the detriment of the public. In other words, if the spouse giving up a right to support would thereby become a public charge, the parties' freedom of contract is constrained. However, North Carolina adds a non-uniform provision here, requiring that before the court may order support under the statute, it must find that the spouse to be supported is a dependent spouse under General Statute Section 50-16.1 and that there are grounds for alimony or alimony pendente lite. 42 Conditioning judicial modification of the premarital agreement on the existence of a dependent spouse being qualified for alimony or alimony pendente lite could result in a refusal to modify the agreement.

Section 52B-8 provides that a premarital agreement may be enforceable even though a marriage is subsequently determined to be void. 43 The court may enforce an agreement under those cir-

40. N.C. GEN. STAT. § 52B-7(b).
41. Id.; See Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500, 502 (1950) (“an antenuptial contract which purports to limit the husband’s liability in the event of separation or divorce, regardless of the circumstances motivating its adoption or those attending its execution is void as against public policy.”); See also Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961). The UPAA is therefore consistent with the growing trend that allows parties to premarital agreements to contract freely with respect to spousal support so long as the agreement and the circumstances of its execution satisfy certain standards. In Re Marriage of MacMillan, 653 P.2d (Colo. 1982) and Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976). At the same time, however, the drafters were aware of the significant interest of the state and the public in not allowing parties to private agreements to adversely affect these third party rights. See also text accompanying notes 76-85 and 139-40 infra.
42. N.C. GEN. STAT. § 52B-7(b).
43. Id. at 52B-8; N.C. GEN. STAT. § 50-16.1(3)(1987) defines “dependent spouse” as “a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is sub-
cumstances only to the extent necessary to avoid an inequitable result. Thus, although the premarital agreement is initially effective only upon the occurrence of a ceremonial marriage, if the marriage turns out to be void, the premarital agreement is not necessarily void also. Rather, the courts have the power to enforce its terms if and to the extent it would otherwise result in an inequity.

Section 52B-9 tolls the statue of limitations during the pendency of the parties' marriage. This tolling avoids the possibility that a cause of action under a premarital agreement might accrue and expire because the parties have remained married, seeking to work out their difficulties. However, the statute specifically retains equitable defenses, such as laches and estoppel, as bars to the enforcement of the premarital agreement under appropriate circumstances.

Sections 52B-10 and 52B-11 are standard provisions generally found in uniform acts. Section 52B-10 makes it clear that application and construction of the statute should be designed to effectuate a purpose of uniformity among the states. Thus, as is true with most uniform acts, the act gives North Carolina courts specific and explicit directions to interpret their statute in a manner consistent with the interpretation accorded the statute by other jurisdictions. As the Act becomes more widely adopted, it is likely that the gloss placed upon the Act by the earlier enacting jurisdictions will have important, controlling effect. Since the legislation is fairly new, and North Carolina is among the first states to adopt the statute, it is predictable that cases arising in North Carolina will have a substantial impact on developments not only in North Carolina but elsewhere.

Section 52B-11 provides that if any provision in the Act is declared to be invalid, the invalidity will not affect other provisions substantially in need of maintenance and support from the other spouse.”

45. N.C. GEN. STAT. § 52B-8.
46. N.C. GEN. STAT. § 52B-9; In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979) (husband's challenge to a divorce decree after several years was precluded by the doctrines of laches and estoppel; antenuptial agreement did not preclude award of lump sum in lieu of alimony).
47. See official comment N.C. GEN. STAT. § 52B-10 & 11.
48. N.C. GEN. STAT. § 52B-10.
or applications of the Act to the extent the other provisions can be given effect without the invalid provision. This severability provision enables survivability of the remainder of the Act even if one or more sections or provisions turns out to be invalid or unenforceable. To the extent the regulation of marriage and marital relationships is clearly within the domain of the state, and more particularly the state legislature, it is unlikely that any provision of the Uniform Act would be declared invalid, either facially or as applied. However, because of the fairly substantial changes brought about by the Act in North Carolina, this eventuality cannot be discounted entirely. The severability provision ensures that, should this occur, the entire act will not be invalidated.

III. THE UNIFORM ACT'S EFFECT IN NORTH CAROLINA

The enactment of the Uniform Premarital Agreement Act in North Carolina might well be viewed as moving North Carolina from the very traditional and conservative position on the marital contractual spectrum to the very modern and liberal position. The law in North Carolina prior to the effective date of the new premarital agreement statute was fairly well settled with respect to antenuptial agreements. The North Carolina law was equally settled with respect to such postnuptial contractual undertakings as standard post marital contracts, separation agreements, and property settlement agreements. Although differences among these various domestic contracts compelled different analyses and yielded different rules depending upon the particular contract at issue, the basic approach of the courts from a contract perspective was largely consistent. This part of the Article will utilize

49. N.C. GEN. STAT. § 52B-11.
53. The parties themselves may determine distribution of the marital property through written agreement; Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985), disc. rev. denied, 313 N.C. 597, 330 S.E.2d 606 (1985); regardless of whether the agreement is oral or written. McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985).
North Carolina premarital agreement cases in considering the effect of the new Act on premarital agreements. However because of the courts' consistent contractual approach, North Carolina cases dealing not only with premarital agreements, but also with the various species of post marital contracts offer guidance.

North Carolina has for years recognized the validity of premarital agreements as defined in the new Act, that is agreements between prospective spouses made in contemplation of marriage and to be effective upon marriage. Moreover, the definition of property contained within the new Act, although extremely broad, is not markedly different from that property which might properly have been the subject of a valid premarital agreement prior to the Act's adoption. Certainly, all of the interests included within the definition of property contained in the Act have been recognized for tract purposes to exist as valuable interests in North Carolina, subject to alienation. This is true despite the fact that there might have been limits imposed on their alienability in some marital agreement settings. It appears to be less clearly true with respect to the forms of property suggested by the comment as included within the definition, such as professional licenses or pro-


55. In re Estate of Loftin and Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974) (indicating that it was well settled in North Carolina that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each other after the marriage and that such contracts will be enforced as written. See also Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942).

56. N.C. GEN. STAT. § 52B-2 (2) states, "'Property' means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings."


59. N.C. GEN. STAT. § 135-9 (1941) (amended 1947) provides that unless otherwise stated, all future or contingent interests are nonassignable and nontransferable.
fessional practices.\textsuperscript{60} Even as to these, however, other marital agreement statutes in North Carolina contain language broad enough to include these types of property interests,\textsuperscript{61} and the cases, both in North Carolina and elsewhere, make clear that the parties to marital agreements have no hesitation in including such property and its valuation in their contracts.\textsuperscript{62}

A. Fitting Within the Act's Definition of "Premarital Agreement"

The Premarital Agreement Act defines a premarital agreement as an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.\textsuperscript{63} The classic premarital agreement is typically entered into within weeks of the marriage,\textsuperscript{64} so that the definition of premarital agreement contained in the Act is unlikely to create any substantial practical problems. As the comment makes clear, the limited definition excludes from coverage agreements purporting to deal with property concerns as between unmarried cohabitants.\textsuperscript{65} These agreements will continue to be governed by rules developed under North Carolina case law.\textsuperscript{66} The definition also excludes other postnuptial and separation agreements.

If it becomes more common for cohabitants and prospective cohabitants to enter into contractual relationships to govern their affairs, it is predictable that a number of questions will arise concerning coverage. For example, although the statute requires that the agreement be made between prospective spouses in contemplation of marriage,\textsuperscript{67} it does not answer the question of when the contemplation of marriage must exist. The structure of the definition suggests that the parties must contemplate marriage at the time of the agreement. Thus, a couple who becomes engaged in January, 1989, expecting to be married in June of 1990, who execute a pre-

\begin{itemize}
\item \textsuperscript{60} See text accompanying note 85 infra.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (N.J. 1983) (value on professional goodwill); Mansell v. Mansell, (military retirement pay).
\item \textsuperscript{63} N.C. GEN. STAT. § 52B-2(1)(1987).
\item \textsuperscript{64} Clark, Antenuptial Contracts, 50 U. COLO. L. REV. 141 (1979).
\item \textsuperscript{65} N.C. GEN. STAT. § 52B-2, comment (1987).
\item \textsuperscript{66} See Suggs v. Norris, 88 N.C. App. 539, 364 S.E.2d 159, \textit{app. denied} 322 N.C. 486, 370 S.E.2d 236 (1988) (agreements regarding finances and property of unmarried cohabitants are enforceable as long as sexual services are not consideration for the agreements.)
\item \textsuperscript{67} See supra note 103 and accompanying text.
\end{itemize}
marital agreement in January of 1989 indicating that it is to be effective upon their marriage would be bound when they married in June, 1990. The couple clearly meets all the requirements of the definition since at the time they are engaged they are prospective spouses, and the agreement by its terms was made in contemplation of marriage and to be effective upon marriage. Slight changes in the facts illustrate a few problems with the definition, and major changes in the facts could cause the courts real difficulty.

To take but the smallest change, if the agreement by its terms does not specify that it is to become effective upon marriage, a question of statutory interpretation arises. The parties are still prospective spouses and execute the agreement in contemplation of marriage. However, the agreement is not, by its terms, to become effective upon marriage since no effective date is given. It nevertheless seems clear that the omission of an express effective date should not destroy either the substance of the agreement or its statutory validity as a premarital agreement.

Suppose however, that the parties expressly state that their agreement is to take effect from the time of its execution. Again, the parties are prospective spouses and the agreement is executed in contemplation of marriage. However, one can argue in this case that because this agreement is not by its terms “to be effective upon marriage” it is not governed by the premarital agreement act. If that interpretation is accepted, the agreement arguably would not be binding when the parties subsequently married, unless it were otherwise deemed to be binding outside of the statute.

Of course, it would be possible for a court to give effect to the apparent intention of the parties to enter a binding premarital agreement, declaring that the contract, although not binding under the statute pre-marriage, became effective upon marriage. However, such an interpretation is neither altogether certain nor necessarily logically defensible. Another slight change in the facts may help to demonstrate this.

Suppose that our parties, instead of becoming engaged, determined to cohabit for a trial period, 18 months. Their understanding is that if the cohabitation “works out,” they will marry in June, 1989. They execute an agreement at the outset of their cohabitation, providing that their agreement will be effective in the event of their marriage. Such an agreement seems clearly beyond the scope of Chapter 52B; the parties are less prospective spouses that prospective live-ins, and the ultimate marriage, rather that being within their contemplation, appears to be largely contingent. In
this case, then, it seems fairly clear that a court would not enforce the agreement following marriage, under the Premarital Agreement Act, despite the fact that by its literal terms it was to be effective upon marriage. If the court were to refuse enforcement, the refusal might well be based on grounds of public policy; it is at least plausible, however, that the refusal would be based on grounds that the parties simply failed to bring themselves within the “contemplation” definition required by the statute. If that were the ground, it would appear inconsistent to enforce the equally definitionally defective agreement whose sole defect was an effective date prior to marriage.

In the previous settings, one could argue that the parties at least held the contemplation of marriage, however remote, at the time of entering into the agreement, and that enforcing the terms of the agreement under the Premarital Agreement Act following their actual marriage furthers the parties’ intentions. Certainly, in the first instance, when the agreement by its terms is to be effective on execution, refusal to enforce the agreement under the Act seems absurd, though the Act by its literal terms may not apply. And in the second case, the trial cohabitation while the refusal to enforce the agreement might seem less absurd from a policy perspective, it appears at a minimum to be logically inconsistent to enforce the former agreement but not the latter. It might be noted, of course, that if the latter agreement is not covered by the Act, it will likely be unenforceable under other North Carolina law. This is true at least to the extent that the agreement contains provisions dealing with support obligations after filing for divorce or marital dissolution.  

even a contingent contemplation of marriage. They are simply engaging in a form of risk planning,\(^6\) aware of at least three potentialities: continued cohabitation, dissolution of the cohabitation relationship, or participation in a ceremonal marriage. To the extent that the contemplation of marriage must exist at the time the agreement is made, this particular agreement is clearly outside the scope of the Act. One might argue that risk (contingency) planning should be sufficient to bring the agreement within the coverage of the Act \(i.e.,\) they contemplated marriage as one of several contingencies. In this case such an argument seems misplaced. The parties certainly contemplated the possibility of marriage. However, it is fairly clear that the parties failed to contemplate marriage within the apparent meaning of the premarital statute, \(i.e.,\) as an event likely to take place or planned at the outset of the agreement to occur. However, a counter argument exists. In the past, North Carolina courts refused to enforce premarital agreements that provide for the contingency of divorce.\(^7\) Courts uniformly refused to enforce contracts providing for the contingency of divorce on public policy grounds, irrespective of the contingency’s remoteness or occurrence.\(^7\) By analogy, the remoteness of the contingency of marriage in the hypothetical case might nevertheless support an argument that the agreement was made in contemplation (albeit contingent contemplation) of marriage. Furthermore, the obverse of the public policy dooming premarital agreements that contemplate divorce is present here. Enforcing this agreement might further the marital relationship, rather than destroy it.

The foregoing illustrations suggest both the relatively narrow scope of the Act and, worse, the potential for unjust and uncertain, if not absurd and illogical results. Compounding this is the fact that, under general principles of contract law, the parties are free to reaffirm prior agreements or adopt prior agreements as effective in the future.\(^7\) To the extent that the parties agreed to be bound

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70. See Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697 (1968) (contract executed by husband providing that if he left wife she would get all of his property encouraged divorce because wife had incentive to get husband to leave).


to the premarital agreement following marriage, it might well constitute an "adoption" of their previous (invalid or not clearly covered by the Act) agreement. Disregarding for the moment the potential statute of frauds implications, a tacit or oral understanding between the parties that they would continue to be bound by their previous agreement following marriage might well operate to cure any pre-existing defect. If an attorney drafted the original agreement (disregarding possible malpractice concerns with respect to its invalidity) and left a space for the parties to initial prior to marriage as an adoption of their previous agreement, the statute would clearly be satisfied. In short, if the real purpose of the Act is to include within the Act's coverage only those agreements entered into by the parties who in fact marry, that purpose is equally well served when the parties to a nonmarital (cohabital) arrangement enter into an agreement and subsequently marry. This is certainly true as to prospective spouses who contemplate marriage but seek an effective date to their agreement prior to their marriage. It should be no less true for parties who at the time of the agreement neither contemplate marriage nor consider themselves to be prospective spouses, but who subsequently participate in a marriage ceremony.

In advocating this approach, no suggestion is made that the courts should necessarily enforce the agreement prior to marriage. However, that suggestion has been made elsewhere by others. 73 Rather, it is suggested that generally, when the parties to non-marital relationships arrange their property interests and obligations, and subsequently in fact marry, they should be treated as falling within the statute's coverage. Given the significant departure from prior North Carolina law embodied in the Uniform Premarital Agreement Act, a failure to so hold might yield unfair results, results that can be supported neither by logic nor public policy.

B. Fitting Within the Act's Definition of "Property"

Unlike problems concerning the definition of premarital agreement, problems concerning the definition of property in the statute will primarily result not from the definition itself, but from the definition as applied to terms in the premarital agreement. That is,

whether something is or is not property within the meaning of the statute will be a fairly simple matter to determine. The difficulty will come in the court's reaction to how that property is dealt with by the parties. The definition of property as defined by the Act is extremely broad, and Section 52B-4, regulating the content of the premarital agreement, imposes few limits on how the parties may deal with their property. Therefore, most of the judicial concerns will probably revolve around questions of the parties' treatment of the property, rather than around whether "property" is at issue. These question will be considered infra. However, a few observations with respect to the property definition itself are in order.

First, the property definition is by its terms tautological, since it defines property to be "an interest... in real or personal property...". This would seem to require that the North Carolina courts deem the contract subject matter real or personal property either in law or at equity. If North Carolina courts refuse to recognize a debtor's particular interest as being property under the law of North Carolina, it automatically falls outside the definition. The official comment indicates that the property definition is designed to embrace all forms of property and interests in property, including rights in certain licenses. However, the definition itself may not be broad enough to include all of that. For example, courts may hold that under North Carolina law, certain valuable rights such as ABC permits or other similar privilege licenses are not property. The Alcoholic Beverage Statutes by their terms prohibit transfer of permits or licenses, and case law in North Carolina indicates that the permit does not confer a property right upon the holder. To the extent that parties seek to deal with these and other "privileges" in the agreement, they seem outside the definition of property, and hence may not properly be dealt with in a premarital agreement. Such a determination might have an impact on the validity of the entire premarital agreement, to the extent that it seeks to deal with such privileges, on the validity of any particular provision insofar as it seeks to deal with such a privilege, and on the enforceability of the agreement. For the law-

74. N.C. GEN. STAT. 52B-2(2).
75. Id. at § 52B-4.
76. Id. at § 52B-2(2)
77. Id. at § 52B-2(2)
yer asked to draft such a provision, it may also impact on professional responsibility rules. Two simple examples will illustrate the difficulty.

Suppose that Bob, owner of Bob's Bar and Grill, holds an ABC permit and appropriate ABC licenses. Prior to his marriage to Jane, the parties enter into a premarital agreement, the terms of which provide that Bob and Jane each convey to the other an undivided one-half interest in each party's property. It seems clear that although Jane might obtain by that grant an undivided interest in Bob's business, she does not obtain an undivided interest (or any interest) in the ABC permit or license. Jane may well have thought that she was getting such an interest. To the extent that the permit and license represent a pecuniary value attributable to the business, Jane may get nowhere near the benefit of her bargain. It might be possible to "revalue" the asset (business) to minimize the separate value of the permit and license. However, if the parties have attached a particular value to the license and permit on the front end, such a revaluation might be impossible or inappropriate.

In that situation, courts may even declare the entire premarital agreement, or that portion of the agreement dealing with the permit and license, invalid as violative of the law. This might well be the outcome if Bob and Jane had attempted to transfer specifically an interest in the permit or license, since such a transfer is prohibited by statute as against public policy. In either case, Jane does not get the benefit of her bargain.

The problem might well arise in a different context instead.


81. N.C. GEN. STAT. § 18B-903(c) provides that upon a change in ownership, all permits "shall automatically expire and shall be surrendered to the Commission." The transferee of a business engaged in the sale of alcoholic beverages must meet the qualifications for permits set out in N.C. GEN. STAT. § 18B-900 (1949) (amended 1983), and must follow the procedures set forth in N.C. GEN. STAT. § 18B-901 to -902 (1989).

82. State v. McNeeley, 60 N.C. (Win.) 232 (1864) (a licensee cannot assign his license to sell alcohol). Compare RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979) (indicating that although agreement or portion thereof may be unenforceable for illegality, court should balance public interest against harm caused by refusal to enforce).
Suppose that Bob and Jane agree that they will each retain their separate property. In furtherance of this agreement, each discloses to the other, as suggested by the Act, a list of his or her property. Bob lists the fair market value of all the real and personal property that he owns. He either excludes the permit and license (which his accountant has valued at $100,000) believing it not to be property or includes the permit and license without informing Jane that it is not property under North Carolina law. In either case, the question arises whether Jane might subsequently be able to attack the disclosure under Section 52B-7 if the other requirements of that section are met.

It would, of course, be possible for the courts to determine that liquor licenses and other similar privileges, although not property in other contexts, constitute property in the premarital agreement setting. Courts regularly engage in such an analysis under federal bankruptcy law, although the policies underlying the analysis in those cases are obviously different. Or, it might be possible to interpret the parties' agreement as expressing an intent primarily to deal with the good will represented by the privilege. North Carolina courts have taken this approach with professional licenses in other contexts. Finally, to the extent that attorneys are aware of the problem, they may be able to deal with it by attributing different values to the asset for different purposes. However, such an approach may lead to an unpleasant controversy with such regulators as the IRS. Forewarned is, at least arguably, forearmed.

The second problem with the property definition involves the relationship of the Premarital Agreement Act and creditor's rights in North Carolina. At least two questions arise. First, to what extent can the parties to a premarital agreement affect the rights of

84. See HAWKLAND, LORD & LEWIS, 8 UNIFORM COMMERCIAL CODE SERIES § 9-106:03 n.9 (1986 and Supp); In re Farmers Markets, Inc., 792 F.2d 1400 (9th Cir. 1986); and In re Tittabawassee Inv. Co., 831 F.2d 104 (6th Cir. 1987).
creditors of each individual party by their agreement? Second, to what extent may the parties to a premarital agreement create private law between themselves that would significantly change North Carolina’s public law? Because the first of these questions deals primarily with the matter of content, that is, what the premarital agreement may contain, it will be dealt with subsequently. The second question, however, is a direct outgrowth of the definition of property contained in the statute.

According to the statute, the term property includes income and earnings of the parties. The official comment explains that the term income means income from property. The term earnings means earnings from personal services. Future earnings are speculative and not certain to be earned. Therefore North Carolina courts have long held that, at least for purposes of post-judgment garnishment, and perhaps for virtually all purposes, future earnings are not property. Other North Carolina statues create limited exceptions in the garnishment area. However, the property definition in the North Carolina Premarital Agreement Act may put a huge hole in the common wisdom that wage garnishment is generally unavailable.

Suppose that Bill and Doris agree in their premarital agreement that Bill will work to send Doris through college, and in exchange, Bill will be entitled to one-half of Doris’ property in the event that their marriage is dissolved. Suppose further that the marriage is subsequently dissolved and Bill obtains a money judgment against Doris based on the agreement. The question arises whether Bill may enforce the money judgment through garnishment of Doris’ wages. The Act makes clear that when the parties specified property, they included Doris’ future earnings (this might have been set forth explicitly in the agreement, though it does not seem to be necessary). By case law, however, future earnings are not subject to garnishment because they are speculative. The Premarital Agreement Act does not make future earnings less speculative. However it seems fairly clear that Bill could argue under the


statute that he is entitled to bring the garnishment action. Furthermore, to the extent that a party by contract may waive any exemption in her favor, it seems clear that Doris may not take refuge in the wage exemption set forth in the garnishment statute.^^88

Of course, one might argue that allowing the parties to treat future earnings as property does not necessarily confer upon them the right to employ garnishment (or any other remedy) that they could not otherwise employ. However, to the extent that the refusal to permit garnishment is based on the notion that is speculative, and hence not property, and to the extent that the Premarital Agreement Act allows the parties to treat future earnings as property, and they would therefore expect to be able to look to that property, and they would therefore expect to be able to look to that property if it became necessary, it would seem logical to allow this limited (albeit very significant) exception to the garnishment rules. Furthermore, to the extent that the judicial rule restricting access to future earnings is based on a judicially perceived public policy that future earnings simply cannot constitute property, it might be argued that perception is no longer valid at all; that seems clearly the case in the area of premarital agreements. Finally, though it does not necessarily follow, the fact that Bill may be able to reach Doris' future earnings, despite the garnishment exemption, may enable Bill's creditors or Doris' creditors to do likewise.

The premarital agreement property definition includes other future or contingent property interests besides future earnings. In fact, the Act's property definition by its literal terms is broad enough to include all future and all contingent interests in property. Other future and contingent property has been traditionally deemed contractually inalienable.^^89 However, the foregoing analysis would apply to these other property interests to permit alienation under the Premarital Agreement Act.

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88. N.C. GEN. STAT. § 1-362 (1983). Garnishment of wages may be exempted if the earnings are necessary for the use of a family supported wholly or partly by the wage earner's labor.

C. Fulfilling the Act's Formality Requirements

Section 52B-3 sets forth the basic premarital agreement formalities requirements.\(^9\) Section 52B-3 has two primary effects. First, it establishes as a formality the need for a signed writing.\(^9\) Second, it makes clear that the premarital agreement is enforceable without consideration.\(^9\) As a practical matter, North Carolina courts have long held that the marriage itself constitutes consideration for an antenuptial agreement.\(^9\) No consideration is required in order to make the premarital agreement valid.\(^9\) However the official comment points out that the question remains unanswered whether consideration may be required for other purposes such as estate tax purposes.\(^9\) Further, as the comment makes clear, the lack of a consideration requirement prevents the possibility of a problem in the event a ceremonial marriage takes place and is later determined to be void.\(^9\) If the rule were simply that the marriage between the parties established consideration, and the marriage was subsequently voided, a legal nullity, the agreement would lack consideration and the agreement would automatically fail. By stating that no consideration is necessary, the Act prevents voided marriages from necessarily voiding premarital agreements. The Act also provides elsewhere that, despite the need for a ceremonial marriage before the agreement is to take effect, if the marriage is subsequently determined to be void, the premarital agreement may

\(^{90}\) N.C. GEN. STAT. \(\S\) 52B-3 entitled “Formalities.” states, “A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.”

\(^{91}\) Id.

\(^{92}\) Id.

\(^{93}\) “Marriage is not only a good and valuable consideration, but it is probably the most valuable and highly respected consideration recognized by our law.” 2 R. Lee, NORTH CAROLINA FAMILY LAW \(\S\) 181 at 432 (4th ed. 1980). See also Whitley v. Whitley, 209 N.C. 25, 182 S.E. 658 (1935).

\(^{94}\) See infra note 148.

\(^{95}\) Merrill v. Fahs, 324 U.S. 308, reh. denied 324 U.S. 888 (1945) (relinquishment of marital rights pursuant to an antenuptial agreement cannot to any extent constitute “adequate and full consideration” as required for federal gift tax purposes); See also 26 U.S.C. \(\S\) 2043(b) (1954) (amended 1984) (“a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent’s property or estate, shall not be considered to any extent a consideration ‘in money or money’s worth.’”).

\(^{96}\) N.C. GEN. STAT. \(\S\) 52B-3, Official Comment; UPAA \(\S\) 2 Official Comment, \(\S\) 9B U.L.A. 372 (1987).
still be enforced, but only to the extent necessary to avoid an inequitable result.97

The signed writing requirement appears at first glance to make a substantial change in North Carolina law. Indeed it may create a trap for the unwary. It is true that North Carolina was one of the only states not to incorporate the original statute of frauds requirement of a writing for promises based upon consideration of marriage other than mutual promises to marry.98 However, it is also true that since North Carolina statutorily recognized marital agreements, there has been a writing requirement of one sort or another.99 Thus, the Uniform Act simply maintains in effect the general requirement that premarital agreements must be in writing, signed by both parties.

The comment makes clear that the agreement may consist of one or more writings intended to be part of the agreement and executed as required by the section.100 In general, North Carolina law respecting the statutes of fraud has permitted the agreement to be evidenced by more than one document.101 As a general con-

99. See Gause v. Hale, 37 N.C. (2 Ired. Eq.) 241 (1842); Hooks v. Lee, 43 N.C. (8 Ired. Eq.) 157 (1851); Brooks v. Austin, 95 N.C. 474 (1886); Wright v. Westbrook, 121 N.C. 155, 28 S.E. 298 (1897); Harris v. Russell, 124 N.C. 547, 32 S.E. 958 (1899); Perkins v. Brinkley, 133 N.C. 86, 45 S.E. 465 (1903); N.C. Gen. Stat. § 47-25 (1785) (amended 1885) provides: "All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration." To be capable of registration all such agreements must be in writing. N.C. Gen. Stat. § 50-20(d) (1981) (amended 1987) provides: "Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties."
101. Millikan v. Simmons, 244 N.C. 195, 93 S.E.2d 59 (1956) (memorandum required may be more than one writing, provided they are connected by internal reference and when taken together their meaning is certain); Hines v. Tripp, 263 N.C. 470, 139 S.E.2d 545 (1965) (memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related
tract principle, North Carolina courts do not require that all the documents be signed by the party against whom enforcement is sought.\textsuperscript{102} That is, in statute of frauds cases in North Carolina where several writings serve to memorialize the agreement, and all are obviously part of the same transaction, but only one or some are signed, they may often be read together for purposes of proving that they refer to or memorialize a single agreement.\textsuperscript{103} By contrast, assuming the comment is accepted, if the parties to a premarital agreement exchanged a series of writings, one of which is signed by both of them, but the rest of which were both internally consistent with and in fact referred to the signed writing, presumably only the writing that contained both signatures would be enforceable to any extent.

For example, suppose that Paula and David, in contemplation of marriage following Paula's graduation from medical school, enter into a signed premarital agreement, formal or otherwise, providing that each will retain his or her separate property following marriage. Thereafter, prior to their marriage, the parties orally agree that in the event of a dissolution of their marriage, David will be entitled to 25% of Paula's earnings from her medical practice for one year following their divorce. Paula writes a memorandum of this agreement and signs her name to it, intending it to be a modification of the prior premarital agreement. Several questions arise at that point.

First, the premarital agreement itself needs no consideration to be binding.\textsuperscript{104} However, this is a premarital modification of the premarital agreement. Ordinarily, modifications of agreements require consideration to be binding.\textsuperscript{105} Therefore, if this modification

\textsuperscript{102} Richardson v. Greensboro Warehouse & Storage Co., 233 N.C. 344, 26 S.E.2d 897 (1943) (where the contract is in several writings, some of which are unsigned but clearly related, courts will give each writing a reasonable interpretation to reach the intent of the parties). See also, Restatement (Second) of Contracts § 132 (1979).

\textsuperscript{103} Smith v. Joyce, 214 N.C. 602, 200 S.E. 431 (1939) (written memorandum need not be contained in a single document but may consist of several papers, some of which are signed, properly connected together); Hines v. Tripp, 263 N.C. 470, 139 S.E.2d 545 (1965) (written memorandum establishing a contract is sufficient if the contract provisions can be determined from separate, but related, writings).


\textsuperscript{105} Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 323 S.E.2d 23 (1984) (memorandum of an oral warranty unenforceable even though satisfying
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requires consideration, the inquiry might end here, without regard to the need for determining whether the modification may be proved despite the absence of both signatures since no consideration exists. However, several factors in the Act suggest that no consideration ought to be necessary. First, the premarital agreement itself is not effective (enforceable) prior to marriage. Since the agreement in not effective, one can argue that subsequent to execution but prior to marriage it is not a legally cognizable agreement at all. Therefore the agreement is not recognized as capable of being modified, and thus not subject to traditional contract notions governing modification agreements. Second, to the extent that is intended to be part and parcel of the premarital agreement itself, it might fall into Section 52B-3's command that no consideration is necessary in any event. Third, Section 52B-6, dealing with amendments or revocations of the premarital agreement after marriage though not technically applicable, does away with the need for consideration for modifications. Thus, it is probable that the premarital modification, executed by Paula, would be deemed a valid modification despite the absence of consideration, but for the signed writing requirement.

If the case involved any other subject matter subject to a statute of frauds, Paula's signature would be sufficient for statute of frauds purposes. True, the agreement would not be enforceable against David, since it lacks his signature, and if he were the party to be charged, he could escape liability by pleading the statute of frauds. And, a recent court of appeals opinion has suggested that the doctrine of mutuality of obligation might prevent enforcement against Paula since enforcement against David could not be had. However, since the agreement benefits David, he would surely seek to fit within one of the recognized exceptions to the statute, remov-
ing that possibility (e.g., admitting the existence of the agreement). To the extent that the purpose behind the signed writing requirement is to serve an evidentiary function, Paula's signature clearly serves that function by showing that the person giving something up actually gave it up. Furthermore, to the extent that the statute itself requires both signatures on the premarital agreement as a formalizing requirement, there remains the original jointly signed agreement demonstrating the parties' serious, formal intent. Thus, there would appear to be no statute of frauds or policy reason for refusing to enforce a premarriage amendment or for that matter, any premarriage series of writings, some jointly signed and others not. Nevertheless, a literal application of the comment, at least, would seem to require non-enforcement.

The preceding example suggests a problem when the parties formally intend their initial writing (and any subsequent writing) to constitute a premarital agreement or part of a premarital agreement. Lurking beneath the surface of Section 52B-3 is yet another danger, apparently one to which the section was actually intended to respond. Keeping in mind that the definition of a premarital agreement requires only an agreement between prospective spouses made in contemplation of marriage, to be effective upon marriage, it is quite possible that the parties will not execute a single, formal document. Instead, they may in fact reach through a series of writings a perfectly legitimate, perfectly workable, yet perfectly unenforceable agreement.

Suppose, for example, that David and Paula are seniors in college, one located in eastern North Carolina, the other in western North Carolina. They are engaged to be married following graduation, and, though they see each other as often as possible, they primarily communicate by frequent phone calls and letters. In a series of letters written by David, all of which contain his signature, he makes it clear (in vivid, romantic detail) that as soon as they are married, everything he owns will be his and Paula's jointly. She (in equally vivid, romantic detail) makes it clear that all that she owns will likewise belong to him, signing each of her letters as well. If

111. James C. Greene Co. v. Arnold, 266 N.C. 85, 145 S.E.2d 304 (1965) (employee's admission that he signed employment contract containing covenant not to compete along with his failure to observe restrictions made out prima facie case to enforce covenant); cf. Pierce v. Gaddy, 42 N.C. App. 622, 257 S.E.2d 459 (1979) (son-in-law's admission that he entered into an oral agreement with former owner giving option to buy land back not sufficient to enforce oral contract).

our couple is mature, their letters might even detail quite clearly how they will set up their finances, where they will live, who will be responsible for birth control, whether they will have children, when, and how many, and what each will do in support of the other (for example, a signed letter from David might agree to support Paula through medical school so that she can provide the funds for their dream house). In short, there are a series of letters, each signed by one of the parties, but none signed by both of the parties. This exchange of letters clearly shows agreement between prospective spouses made in contemplation of marriage to be effective upon their marriage. Nevertheless, Section 52B-3 by its literal terms makes it clear that no premarital agreement within the meaning of the Act has been entered into.

In the foregoing case, the result seems both logical and clearly defensible, but not under a statute of frauds analysis as such. Rather, it is logical and defensible on the pure policy ground that no formality attended the letter writing. That is, while Paula and David might have intended an agreement, and might have meant every word they wrote, it is unlikely that they contemplated, at the time that they wrote their respective letters, that they would have binding effect following their marriage. Viewed from this perspective, Section 52B-3 serves a far different function than simply a statute of frauds function. To that extent the courts, in interpreting whether a particular premarital agreement should be given effect, should perhaps focus less on the requirement of joint signatures from a statute of frauds evidentiary perspective and more on the apparent formal intent of the parties to be bound. By doing so, a court could legitimately enforce the writings in the first example and legitimately refuse to enforce the writings in the second.

A final, very serious danger lurking below the surface of Section 52B-3 is that section's interrelationship with other North Carolina marital agreement statutes. For example, the official comment makes clear that the only formality required for a valid premarital agreement is a signed writing. However, the North Carolina equitable distribution statute requires that an agreement avoiding the equitable distribution statute be acknowledged if it is to be effective.113

One other point about Section 52B-3 is in order. The official comment to the section makes it clear that above all, a premarital agreement is a contract. Therefore, enforceability requires that the

parties have contractual capacity.\textsuperscript{114} This capacity requirement of course, could create a problem with minors who are capable of marrying, but incapable of entering into a contract prior to their marriage. This capacity requirement also raises all sorts of questions with respect to avoidance under North Carolina's strict common law rules governing minority.\textsuperscript{115} Practically, most minors who marry are impetuous and unlikely to enter into premarital agreements. Furthermore, if they do, it is at least arguable that while the statute of limitations is tolled by the Premarital Agreement Act,\textsuperscript{116} the Act has no effect on the affirmability of minors' contracts. Thus, the minor would have to disaffirm the premarital agreement within a reasonable time after reaching majority, or be bound to it thereafter.\textsuperscript{117} To the extent that this is true, it would support the argument made earlier in favor of "adoption" of a non-complying agreement. If the agreement is capable of ratification for some purposes, it is arguably capable of ratification for all purposes.\textsuperscript{118}

Minors entering into a premarital agreement pose minimal problems that are unlikely to arise with great frequency. However the official comment, suggesting that capacity must exist, raises a more difficult question with respect to capacity. Specifically, Section 52B-7, dealing with enforcement, specifies that premarital agreements are unenforceable if the person against whom enforcement is sought can prove that (1) the agreement was not entered

\textsuperscript{114} Id. at § 52B-3 Official Comment (1987).
\textsuperscript{115} Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968) (absent an enabling statute providing a different rule, an infant's contract with his or her spouse is subject to the general principle that the deeds and contracts of an infant are voidable at his election within a reasonable time after he comes of age); Gillis v. Whitley's Discount Auto Sales, 70 N.C. App. 270, 319 S.E.2d 661 (1984) (under the common law rule, conventional contracts of a minor are voidable, except those for necessaries and those made non-voidable by statute). \textit{See also}, Navin, \textit{Contracts of Minors Viewed from the Perspective of Fair Exchange}, 50 N.C.L. Rev. 517 (1972).
\textsuperscript{116} N.C. GEN. STAT. § 52B-9 (1987) ("Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement.")
\textsuperscript{117} \textit{See supra} note 115 on the effect of the minor simply acknowledging the existence of the agreement; \textit{See Alexander v. Hutcheson}, 9 N.C. 535 (1823); Turner v. Gaither, 83 N.C. 537 (1880). Note that the failure to disaffirm the contract within a reasonable amount of time will result in a ratification of it; thus, simply remaining married and doing nothing with regard to the premarital agreement will amount to a ratification.
\textsuperscript{118} \textit{See supra} note 72.
into voluntarily or that (2) was unconscionable AND (a) there was neither fair and reasonable disclosure, (b) voluntary and express waiver of disclosure OR (c) adequate knowledge of the other party's financial standing.\textsuperscript{119} Section 52B-3's official comment and the general common law of contracts suggest yet another way to escape liability under a premarital agreement. Parties may be able to escape liability through incapacity based upon minority, duress, undue influence, and other invalidating causes.\textsuperscript{120} In other words, if one believes the official comment and there is no reason why one ought not, then premarital agreements may be avoided not only on statutory grounds which make them unenforceable, but on common law grounds as well.

D. Fitting Within the Scope of the Premarital Act

Perhaps Section 52B-4 creates the most notable change in North Carolina premarital agreement law. Section 52B-4 deals with the permissible content of premarital agreements.\textsuperscript{121} North Carolina common law, as well as interpretations under previous statutes dealing with marital agreements, took an extremely conservative view with regard to what parties to a premarital or other marital agreement might include.\textsuperscript{122} By contrast, the Premarital

\begin{itemize}
\item \textsuperscript{119} N.C. GEN. STAT. § 52B-7(a)(2) (1987).
\item \textsuperscript{120} The comment makes clear that the parties must have the capacity to contract in order to enter into a binding agreement. Traditionally, contract law has separated out the notions of incapacity and other invalidating causes such as duress, undue influence, fraud and so on; See J. CALAMARI AND J. PERILLO, CONTRACTS, chs. 8 & 9 (3d. 1987). The concepts are, however, closely related both in that they both concern themselves with the presence or absence of the necessary state of mind to enter into a contractual relationship and in that the absence of either will generally result in a voidable contract. To the extent that the courts analyze duress and its kin in terms of robbing one of his or her free will, see \textit{id.}, The absence of capacity caused by these invalidating causes would arguably be sufficient to permit avoidance under the Act.
\item \textsuperscript{121} N.C. GEN. STAT. § 52B-4 (1987).
\item \textsuperscript{122} See N.C. GEN. STAT. § 50-20 (1981) (amended 1987) (parties might contract by written agreement to determine distribution of "marital property" in an equitable manner; property owned by the parties prior to marriage and other "separate property" excluded); Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942) ("a man and woman contemplating marriage, may enter into a valid contract with respect to the property and property rights of each after marriage."). See generally 2 R. LEE, NORTH CAROLINA FAMILY LAW § 179 (4th ed. 1980). See also Mengal v. Mengal, 103 N.Y.S.2d 992 (1951) (agreement determining where children of one of spouses by prior marriage would reside during marriage refused to be enforced).\textsuperscript{120}
\end{itemize}

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Agreement Act in Section 52B-4 makes it clear that the parties to a premarital agreement may contract with respect to a wide range of subject matters. The section specifies seven particular matters as to which the parties might contract in a premarital agreement, there is an eighth provision which specifies that any other matter, including matters with respect to personal rights and obligations, may be resolved by the parties' agreement so long as it is not in violation of public policy or a statute imposing a criminal penalty. The only other prohibited matter involves child support; while the parties may contract with respect to child support, according to the explicit terms of the statute, the parties' agreement may not adversely affect the child's parental support right.

Thus, Section 52B-4 specifically provides that the parties may contract with regard to their rights and obligations, or either of them, in any property regardless of where located and regardless of when acquired. This again calls into play the extremely broad definition of property set forth in Section 52B-2(2). Section 52B-4 also suggests a legislative intent to broaden the types and alienability of property. Nevertheless, it remains true that, before courts determine whether the parties have legitimately dealt with a subject, courts must first determine whether that subject is in fact property.

The contract may deal with the rights of the parties to purchase, sell, use, otherwise transfer or dispose of, abandon, consume, assign or encumber any property, real or personal. Section 52B-4(a)(3) clearly states that the parties may contract with respect to disposition of property upon separation, marital dissolution, death or other conditioning event. At this juncture, it is appropriate to point out that this provision alone effects an enor-
mous change in North Carolina law. It has long been the North Carolina rule that the parties to a premarital agreement could not include enforceable provisions for property distribution in the event of the termination of marriage other than by death, on the ground that such provisions were in derogation of the strong public policy in favor of the marital relationship. It is now clear, however, that provisions in a premarital agreement may deal directly with the distribution of property following separation or divorce.

Section 52B-4(a)(4) provides that the premarital agreement may modify or eliminate spousal support. This section may create a conflict with the equitable distribution statute to the extent the latter statute requires certain formalities be followed before modification or elimination of spousal support requirements will be effective. An argument can certainly be made that, to the extent that the premarital agreement governs the matter, and to the extent that it is otherwise in compliance with the Premarital Agreement Act, any inconsistent provision contained in the equitable distribution statute (or for that matter other enactments in North Carolina law) are implicitly repealed. Although the rules of statutory construction are in general opposed to implicit repeal, and although the two statutes (and perhaps others regarding domestic relations) may be and should be reconciled by the attorney drafting the premarital agreement (e.g., as by complying with the more stringent statute), such reconciliation should not be left to chance or skill. It would surely be appropriate for the legislature to clarify this area, and, pending that, judicial interpretation ought to give effect to the Premarital Agreement Act. Certainly such a result is clearly justified when the parties have not employed counsel; it may be justified on a variety of statutory construction bases as well.

Section 52B-4(a)(6) of the premarital agreement act specifically provides that the parties may contract with respect to ownership rights and disposition of death benefits from a life insurance policy. Such a provision, contained in a premarital agreement,

135. Id. at § 50-20(d-f)(1987).
136. Watt v. Alaska, 451 U.S. 259 (1981) (conflicting statutes should be interpreted so as to give effect to each but to allow a later-enacted, more specific statute to amend an earlier, more general statute only to the extent of the conflict between the two statutes); Board of Agric. v. White Oak Buckle Drainage Dist.
could have a serious effect on the debtor’s exemption rights under North Carolina law, for North Carolina by constitution and statute specifies that, under certain circumstances, insurance policies and their proceeds are exempt from execution. Should the parties contract with respect to insurance policies or proceeds in a manner inconsistent with the exemption rules, it is possible that a waiver of exemption will be effected. A single example will illustrate the problem.

North Carolina's constitution and statutes generally provide that a life insurance policy and its proceeds, which insure the life of the insured for his or her spouse's or children's benefit are exempt. Should the parties to a premarital agreement provide for contingent uses for the policy or proceeds, as in the event of separation, dissolution, breach on contract, etc., it might well constitute a waiver of the exemption. Thus, dealing with such property raises the same question raised earlier regarding the garnishment exemption. However, in this case the parties' agreement is most likely to significantly impact the insured's third party creditors. These creditors might be able to argue that because of how cash value and/or proceeds are dealt with in the agreement, they are reachable assets. And it is no answer to suggest that creditors will not likely discover the terms of the essentially private premarital agreement. Murphy's Law suggests that they will. Nor is it satisfactory simply to handle the matter as it would be handled in the event of divorce, i.e., treating the ex-spouse as a spouse for purposes of the exemption. This is not satisfactory since by hypothesis, the parties to the premarital agreement have not simply changed their marital status, they have literally contracted away their exemption. Thus, the policies employed to retain the exemption in the event of dissolution (i.e., that the policy and proceeds continue to be used solely by a dependent (ex)spouse and/or children) may well not be present.

Finally, the premarital agreement act in section 52B-4(a)(7) specifically permits the parties to a premarital agreement to specify the choice of law which will govern construction of their con-
tract.\textsuperscript{141} It has long been a generally accepted rule that choice of law provisions in a contract will control, provided that the jurisdiction chosen bears an appropriate relationship to the transaction.\textsuperscript{142} Section 52B-4(a)(7) contains no such limitation. Theoretically it would be possible for parties in North Carolina to arbitrarily apply any jurisdiction's law when construing their premarital agreements. The effect of such a selection might be mind boggling. Given general conflict of laws rules, the parties' inappropriate choice of law could render their premarital agreement unenforceable. For example, if the parties chose the law of the state of X, which generally prohibits premarital agreements dealing with divorce, the end result might be to frustrate entirely their premarital agreement. Or, and more likely, suppose a North Carolina couple, expecting to move shortly to another jurisdiction, enter into a premarital agreement in North Carolina specifying that it would be governed by North Carolina law. Under those circumstances, it is quite conceivable that, in the event of a divorce in the new jurisdiction, a court might decline to apply North Carolina law under

\textsuperscript{141} Article X, § 5 of the North Carolina Constitution provides an exemption against creditors for life insurance proceeds for the benefit of the spouse or children. The question here is whether that exemption applies against creditors where former spouses, as a result of a marital agreement, benefit from life insurance proceeds from a former spouse after the marriage terminates. North Carolina case law holds that a former spouse may remain the beneficiary of a life insurance policy taken on the life of the other spouse by a marital agreement. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970). N.C. GEN. STAT. § 58-95 (1977) protects lawful beneficiaries of life insurance policies from the claims of creditors or representatives of the person effecting the insurance. The statute protects beneficiaries before and after the insured's death from creditors claims. However, the beneficiaries protected under this statute appears to include the spouse, or children, or both, or a guardian. N.C. GEN. STAT. § 58-115 (1931) (amended 1947) protects beneficiaries or assignees of life insurance policies from claims of creditors and representatives of the insured. This statute was enacted to resolve the seeming conflict between N.C. GEN. STAT. § 58-95 and Article X, § 5 of the North Carolina Constitution. Since its enactment, the North Carolina Supreme Court decided that while spouses and children are still protected, the protection is not limited to any particular class of beneficiaries. Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). Thus, although the question has not been addressed directly, it seems likely that former spouses benefiting from life insurance proceeds as a result of a marital agreement would be protected from creditors claims. See also Note, Creditor's Rights—The Exempt Status of the Cash Surrender Value of Life Insurance in North Carolina, 7 Wake Forest L. Rev. 515 (1971).

\textsuperscript{142} N.C. GEN. STAT. § 52B-4(a)(7)(1987).
its conflict of laws rules. A full discussion of choice of law concerns is beyond the scope of this Article. However, it is apparent even upon cursory examination that conflict of laws problems will arise. This is true notwithstanding the statute's express permission to include a choice of law provision in the premarital agreement.

That express permission given by the statute does not resolve all of the questions is made even more clear by the final broad permissive grant contained in Section 52B-4(a)(8). Simply put, the question is how free are the parties in reality to contract with respect to myriad matters?

The flexibility of the parties is fairly clear insofar as matters in violation of criminal statutes are concerned. So long as a lawyer is involved and the lawyer drafting the premarital agreement has a fairly clear notion of what is and is not statutorily proscribed conduct, the agreement is unlikely to run afoul of this particular provision. As far as violations of public policy are concerned, however, that is an altogether different matter. It has long been the rule that the courts have inherent authority to void contracts as violative of public policy, although it is much less clear what types of provisions will violate a state's public policy. For purposes of this Article, whether a state’s public policy is embodied in its nonstatutory criminal law, statutory civil law, its general common law, or inherent notions of morality, is less important than what kinds of clauses are likely to be struck known as violative of public policy notwithstanding the broad grant otherwise contained in Section 52B-4(a)(8).

Unfortunately, the Act’s official comment is of limited assistance. The comment indicates that subject to the public policy limitation, the agreement may provide for such matters as choice of


144. Where the issue is whether the agreement validly controls alimony or property division upon divorce, the state having the most significant relationship to the controversy would seem to be that of the parties' domicile at the time of divorce. Clark, Antenuptial Contracts, 50 UNIV. OF COLO. L. REV. 141, 147 (1979). That state's choice of law might refuse enforcement of the agreement not only pursuant to its general conflict of laws rules, but on public policy bases (such as the policy against permitting contracts to encourage divorce) as well.

145. N.C. GEN. STAT. § 52B-4(a)(7).
abode, freedom to pursue career opportunities, the upbringing of children and so forth. Should one accept the comment, this would clearly mark a legislative change in the public policy of most enacting states. North Carolina case law on the matter is sparse, but other jurisdictions have held that agreements between spouses regarding their child’s religious education are not enforceable on public policy grounds. Jurisdictions have also held that agreements pursuant to which a wife has the freedom to decline to follow her husband are unenforceable on public policy grounds, and that agreements affecting intimate aspects of the marital relationship (such as who bears responsibility for birth control, etc.) are not to be enforced on public policy grounds. It is an open question whether these kinds of matters may now be dealt with under the broad provisions of section 52B-4(a)(8) or whether the public policy of the state will continue to prohibit enforcement of these types of agreements.

Certainly, the parties are to be given significantly more leeway than they enjoyed prior to the Act’s enactment. Thus, to the extent that the parties might agree on who will bear the primary

146. Waggoner v. Western Carolina Publishing Co., 190 N.C. 829, 130 S.E.609 (1925) (whatever contravenes sound morality or is contra bones mores, vitiates any contract and renders void any engagement founded upon it); Lamm v. Crumpler, 233 N.C. 717, 65 S.E.2d 336 (1951) (an executory contract, the consideration of which is against good morals, or against public policy, or the laws of the state, or in fraud of the state, or of any third person, cannot be enforced in a court of justice); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979); and Gellhorn, Contracts and Public Policy, 35 COLUM. L. REV. 679 (1935).


150. In North Carolina, the wife acquires the domicile of her husband by operation of law. In re Estate of Cullinan, 259 N.C. 626, 131 S.E.2d 316 (1963); Smith v. Morehead, 59 N.C. (6 Jones Eq.) 280 (1863); 1 R. LEE, NORTH CAROLINA FAMILY LAW § 1 (4th ed. 1980); Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951) (the choice of determining where the home of the family will be is a right of the husband as head of family, imposing a marital duty upon the wife and any contract attempting to make an ordinary marital duty the subject of commerce is void as against public policy).
child care responsibilities, such an agreement seems clearly unenforceable.

The parties might in their agreement provide for a particular set of rules to guide them during their marriage and in the event of its dissolution. Unfortunately, when all is said and done, the mere fact that the parties have this right does not make more realistic the probability that a court will in fact become involved in the agreement’s enforcement during the marriage. This observation is also true to the extent that it intrudes upon sensitive or intimate areas, following dissolution. Section 52B-4(b) makes at least this much clear: regardless of how the parties seek to order their own relationship, the premarital agreement may not adversely affect a child’s right to support. Thus, even though the agreement between prospective spouses makes clear that one spouse has the support obligation, the agreement will not be read to relieve the other spouse of his or her obligation if the agreement would work to the detriment of the child. This aspect of the statute is clear enough and will unlikely cause significant problems.

Section 52B-5 reiterates the proposition that the premarital agreement becomes effective upon marriage. As indicated earlier, the marriage prerequisite is implicit in the Section 52B-2 definition of premarital agreement. As also indicated earlier, that implication is not without significant ramifications.

Section 52B-6 provides that the premarital agreement may not be orally amended or revoked following the parties’ marriage. However, the parties may amend or revoke the agreement by a signed writing. In addition, the written amendment or revocation is enforceable without consideration.

As mentioned earlier, there are significant questions as to whether a defective premarital agreement may be amended following a marriage so as to bring it within the scope of the Act. If it can, presumably the amended agreement will be subject to all the

153. Id. at § 52B-4 (1987).
154. Id. at § 52B-5.
155. Id. at § 52B-2(1).
156. Id. at § 52B-6.
157. Id.
158. Id.
Act's provisions, including the enforcement provisions. If it cannot, the amended agreement would presumably be governed by applicable domestic relations law outside of the Premarital Agreement Act. Under those circumstances, it would perhaps be possible to bring into play the entire range of concerns the statute was designed to change. As a matter of statutory construction, arguably Section 52B-6 does not apply to an agreement which does not qualify in the first instance as a premarital agreement as defined by Section 52B-2. By its terms, Section 52B-6 provides only to post marriage amendments to or revocations of PREMARITAL AGREEMENTS. Therefore, if the parties never properly entered into a premarital agreement, the Act would govern neither the original agreement nor any amendment or revocation. This is not to say that any such amendment or revocation would be invalid. Instead, this observation merely suggests that the residual North Carolina domestic relations law would apply. One major pitfall for the unwary, however, would include the need for consideration in such a case. On the other hand, absent specific statutory or case law requirements to the contrary, the prior agreement would be modifiable or revocable orally, it being a basic principle of contract law that absent a statute such as section 52B-6, even a contract containing a no oral modification clause may subsequently be orally modified.

E. Avoiding Enforcement Under the Premarital Agreement Act

1. Voluntariness

The enforcement provision, Section 52B-7 is one of the most interesting and confusing aspects of the new Act. Subsection (a) specifies two circumstances under which the premarital agreement

159. See text accompanying notes 64-68 supra.
161. Absent an exception to the requirement of consideration such as that contained in the Act, an agreement would be governed by general contract law and would therefore have to be backed by a valuable consideration. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972). N.C. GEN. STAT. § 52-10 (1871) (amended 1977), however, allows parties about to be married to release and quitclaim rights in the property of each other which would be acquired upon marriage without a valuable consideration. Thus, even if the Act did not apply, depending upon what the parties in fact did in their agreement and whether their agreement otherwise had consideration, their agreement might nevertheless be enforceable under North Carolina law.
will not be enforceable. First, if the party against whom enforce-
ment is sought did not execute the agreement voluntarily, the
agreement will not be enforceable against her or him.\textsuperscript{162} Voluntary
execution is nothing new to the law of marital agreements. How-
ever, the statute itself does not define what constitutes voluntary
execution. Presumably, the question of voluntariness, unlike the
question of unconscionability (to be discussed below) is a question
of fact.\textsuperscript{163} Unfortunately, the official comment sheds little light on
the whole notion of voluntariness. The comment suggests primarily
that the absence of assistance of independent counsel is not a de-
terminant.\textsuperscript{164} However, "lack of that assistance may well be a fac-
tor in determining whether the conditions stated"\textsuperscript{165} are met.
Given the absence of statutory guidance in the Act, it is likely that
voluntariness will be judged by a basic contract standard; invalid-
dating causes such as fraud, duress, mistake, undue influence, etc.,
that would render nugatory contracts in general, will also be avail-
able to show the absence of voluntariness in the context of the pre-
marital agreements. Courts may also avoid premarital agreements
on lack of capacity grounds, since as noted earlier, some of these
same invalidating causes might give rise to arguments concerning
capacity.\textsuperscript{166}

Case law surrounding these concepts in the premarital and
marital context will aid the person asserting lack of voluntariness
since North Carolina law clearly holds that a confidential or quasi
confidential relationship exists between spouses and prospective
spouses.\textsuperscript{167} The implicit requirements imposed on the fiduciary will
aid the spouse seeking to avoid the agreement by asserting lack of
voluntariness based on undue influence.\textsuperscript{168} Thus, despite the fact

\begin{enumerate}
\item\textsuperscript{162} N.C. GEN. STAT. § 52B-7(1987).
\item\textsuperscript{163} Id. at § 52B-7(1).
\item\textsuperscript{164} The Official Comment suggests various factors that may be taken into
account in determining voluntariness, all of which are dependent upon the facts
and circumstances surrounding the agreement. See Lutgert v. Lutgert, 338 So. 2d
1111 (Fla. 1976) (husband presented wife with premarital agreement 24 hours
before the marriage was to take place and demanded that she sign or there would
be no wedding).
\item\textsuperscript{165} N.C. GEN. STAT. § 52B-7 Official Comment (1987).
\item\textsuperscript{166} N.C. GEN. STAT. § 52B-7 Official Comment (1987). See Lutgert v.
Lutgert, 338 So. 2d 1111 (Fla. 1976) (wife spoke to husband's lawyer before sign-
ing agreement but did not have independent counsel); Del Vecchio v. Del Vecchio,
143 So. 2d 17 (Fla. 1962).
\item\textsuperscript{167} See supra note 120 and accompanying text.
\item\textsuperscript{168} Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Shepherd v.
\end{enumerate}
that the statute places the burden of proof upon the party against whom enforcement is sought, that same party will undoubtedly be aided by the common law rules governing voluntariness in the premarital and marital setting.

2. Unconscionability Plus

Section 52B-7(a)(2) provides a second, more complex mechanism for avoiding enforcement. In order to avoid an agreement under this provision, the party against whom enforcement is sought must prove that the agreement was unconscionable when it was executed and that prior to the execution of the agreement he or she was not provided fair and reasonable property and financial disclosures of the other party and he or she did not voluntarily and expressly waive in writing the right to such disclosures beyond those given and did not have or could not reasonably have had, adequate independent knowledge of the property or financial obligations of the other party.169 Unlike the question of voluntariness, courts decide the issue of unconscionability as a matter of law.170 The official comment makes clear that the concept of unconscionability is drawn from the Uniform Marriage and Divorce Act, which itself drew heavily upon the Uniform Commercial Code.171 Volumes have been written concerning this standard. However, a few things might be noted in the context of the premarital agreement. As stated above, the marital relationship imposes certain additional expectations with regard to voluntariness. The marriage


170. The conditions set forth in subsection (a) provide statutory requirements for disclosure. While North Carolina courts have addressed the subject of disclosure in premarital agreements previously, the statute lists a minimal set of requirements which must be met. Tiryakian v. Tiryakian, 91 N.C. App. 128, 133, 370 S.E.2d 852, 855 (1988).

relationship also imposes a different standard of unconscionability. Thus, sharp dealing that might be permissible, though by no means acceptable, in a commercial setting, is totally incompatible within the context of a premarital agreement. Second, the Act's use of the term unconscionability presumably incorporates both procedural and substantive unconscionability, that is both conduct leading up to the execution of the agreement that is oppressive, unfair and surprising, as well as terms which by their nature are grossly unfair. Therefore, it is fair to conclude that the availability of unconscionability in the Act as a policing tool confers upon the courts fairly dramatic power to inquire into the fairness of the parties' conduct and ultimate agreement.

However, abstract judicial notions of noninterference with contractual relationships generally, as well as the act itself circumscribe this power of inquiry into unconscionability. It is not enough that the party against whom enforcement is sought prove unconscionability as a matter of law at the time of execution. He or she must also couple that proof of unconscionability with proof that prior to execution of the agreement appropriate disclosures were not made, were voluntarily waived and could not have been independently known. For example, suppose a party asserts overreaching and proves unconscionability, that not amounting to involuntariness. If the party against whom enforcement is sought cannot also show (1) that she or he was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, and (2) did not expressly and voluntarily waive in writing such a disclosure beyond the disclosure given and (3) did not have adequate knowledge of the property or financial obligations of the other party, then the court must nevertheless enforce the agreement. Therefore it is thus apparent that unconscionabil-

172. See supra note 34, and accompanying text.
173. See supra note 37, and accompanying text.
174. Uniform Commercial Code § 2-302 governs unconscionability in the commercial contract setting. As applied to commercial contracts there are two kinds of unconscionability: procedural ("bargaining naughtiness") and substantive (overly harsh terms). See Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485, 487 (1967). Substantive unconscionability involves one-sided terms from which a party seeks relief. Procedural unconscionability involves the process of making a contract. White and Summers, Uniform Commercial Code, § 4-3 p. 186 (3d ed. 1988). In addition the Official Comment of the Act states that the act does not introduce a novel standard unknown to the law. The Comment suggests that the standard of unconscionability is to be applied in the premarital agreement setting as it is applied in other contexts.
ity standing alone is not enough. Rather, unconscionability must be coupled with proof of the absence of meaningful, appropriate disclosure.

This particular provision, while not surprising in context, is a dramatic departure from contract law generally as it has developed over the past 20 years. During that time period, the courts have had no hesitancy whatsoever in declaring contracts or clauses as unconscionable, and therefore unenforceable. If one is to interpret Section 52B-7(a)(2) as written, this type of judicial policing may not occur with respect to premarital agreements. The typical unconscionability likely to be encountered in the context of a premarital agreement is an unfair division of material assets. To this extent it is not surprising to find unconscionability closely tied to the notion of disclosure. However, it remains to be seen whether the courts will enforce the statute as written. One can readily imagine situations where one prospective spouse, though fully aware of the property and financial obligations of the other, nevertheless voluntarily enters into a one sided, oppressive and grossly unfair premarital agreement. What is difficult to imagine is a North Carolina court blindly enforcing that agreement under a pure freedom of contract analysis.

3. Modification of Spousal Support

Section 52B-7(b) provides yet another mechanism for nonenforcement. If a premarital agreement modifies or eliminates spousal support so to render one party to the agreement eligible for public assistance at the time of separation or dissolution, as a matter of public policy the court may require the other party to provide support to the extent necessary to avoid the eligibility. Before doing so, the court must find that the party for whom support is ordered is a dependent spouse and that there are grounds for alimony or alimony pendente lite. The obvious purpose of

subsection (b) is to prevent the parties to a premarital agreement from contracting to the detriment of the public welfare. Thus, to the extent that the terms of the agreement will leave a spouse eligible for public assistance, the court has the inherent power to modify the agreement. However, there are a few interesting side bars of note.

First, circumstances at the time of separation or dissolution determine whether this particular provision is applicable. Circumstances present upon entry into the agreement are not determinative. Thus, a voluntarily executed agreement based on full disclosure, fair when made, might nevertheless be refused enforcement to the extent that spousal support elimination or modification makes an individual eligible for public assistance at the time of the dissolution. Second, avoiding agreements based on subsection (a), involuntariness and unconscionability grounds, result in the entire agreement being unenforceable. However, subsection (b) declares only the particular provision eliminating or modifying spousal support unenforceable. This means of avoiding the agreement is further restricted since the agreement is only avoided to the extent necessary to avoid eligibility for public assistance. Third, the key is not whether the affected spouse in fact obtains public assistance, but whether he or she is eligible for it. Thus, although the goal is to prevent agreements that impose a burden on the public, the sweep may be much broader.

4. Void Marriages

Section 52B-8 provides one additional mechanism for nonenforcement. Should the courts determine the ceremonial marriage, adverted to in the comments to Section 52B-3, to be void, the premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.179

The official comment makes clear the drafters envisioned the kind of inequitable result where parties have gone through a ceremony, lived together for a substantial period of time and relied upon the existence of a premarital agreement.180 Accordingly, this section provides the court with discretion to enforce in a limited manner such an agreement, notwithstanding the fact that it does not qualify as a premarital agreement under the Act.181

179. Id.
180. Id. at § 52B-8.
181. Id. at § 52B-8 comment (1987).
It is, of course, beyond the scope of this Article to determine under what circumstances a marriage might be void. However, it is worth pointing out that the existence of Section 52B-8 does support a couple of important notions. First, the section implicitly makes clear that all agreements, which for any other reason fail as premarital agreements, will not be subject to the Act at all, and may even go so far as to imply that if the parties seek to enter a premarital agreement under the Act, but fail to do so, the courts are not to enforce that agreement at all, that is, even under North Carolina common law. Second, by empowering the courts to enforce agreements that are defective only because of the void marriage, it suggests that the courts do not have authority beyond that given by the Act. These implications could have disastrous effect. As suggested earlier, there are many reasons, besides a void marriage, why an attempt at executing a valid premarital agreement might fail. Should the courts take the position, on an "inclusio unius" analysis, that the act only governs those agreements invalid due to void marriages, the results could be disastrous.

5. Statute of Limitations

Section 52B-9 provides for the tolling of any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the pending of the marriage between the parties. It also makes clear, however that equitable defenses that would limit the time for enforcement, including laches and estoppel, remain available to the parties. As the comment points out, permitting the statute of limitations to run would encourage litigation to preserve rights; to avoid that, so long as a party does not engage in conduct which would give rise to an equitable defense to enforcement, the fact that he or she does not assert a claim for relief under the premarital agreement will not bar his or her subsequent assertion following dissolution of the marriage for the statutory time period.

Although the provision’s purpose is laudable, its impact is not completely obvious at first glance. It is clear that, should one of the
parties to the premarital agreement breach the agreement during marriage, the statute of limitations governing breaches of contract would be tolled until the marriage was terminated, as by divorce or death. Less clear, perhaps, is whether the statute of limitations would be tolled during marriage when the parties discovered but failed to act upon this cause of action, then subsequently married and divorced. This of course presupposes that the failure to bring the fraud action and the “forgiveness” evidenced by the marriage does not amount to conduct creating an estoppel or giving rise to laches. Finally, the section does not define the term “during the marriage” though presumably the term retains its common definition. Thus, the statute of limitations is presumably tolled from the time that the parties become married until the time that their marriage is irretrievably permanently legally terminated. The interplay of this section and the provision governing void marriages, to say the least, is interesting for it is unclear whether the statute of limitations would be tolled in that event. Furthermore, tolling would presumably occur during periods of separation, regardless of the separation length. As long as there is hope for reconciliation (presumably based upon a good faith standard), no equitable defenses to enforcement should be erected. This is true for the same reason that tolling occurs in the first instance.

F. Miscellaneous

The final two provisions of the Act, Sections 52B-10 and 52B-11, are hardly worthy of comment. The former simply indicates that the Act is to be applied to effectuate its general purpose, to make uniform the law on premarital agreements in the enacting states. Thus far, too few states have enacted the legislation and too little commentary or case law exists with regard to the legislation to determine whether this particular goal will be realized. However, it is likely that here, as with other uniform acts, the courts in the enacting states will pay great deference to other state interpretations.

The final provision merely creates a statutory severability rule. The provision makes clear that if any portion of the Act or its application is held to be invalid, the remainder of the Act will be given effect to the extent that it can without the invalid provision. Such severability provisions have invariably been upheld,

188. Id.
189. Id. at § 52B-11 (1987).
and there is no reason to suspect that it will not be upheld in this case. At the same time, many portions of the Act are controversial. However, they are unlikely to be declared invalid, and the severability provision is therefore unlikely to be invoked.

IV. Conclusion

This article has attempted to highlight the Premarital Agreement Act as enacted in North Carolina, and to call attention to some of its major benefits and pitfalls. Although the effect of the Act is by no means clear, its goal is clearly to liberalize the rules governing premarital agreements. The new Act gives the domestic relations contract lawyer another weapon in the arsenal for dealing with marital relations. Whether it will be as useful as other weapons in that arsenal have proven to be will depend to a large extent on the passage of time and the Act’s reception in the courts.190

190. Id.