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Premarital Agreements

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PREMARITAL AGREEMENTS*

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I. INTRODUCTION

The law concerning the premarital agreement has undergone an upheaval, even in states like North Carolina which have seen little appellate litigation on the topic. The upheaval in North Car-

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olina comes not from changes in the common law, but from the adoption of the Uniform Premarital Agreement Act (UPAA). This act, which went into effect on July 1, 1987, appears to change some of the few principles on premarital agreements which had become part of the case law of this state. In other respects, the act raises questions which only appellate experience will answer.

This article devotes most of its attention to the UPAA, offering analyses of its various provisions and suggesting some possible interpretations by the North Carolina appellate courts. Only a few of the provisions lend themselves to predictions, however. In the first place, North Carolina case law offers little guidance. Moreover, interpretation of the act by the fifteen states[1] which have adopted it is sparse. The National Conference of Commissioners on Uniform States Laws approved the UPAA only in 1983. Like the North Carolina version, these statutes generally provide that the act applies only to agreements executed on or after the effective date. So far, the cases provide almost no insight into how the courts will interpret some of the act's provisions. Therefore, principles of statutory interpretation and non-UPAA case law best indicate how the appellate courts of North Carolina will receive the act.

Before analyzing the UPAA, the article first gives an overview of the North Carolina case law and statutory law which existed at the time of the adoption of the act. Against this background, the UPAA brings sweeping change to the law of premarital agreements.

II. PRE-UPAA LAW IN NORTH CAROLINA

Before the adoption of the UPAA, the question which North Carolina law had hardly addressed was to what extent this state would recognize the premarital agreement as a tool of divorce fi-

1. The statutes of these fifteen states are ARK. STAT. ANN. § 9-11-401 (Supp. 1989); CAL. CIV. CODE § 5300 (Deering 1990); HAW. REV. STAT. § 572D (Supp. 1989); ILL. ANN. STAT. ch. 40 para. 2601 (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 23-801 (1988); ME. REV. STAT. ANN. tit. 19 § 141 (Supp. 1989); MONT. CODE ANN. § 40-2-601 (1988); NEV. REV. STAT. ANN. § 123A.010 (Cum. Supp. 1989); N.C. GEN. STAT. § 52B (1987); N.D. CENT. CODE § 14-03.1-01 (Supp. 1989); OR. REV. STAT. § 108.700 (1989); R.I. GEN. LAWS § 15-17-1 (1988); S.D. CODIFIED LAWS ANN. § 25-2-16 (Supp. 1990); TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1990); and VA. CODE ANN. § 20-147 (Supp. 1990). In addition, the act has been introduced in Washington, D.C., where it is in committee. The act was introduced in Mississippi but the legislature has shown little interest in it.

nancial planning. In two earlier stages of the history of the premarital agreement, the law favored the use of these contracts.[2] In the first stage of the premarital agreement, it preserved for the married woman some of the property rights which marriage and the common law system otherwise took from her.[3] When Married Women's Property Acts reversed some of the inequities of the common law system, the premarital agreement remained but served other purposes. In the next stage of the history of this contract, persons marrying relatively late in life used the agreement to retain part of their respective estates for children of previous marriages. In this setting, spouses-to-be simply executed absolute releases in the property of the other.[4] These agreements made no provisions about divorce and assumed that the marriage would survive until the death of one of the parties.

More recently, parties have called the premarital agreement into service for other purposes. Most significantly, spouses-to-be have relied on the premarital agreement for financial planning for the contingency of divorce. For this purpose, the parties agree prenuptially on property distribution, alimony, and other matters to take effect in the event of divorce. Persons about to marry have also used the premarital agreement as a marriage contract in which the parties define their mutual expectations about their ongoing marriage.

As a tool of divorce financial planning and as a marriage contract, the modern premarital agreement has raised a number of concerns.[5] The North Carolina appellate courts have spoken to only a few of these issues. In a review of pre-UPAA law, this section gives the principles which the courts had clarified and points out the questions which lingered. This law remains useful for the interpretation of agreements executed before the effective date of

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2. *See, e.g.*, Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955) (finding premarital agreements in general consistent with the state's public policy on regulating marriage).

3. *See* R. Lee, *North Carolina Family Law* § 179, at 424-25 (4th ed. 1980).

4. *See, e.g.*, Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942) (premarital agreement promising proceeds of insurance to wife at husband's death); Perkins v. Brinkley, 133 N.C. 86, 45 S.E. 465 (1903) (widow barred by premarital agreement from a year's support from husband's estate).

5. *See generally* Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4th 22 (1987).

the act.[6]

A. *Premarital Agreement Requirements*

Although the North Carolina appellate courts have not treated a number of issues about premarital agreements, some principles are clear. These agreements must satisfy general contract requirements and meet other requirements that reflect a concern for the setting in which they are entered into. North Carolina case law has applied to the premarital agreement the general contract requirements that the parties execute the agreement with capacity, and voluntarily, without fraud, duress, or undue influence.

1. *Capacity*

By statute, North Carolina law recognizes the capacity of persons of full age to enter into premarital agreements. N.C. GEN. STAT. § 52-10, provides:

> Contracts between husband and wife not inconsistent with public policy are valid, and *any persons of full age about to be married* and married persons *may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire* or may have acquired by marriage *in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.*[7]

This statute recognizes the capacity of eighteen-year-olds about to marry to contract at least about property rights.

2. *Voluntary Execution*

Voluntariness rasises a number of issues, one of which is the presence of independent counsel. Some states require that each party be represented by counsel as a prerequisite to enforcement of the agreement.[8] North Carolina law has recognized no such pro-

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6. *See, e.g.*, Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) (applying pre-UPAA law to a premarital agreement executed in 1979 and litigated in 1989); Tiryakian v. Tiryakian, 91 N.C. App. 128, 370 S.E.2d 852 (1988) (applying pre-UPAA law to refuse to enforce a premarital agreement executed in September 1984).

7. N.C. GEN. STAT. § 52-10(a) (1984) (emphasis added).

8. *See, e.g., In re* Matson, 41 Wash. App. 660, 705 P.2d 817 (1985), *aff'd*, 107 Wash. 2d 479, 730 P.2d 668 (1986) (refusing to enforce premarital agreement of which attorney never advised wife of adverse practical effect).

vision, and the UPAA makes no reference to the need for independent counsel. For various reasons, however, the burden of establishing grounds to void the agreement may be easier to carry in attacking a premarital agreement. As some insurance against a later attack on enforceability, in the normal case, a lawyer should insist that counsel represent each side to an agreement.

In a recent case, however, the North Carolina Court of Appeals attached little significance to the fact that only the prospective husband was represented by counsel. In *Howell v. Landry*,[9] the husband had told the wife about three weeks before the wedding that he wanted a premarital agreement. He did not mention it again until the night before he and his wife-to-be were flying to Nevada for the wedding.[10] On the basis of this and other evidence, the trial court found that the agreement was the product of duress and undue influence.[11] The court of appeals reversed and remanded, finding the wife's evidence insufficent to carry her burden of proving these defenses.[12] The court held that she could not establish duress and undue influence based solely on the brief interval between the time the husband presented the agreement and the wedding.[13] Furthermore, the court observed that the totality of the circumstances failed to support her defense: she was an employee of the husband's business, knowledgeable about his financial affairs, and under no particular economic constraints.[14] The court also found that since the husband made no threat other than to call off the wedding, the case was distinguishable from *Link v. Link*,[15] on which she had relied.[16] An earlier case from the court of appeals gave more attention to the absence of counsel than *Howell*. In *Tiryakian v. Tiryakian*,[17] the court of appeals upheld a trial court's decision to refuse to enforce a premarital agreement in

9. 96 N.C. App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

10. Howell v. Landry, 96 N.C. App. 516, 520, 386 S.E.2d 610, 612 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

11. *Id.* at 522, 386 S.E.2d at 614.

12. *Id.* at 529, 386 S.E.2d at 618.

13. *Id.* at 528, 386 S.E.2d at 617.

14. *Id.* at 529, 386 S.E.2d at 618.

15. 278 N.C. 181, 179 S.E.2d 697 (1971) (finding duress in husband's threat to take house and children unless wife made certain property transfers to him).

16. Howell v. Landry, 96 N.C. App. 516, 528, 386 S.E.2d 610, 617 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

17. 91 N.C. App. 128, 370 S.E.2d 852 (1988).

which the wife was not represented by counsel.[18] The court did not base its decision on the lack of counsel but did take note of it.[19] Notwithstanding *Howell*, the lawyer representing a spouse-to-be should appreciate that if the other side is not represented, the agreement is more vulnerable than it would be if both parties had lawyers. When presented to the North Carolina Supreme Court, one may find that it takes little more evidence than the wedding-eve ultimatum to support the defense of undue influence or duress.

The issue of adequate representation raises another question. May one lawyer represent both parties in a premarital agreement? The question involves the same concerns as the representation of both sides to a separation agreement or other cases of multiple representation. Rule 5.1 of the North Carolina Rules of Professional Conduct provides in pertinent part:

> (A) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless:
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> (1) The lawyer reasonably believes the representation will not adversely affect the interest of the other client; and
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> (2) Each client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.
>
> (B) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.
>
> (C) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from representation of any party he cannot adequately represent or represent without using confidential information or secrets of another client or former client except as Rule 4 would permit with respect to a client.[20]

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18. Tiryakian v. Tiryakian, 91 N.C. App. 128, 133, 370 S.E.2d 852, 854-55 (1988).

19. *Id.* at 133, 370 S.E.2d at 854-55.

20. N.C. RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1985).

By these provisions, a lawyer faced with a request for joint representation must first decide if he or she thinks that the representation of one client "will be or is likely to be directly adverse to" the other client. Also, the lawyer should decide if the representation of one client "may be materially limited by the lawyer's responsibilities to" the other client. For example, if the parties differ on the proper scope of the premarital agreement, the lawyer should conclude that joint representation is impossible. The only safe course for a lawyer who has any reason to suspect controversy over the agreement — by disgruntled children of a former marriage, for example — is to insist that each spouse-to-be retain separate counsel. For persons with large estates, a lawyer should probably insist on separately-retained counsel whether there are indications of potential controversy or not.

North Carolina case law has also recognized a principle important in determining whether a premarital agreement is voidable because of fraud, duress, or overreaching. Like most states, North Carolina law considers persons about to marry to be in a confidential relationship.[21] When the parties have a confidential relationship, it may be easier to carry the burden of establishing the traditional grounds to void a contract than it is in other contexts.

a. Fraud and Full Disclosure

The burden of establishing fraud is usually difficult. Like the case law of other states, North Carolina case law requires the moving party to show that (1) the other party falsely represented a material fact; (2) the other party had fraudulent intent and knowledge of falsity; and (3) the moving party detrimentally relied on the representation.[22] Because spouses-to-be are in a confidential relationship, however, the absence of disclosure may render the premarital agreement subject to successful attack.[23]

In many other states, the law clearly has imposed disclosure

21. Shepherd v. Shepherd, 57 N.C. App. 680, 682, 292 S.E.2d 169, 170 (1982) (fraud action against the husband for causing wife to enter into an invalid marriage).

22. *In re* Estate of Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974) (holding that the wife's allegations of fraud in the husband's procuring the premarital agreement were conclusory and did not satisfy pleading requirements).

23. *But see* Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) (the circumstances revealed that there was no dominant party; therefore, the wife who attacked the agreement had the burden of proving invalidity).

requirements in the setting of premarital agreements far more extensive than the disclosure requirements in the ordinary contract setting.[24] In this state, the North Carolina Court of Appeals has recognized that spouses-to-be owe each other a duty of disclosure before executing premarital agreements.[25] In *Tiryakian*, the court of appeals affirmed the trial court's setting aside of the agreement and held that "absent any voluntary waiver, especially considering the confidential relationship between prospective spouses, the failure to fully disclose one's financial status is grounds for invalidating an antenuptial agreement."[26] In the setting of separation agreements, the North Carolina Court of Appeals, in *Lee v. Lee*,[27] reversed the trial court's order refusing to set aside an agreement for the husband's failure to disclose a loan before the parties executed a separation agreement.[28] The *Lee* case, however, is not necessarily significant on the need for disclosure. In *Lee*, the agreement provided that failure to disclosue was a material breach;[29] therefore, subsequent courts could narrowly interpret the court's holding.[30]

b. Undue Influence

This state has also recognized in theory that the court will refuse to enforce a premarital agreement which is the product of un-

24. *See, e.g.*, Faver v. Faver, 266 Ark. 262, 583 S.W.2d 44 (1979) (law raises presumption of designed concealment when provision for wife in premarital agreement is disproportionate to means of intended husband); Del Vecchio v. Del Vecchio, 143 So. 2d 17, 21 (Fla. 1962) (disclosure need not be minutely detailed but must be full, fair, and open); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982) (premarital agreement must be entered into with full knowledge); Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984) (parties to premarital agreements must make frank, full, and truthful disclosures of all their assets); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984), *cert. denied*, 476 U.S. 1117 (1986) (premarital agreements must be entered into with full disclosure, or full knowledge and understanding of nature, value, and extent of prospective spouse's property); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972) (intended spouse in premarital agreement must have full knowledge of all the facts and circumstances that materially affect the contract).

25. *See* Tiryakian v. Tiryakian, 91 N.C. App. 128, 133, 370 S.E.2d 852, 855 (1988).

26. *Id.*

27. 93 N.C. App. 584, 378 S.E.2d 554 (1989).

28. Lee v. Lee, 93 N.C. App. 584, 588, 378 S.E.2d 554, 556 (1989).

29. *Id.* at 587, 378 S.E.2d at 555.

30. For a discussion of the UPAA's limited disclosure requirements, see *infra* notes 83-97 and accompanying text.

due influence.[31] The fact which most frequently leads to voiding a premarital agreement because of undue influence is the wedding-eve ultimatum. When one spouse-to-be presents the premarital agreement to the other close to the wedding, the reluctant spouse has the basis for a claim of undue influence or overreaching. A number of states have voided premarital agreements for this reason.[32]

The *Howell* case, however, gave little attention to the wedding-eve ultimatum. As stated above, in this case, the prospective husband had presented the agreement to the wife on the day before they were scheduled to leave for the trip to their wedding.[33] The trial court had concluded that the wife had not had time to discuss the agreement with a lawyer but, nevertheless, after making a few adjustments, signed it that night.[34] The court found that the facts did not enable the wife to carry her burden of establishing duress or undue influence *per se* or by a totality of the circumstances.[35]

In contrast, in *Tiryakian*, without naming the doctrines of duress or undue influence, the court of appeals upheld the trial court's settting aside of a premarital agreement in which the prospective husband presented a premarital agreement to his prospective wife the day before the wedding.[36] The wife executed the agreement within forty minutes and rushed to the rehearsal dinner.[37] The court of appeals relied explicitly only on the lack of disclosure for its decision but reviewed the facts on the proximity of

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31. *See In re* Estate of Loftin, 285 N.C. 717, 721, 208 S.E.2d 670, 674 (1974) (recognizing the doctrine but concluding that the wife's allegations of undue influence in husband's procuring the premarital agreement were too conclusory).

32. *See, e.g.*, Newman v. Newman, 653 P.2d 728 (Colo. 1982) (stating, in dicta, that the premarital agreement was executed far enough in advance of the wedding so as not to raise unconscionability concerns); *In re* Norris, 51 Or. App. 43, 624 P.2d 636 (1981), *review denied*, 291 Or. 151, 634 P.2d 1345 (1981) (holding premarital agreement invalid where wife was presented with the agreement just prior to the wedding).

Delaware has a statute requiring that premarital agreements be executed at least ten days prior to the marriage. *See* DEL. CODE ANN. tit. 13, § 301 (1981).

33. Howell v. Landry, 96 N.C. App. 516, 520, 386 S.E.2d 610, 612 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

34. *Id.* at 520, 386 S.E.2d at 612-13.

35. *Id.* at 527-29, 386 S.E.2d at 617-18.

36. Tiryakian v. Tiryakian, 91 N.C. App. 128, 131-33, 370 S.E.2d 852, 853-55 (1988).

37. *Id.* at 131, 370 S.E.2d at 853.

the wedding to the execution of the agreement.[38] *Howell*, the later of the two cases from the court of appeals, undermines *Tiryakian's* support for the generally-recognized view that the wedding-eve ultimatum makes the parties vulnerable and may justify the refusal to enforce the agreement.

B. Effect of Subsequent Agreements

On a number of occasions, the North Carolina courts have reviewed issues which dealt with the effect on the premarital agreement of the parties' entering into subsequent agreements. For example, parties have entered into contracts establishing joint bank accounts, separation agreements, and other kinds of contracts after their execution of the premarital agreement.

In these cases, the courts have applied the contract principle that the law in general should give effect to all of the contracts. The law recognizes an exception to this principle only when the later agreement evidences the intent of the parties to rescind. The law finds such an intent only if the later agreement deals comprehensively with a topic covered in the earlier one.[39]

The courts have applied this principle in several settings. For example, in *Turner v. Turner*,[40] the North Carolina Supreme Court found nothing inconsistent between the terms of a premarital agreement and a later separation agreement.[41] The case is only minimal support for the general rule because the parties had reconciled since the execution of the separation agreement.[42] Since the reconciliation abrogated the executory parts of the separation agreement, the court held that the separation agreement was not inconsistent with the premarital agreement.[43]

In another setting as well, the court of appeals found that the premarital agreement and a later contract could co-exist.[44] In this case, the parties had entered into a premarital agreement in which

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38. *Id.* at 131-33, 370 S.E.2d at 853-55.

39. Commercial Nat'l Bank of Charlotte v. Charlotte Supply Co., 226 N.C. 416, 426, 38 S.E.2d 503, 509-10 (1946) (recognizing the need for a subsequent agreement to deal comprehensively with the subject matter of the prior agreement in order to effect a rescission).

40. 242 N.C. 533, 89 S.E.2d 245 (1955).

41. Turner v. Turner, 242 N.C. 533, 539-40, 89 S.E.2d 245, 249-50 (1955).

42. *Id.* at 536, 89 S.E.2d at 247.

43. *Id.* at 540, 89 S.E.2d at 250.

44. *See* Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 79, 220 S.E.2d 136, 139 (1975).

they agreed to acquire property as if they had never married.[45] They subsequently established a joint bank account with rights of survivorship.[46] Over an argument that the premarital agreement treated the funds as separate property, the court gave effect to the joint bank account.[47] The court concluded that the premarital agreement applied only to separate property while the agreement establishing the joint bank account rendered the funds joint property.[48]

In both of these cases, the appellate courts failed to find that the parties intended by the later agreement to rescind any portion of the premarital agreement. Although the *Harden* court gave effect to the later agreement, the court reached that result by concluding that the two agreements were consistent.[49] The negative implication of these cases, however, raises a point which lawyers should press upon their clients. If the parties enter a later agreement which deals comprehensively with a term covered in the premarital agreement, neither can rely on the treatment of that term in the premarital agreement. For example, if the parties in the premarital agreement release rights to certain property and then make a different provision for that property in a separation agreement, the separation agreement may rescind the disposition provided in the premarital agreement.

C. *Subject Matter of Premarital Agreements*

With the enactment of its equitable distribution act, North Carolina appears to have joined the ranks of states which approve the use of premarital agreements for at least some aspects of divorce financial planning. By statute, North Carolina law provides: "Before, during or after marriage the parties may by written agreement . . . provide for distribution of the marital property in a manner deemed by the parties to be equitable . . . ."[50]

In *Buffington v. Buffington*,[51] the court of appeals interpreted the provision to reflect a change in public policy and concluded that parties could enter into binding separation agreements before

45. *Id.* at 78, 220 S.E.2d at 138.
46. *Id.*
47. *Id.* at 79, 220 S.E.2d at 138.
48. *Id.* at 79-80, 220 S.E.2d at 138-39.
49. *Id.* at 79-80, 220 S.E.2d at 139.
50. N.C. GEN. STAT. § 50-20(d) (1987).
51. 69 N.C. App. 483, 317 S.E.2d 97 (1984).

physical separation.[52] The reasoning of the court would apply equally well to the premarital agreement and authorize a prenuptial release of property rights. The *Howell* case recently decided, however, that for agreements not governed by the UPAA, premarital releases of alimony remain unenforceable.[53] As discussed below, the UPAA authorizes many more topics as appropriate for divorce financial planning in premarital agreements.

III. THE UPAA

North Carolina adopted the UPAA in 1987, relatively soon after the National Conference of Commissioners on Uniform State Laws approved it. The North Carolina version follows the Uniform Act almost exactly, with one exception which incorporates the North Carolina requirement for fault as a condition to awarding alimony.[54] The North Carolina version includes the official comments to the act, which make clear that the concern for uniform treatment of enforcement issues prompted the Commissioners to treat the topic through a uniform act. In this section, the article looks at each section of the act and relates the act to current North Carolina law. Some of the principles discussed in the preceding sections remain good law even after the UPAA. For others, the act may work radical changes.

A. Definitions — § 52B-2

The UPAA applies only to *premarital* agreements, not to cohabitation agreements, post-marital or separation agreements.[55] Also, the act defines "property" broadly to include income and earnings in addition to more traditional items of property.[56] By this broad definition of "property," the Commissioners apparently wanted to avoid limiting the act to traditional property rights and apply it more broadly to property as some cases have defined it in

52. Buffington v. Buffington, 69 N.C. App. 483, 488, 317 S.E.2d 97, 100 (1984).

53. Howell v. Landry, 96 N.C. App. 516, 531, 386 S.E.2d 610, 619 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

54. *See* N.C. GEN. STAT. § 52B-7(b) (1987).

55. *See* N.C. GEN. STAT. § 52B-2(1) (1987) (defining "premarital agreement" to mean "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage").

56. N.C. GEN. STAT. § 52B-2(2) (1987).

equitable distribution actions.[57] While North Carolina's equitable distribution act specifically exempts professional licenses and degrees from the definition of marital property,[58] the UPAA appears to authorize parties to dispose of licenses, degrees, and increased earning capacity prenuptially as property.

B. Formalities — § 52B-3

The UPAA dispenses with all formalities except a signed writing and recognizes that the agreement needs no consideration to be binding.[59] By statute, the North Carolina legislature had already dispensed with the need for consideration for premarital agreements releasing property rights.[60] The act's dispensing with the need for acknowledging the agreement, however, conflicts with N.C. GEN. STAT. § 50-20(d), which provides that "[b]efore . . . marriage the parties may by written agreement, duly executed and acknowledged . . ., provide for distribution of the marital property . . . ."[61] Since the provisions on premarital agreements are more specific, there should be no need to acknowledge the agreements to make them enforceable, at least between the parties.[62] In order to avoid a contest, however, the prudent course of action is to have the agreement acknowledged.

The official comment to N.C. GEN. STAT. § 52B-3 recognizes the traditional defenses based on lack of capacity.[63] Therefore, North Carolina's pre-UPAA law remains pertinent on this subject.[64] In its provisions on enforcement, however, the act severely limits attacks on the basis of involuntariness and failure to disclose.[65]

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57. *See, e.g.*, O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (defining "property" to include increased earning capacity).

58. *See* N.C. GEN. STAT. § 50-20(b)(1) (1987).

59. N.C. GEN. STAT. § 52B-3 (1987). A California case interpreting the UPAA concluded that the UPAA did not affect enforcement alternatives so that a premarital agreement could be enforceable by promissory estoppel principles even though the agreement was oral. *See* Hall v. Hall, 222 Cal. App. 3d 578, 271 Cal. Rptr. 773 (1990).

60. *See* N.C. GEN. STAT. § 52-10(a) (1984).

61. N.C. GEN. STAT. § 50-20(d) (1987).

62. *See* N.C. GEN. STAT. § 47-25 (1984) (requiring marriage settlements and other marriage contracts to be acknowledged and registered to be valid against creditors and purchasers for value).

63. *See* N.C. GEN. STAT. § 52B-3 official comment (1987).

64. *See supra* note 7 and accompanying text.

65. For a discussion of the UPAA's limitations on attacks based on involun-

C. *Content — § 52B-4*

In authorizing the parties to deal prenuptially with a number of specific topics and "[a]ny other matter, including their personal rights and obligations,"[66] the act departs dramatically from North Carolina precedent. The act grants parties the right to contract about property rights at divorce, death, or upon any other contingency.[67] Except for its expansive definition of "property," this portion of the act merely codifies North Carolina case law. However, the act also authorizes "[t]he modification or elimination of spousal support,"[68] a clear departure from North Carolina precedent.

The North Carolina appellate courts have consistently concluded that premarital agreements which waive spousal support violate the public policy of this state.[69] The UPAA, on the other hand, clearly intends to enable parties to plan for divorce by modifiying or eliminating spousal support. The official comment recognizes that states had split on the enforceability of terms dealing with spousal support.[70] In the prefatory note to the act, the Commissioners recognized that the need to reconcile different treatments of premarital agreements led to the drafting of the act.[71] In conjunction, these comments lead inescapably to the conclusion that authorizing the release of spousal rights is central to the act.

The North Carolina legislators apparently intended to honor this provision of the act. In the first place, principles of statutory interpretation suggest that by specifically listing the first seven items in N.C. GEN. STAT. § 52B-4(a),[72] the legislature found that

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tariness and inadequate disclosure, see *infra* notes 83-97 and accompanying text.

66. N.C. GEN. STAT. § 52B-4 (1987).

67. N.C. GEN. STAT. § 52B-4(a)(1)—(3) (1987).

68. N.C. GEN. STAT. § 52B-4(a)(4) (1987).

69. *See, e.g.*, Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961); Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

70. *See* N.C. GEN. STAT. § 52B-4 official comment (1987).

71. N.C. GEN. STAT. ch. 52B prefatory note (1987).

72. The UPAA authorizes parties to contract with respect to the following topics:

> (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 in, mortgate, encum-

these items do not violate public policy. This conclusion follows from reading these provisions in conjunction with the general provision authorizing parties to contract about "[a]ny *other* matter . . . not in violation of public policy . . . ."[73] In other words, the first seven items are "not in violation of public policy," and the parties may choose to contract about other matters, which, like the matters on the approved list, do not violate public policy. The recognition that the parties may eliminate spousal support also appears from the North Carolina modification of the Uniform Act.[74]

Another section with public policy implications is N.C. GEN. STAT. § 52B-4(a)(7) which recognizes the right of the parties to choose the governing law of the agreement. Although the North Carolina courts had not dealt with this topic prior to the adoption of the UPAA, some states prohibited the parties from choosing the governing law of premarital agreements. For example, in *Scherer v. Scherer*,[75] the Georgia Supreme Court found that the strong policy considerations at issue in premarital agreements required it to apply Georgia law to the interpretation of the agreement.[76] Although the North Carolina appellate courts had not dealt with the issue of choosing governing law, the act breaks from venerable precedent of at least some states.

N.C. GEN. STAT. § 52B-4(a)(8) authorizes the parties to contract about "[a]ny other matter, including their personal rights and obligations, not in violation of public policy."[77] In this way, the act recognizes that there may be matters about their ongoing relationship to which the parties can agree prenuptially. The offi-

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ber, 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; and
(8) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

N.C. GEN. STAT. § 52B-4(a) (1987).

73. N.C. GEN. STAT. § 52B-4(a)(8) (1987) (emphasis added).
74. *See infra* notes 98-99 and accompanying text.
75. 249 Ga. 635, 292 S.E.2d 662 (1982).
76. Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662, 664 (1982).
77. N.C. GEN. STAT. § 52B-4(a)(8) (1987).

cial comment lists as examples "the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on."[78] To the extent the act authorizes these provisions, it represents an even greater departure from precedent than in its treatment of spousal support. On the prenuptial waiver of spousal support, at least some states had already concluded that these waivers were consistent with public policy.[79] On the other hand, rarely have courts enforced provisions by which the parties agreed on terms which would regulate their ongoing marriage.

For two main reasons, courts have found that these provisions violate public policy. Since the provisions control the ongoing relationship, the breach occurs during the healthy marriage. Courts fear that recognizing these causes of action increases sources of conflict.[80] Courts also want to avoid the enforcement problems that these agreements raise. What remedy would the court grant for breach of an agreement to allow the wife first choice in pursuing her career, for example? How could the court compute damages? Even more troubling, how could the court fashion a decree of specific performance? For these and other reasons, the courts have simply not enforced these provisions. The one exception has been for provisions by which the parties agree on how to raise children.[81]

The Commissioners themselves recognized, in effect, that states might not enforce these provisions. In the official comment to this section, the Commissioners assume enforceability of the topics listed in N.C. GEN. STAT. § 52B-4(a)(1)—(7) (topics are intended to illustrate matters not in violation of public policy but

78. N.C. GEN. STAT. § 52B-4 official comment (1987).

79. *See, e.g.*, Barnhill v. Barnhill, 386 So. 2d 751 (Ala. Civ. App. 1980); Newman v. Newman, 653 P.2d 728 (Colo. Sup. Ct. 1982) (hinging right on full disclosure); Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976) (relying on relatively equal status of women and men); Gross v. Gross, 11 Ohio St. 3d 99, 464 N.E.2d 500 (1984) (may set alimony amounts); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960) (may waive right to alimony); Unander v. Unander, 506 P.2d 719 (Ore. 1973) (premarital agreement waiving alimony should be enforced unless unfair under the circumstances).

80. Mengal v. Mengal, 201 Misc. 104, 103 N.Y.S.2d 992 (1951) (provision in premarital agreement providing that wife's sons from another marriage were not to live with the couple was void as against public policy); *see also* Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757, 783-84 (1984).

81. *See, e.g.*, Ramon v. Ramon, N.E.2d, 34 N.Y.S. 100 (Fam. Ct. 1942) (agreement on religious training); Avitzur v. Avitzur, 58 N.Y.2d 108, 446 N.E.2d 136 (Fam. Ct. 1983) (agreement on religious ceremony).

not to be exclusive).[82] In contrast, in referring to the catchall provision of N.C. GEN. STAT. § 52B-4(a)(8), the Commissioners recognized that provisions which regulate the ongoing relationship are subject to the public policy limitation. The North Carolina appellate courts have not dealt with provisions regulating the ongoing relationship, and it is difficult to imagine the courts of this state taking that plunge.

D. Enforcement — § 52B-7

The UPAA is most controversial in its treatment of enforcement issues. As the prefatory note to the act recognizes, appellate courts around the country had handled enforcement issues in a variety of ways.[83] The Commissioners based the need for a uniform act in large measure out of a concern for the differing treatment of enforceability, and the act reconciles the differing treatments always in favor of enforcement.

1. Involuntary Agreements — § 52B-7(a)(1)

The act provides that the party seeking to avoid enforcement carries the burden of proof on unenforceability.[84] In N.C. GEN. STAT. § 52B-7(a)(1), the act makes involuntary execution of the agreement a ground to avoid enforcement.

The act leaves some aspects of what makes execution voluntary entirely to case law. In N.C. GEN. STAT. § 52B-7(a)(2), the Act addresses the need for disclosure and recognizes waiver of additional disclosure.[85] As described earlier[86] North Carolina case law has treated whether an agreement is voluntary by analyzing questions of the presence of counsel, the confidential relationship, the need for disclosure, and the wedding-eve ultimatum. Since the act addresses only disclosure, the existing law is the exclusive source for defining these other elements of voluntariness.

Although the act itself does not address the need for counsel, the official comment does. The comment acknowledges that the

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82. N.C. GEN. STAT. § 52B-4 official comment (1987).

83. N.C. GEN. STAT. ch. 52B prefatory note (1987).

84. N.C. GEN. STAT. § 52B-7(a) (1987).

For a case from another state finding that the UPAA had changed the law on who had the burden of proof in premarital agreements, see Chiles v. Chiles, 779 S.W.2d 127 (Tex. Ct. App. 1989).

85. *See* N.C. GEN. STAT. § 52B-7(a)(2) (1987).

86. *See supra* notes 8-38 and accompanying text.

agreement may be enforceable with or without counsel but also recognizes that the presence or absence of counsel could "be a factor."[87]

2. *Unconscionable Agreements — § 52B-7(a)(2)*

Even if the moving party voluntarily executed the agreement, that party may still avoid enforcement under N.C. GEN. STAT. § 52B-7(a)(2). However, the burden is extremely difficult. The moving party must establish that the agreement was unconscionable when executed *and* before execution (1) the other party failed to provide "a fair and reasonable disclosure of [that party's] property or financial obligations"; *and* (2) the moving party did not voluntarily execute a written waiver to additional disclosure; *and* (3) the moving party "[d]id not have or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party."[88]

This provision prompts the comment that the act reconciles all the differing views of enforceability in favor of enforceability. Together, the provisions of N.C. GEN. STAT. § 52B-7(a)(2) make an agreement enforceable even if it were unconscionable when executed as long as the moving party received a fair and reasonable disclosure *or* waived disclosure *or* reasonably could have had an adequate knowledge of the relevant information.[89]

Before the UPAA, probably no state's case law went so far to protect the enforceability of a premarital agreement. In the first place, the burden of "unconscionable when executed"[90] is tough measured by the standards developed in case law from other states. The official comment defines "unconscionable" by commercial standards but recognizes that courts should define the term with reference to the obligations of spouses-to-be to deal fairly with each other.[91]

Even more onerous than the use of the term "unconscionable" is the use of "when executed." Many states had concluded that courts should measure the enforceability of premarital agreements by evaluating the circumstances of the parties *at the time of en-*

87. N.C. GEN. STAT. § 52B-7 official comment (1987).
88. N.C. GEN. STAT. § 52B-7(a)(2) (1987) (emphasis added).
89. *Id.*
90. *See id.*
91. N.C. GEN. STAT. § 52B-7 official comment (1987).

forcement.[92] In this way, the courts retained the power to see if changed circumstances since the execution of the agreement, particularly unforeseen changed circumstances, rendered enforcement unfair. The act is harshest in making these changed circumstances irrelevant to the issue of enforcement. The UPAA focuses on the circumstances at execution, apparently depriving the court of the authority to take subsequent developments into account.

Among the North Carolina appellate cases, only one had mentioned the unfairness of a premarital agreement as a defense to enforcement. In *Howell,* the court said in dicta that the court should not review the substantive fairness of a premarital agreement in deciding whether to enforce it and based this conclusion on cases involving separation agreements.[93] In the setting of separation agreements, the North Carolina appellate courts have taken an approach which by the standards of other states is harsh. In essence, North Carolina case law has refused to review separation agreements for overall fairness.[94] The act introduces to the courts the idea that the courts should review an agreement to see if it was "unconscionable when executed."

On the other hand, the UPAA may prevent the North Carolina courts from developing any law on the unenforceability of premarital agreements because of their substantive unfairness at the time of enforcement. Even though North Carolina law did not recognize a substantive review for separation agreements, *Howell* aside, the North Carolina Supreme Court might have recognized the need for a fairness review at the time of enforcement of premarital agreements. After all, the parties may have executed these agreements many years before the time of enforcement. In the interim, the parties may have changed their lifestyles so that the premarital agreement no longer reflects the assumptions on which it was based. The act might keep the courts from developing this

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92. *See, e.g.,* Burtoff v. Burtoff, 418 A.2d 1085 (D.C. 1980); Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972), *aff'd,* 290 So. 2d 126 (Fla. 1974); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982)(dicta).

93. Howell v. Landry, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989), *review denied,* 326 N.C. 482, 392 S.E.2d 90 (1990).

94. *See, e.g.,* Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965); Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965); Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985); Johnson v. Johnson, 67 N.C. App. 250, 313 S.E.2d 162 (1984); Biesecker v. Biesecker, 62 N.C. App. 282, 302 S.E.2d 826 (1983); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, *review denied,* 298 N.C. 305, 259 S.E.2d 918 (1979).

line of reasoning. The only way for parties to make sure that changed circumstances are relevant at enforcement is to include a provision to that effect in the agreement. Otherwise, the parties themselves would have to modify the agreement before the marriage breaks down to keep from being stuck with an agreement that no longer reflects the marital assumptions.

Subsections (i), (ii) and (iii) of N.C. GEN. STAT. § 52B-7(a)(2) deal with the need for disclosure. Until the *Tiryakian* case, no North Carolina appellate court had dealt with this need. In that case, the court of appeals found that one spouse must "fully disclose [his or her] financial status" for the agreement to be valid.[95]

The act also recognizes that the parties may "voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided."[96] The act does not require independent counsel as a condition of a valid waiver. In other states, however, the presence of counsel is often the most significant factor in determining whether a waiver is valid.[97]

3. *Spousal Support Agreements — § 52B-7(b)*

The one exception the act makes for full enforceability is in the limitations which it places on modifying or eliminating spousal support. The act provides that if the agreement leaves one spouse eligible for public support, then the court may require the other spouse to provide minimal support.[98] In this section, the North Carolina legislature made its one change from the uniform act. The legislature clarified that establishing dependency and grounds for support are prerequisites to an order under this section.[99] By mak-

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95. Tiryakian v. Tiryakian, 91 N.C. App. 128, 133, 370 S.E.2d 852, 855 (1988). Other states have also developed high standards for disclosure. For a review of some of these standards, see the cases cited *supra* note 24.

96. N.C. GEN. STAT. § 52B-7(a)(2)(ii) (1987).

97. *See, e.g.*, Norris v. Norris, 419 A.2d 982 (D.C. 1980); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

98. The UPAA provides, in part:

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance . . . a court . . . may require the other party to provide support to the extent necessary to avoid that eligibility.

N.C. GEN. STAT. § 52B-7(b) (1987).

99. *See* N.C. GEN. STAT. § 52B-7(b) (1987) (providing that "the court must find that the party for whom support is ordered is a dependent spouse, as defined

ing this addition, the legislature evidenced an intent to honor the provision of § 52B-4(4), allowing the elimination of spousal support, and reaffirmed its commitment to fault-based alimony.

E. Void Marriages — § 52B-8

The only other significant provision of the act treats the effect of a void marriage. This provision and the official comment recognize that under some circumstances, the court may enforce a premarital agreement even if the marriage turns out to be void.[100] The comment suggests that only if the parties had been married for a significant time and only then if one of the parties had relied on the agreement should it apply in the face of a void marriage.[101]

IV. CONCLUSION

The UPAA raises a number of issues both on the appropriate topics for a premarital agreement and on enforceability. In promoting uniformity, the act serves the public well. In making enforceability an issue which turns only on circumstances that existed at the time of execution, however, the act may disserve the public. The UPAA may have discouraged the North Carolina courts from developing the appropriate equitable concern to review the fairness of the agreement measured by the circumstances as they exist at the time a party seeks to enforce it.

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by G.S. 50-16.1, and that there are grounds for alimony under G.S. 50-16.2 or alimony pendente lite under G.S. 50-16.3").

100. *See,* N.C. GEN. STAT. § 52B-8 (1987) (stating that "[i]f a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result"); N.C. GEN. STAT. § 52B-8 official comment (1987).

101. *See* N.C. GEN. STAT. § 52B-8 official comment (1987).