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## Avoiding Wonderland: Clarifying Marriage Requirements in North Carolina

*"[A] journey is like marriage. The certain way to be wrong is to think you control it."*<sup>1</sup>

### INTRODUCTION\*

After thirteen years of dating, Michael, a wealthy entrepreneur residing in Wake County, North Carolina, proposed to Natalie. Natalie gleefully accepted his proposal and the two were married in December 2007. In a Christmas-themed ceremony officiated by Natalie's father, she and Michael exchanged traditional Christian wedding vows and consented to take each other as husband and wife. The couple intended to be legally married and lived happily together—for three years. For reasons unknown to Michael, Natalie left the marital home during the summer of 2010 and subsequently filed for divorce, equitable distribution, and spousal support.

To appropriately respond to Natalie's divorce complaint, Michael consulted a family law practitioner in Raleigh, North Carolina and surprisingly discovered problems with his marriage. First, neither he nor Natalie obtained or signed a marriage license. Second, he and Natalie were married by Natalie's father, not an authorized minister or a magistrate. These flaws are explicit violations of the chapter entitled "Marriage" in the North Carolina General Statutes.<sup>2</sup> Armed with this information, Michael responded to Natalie's suit by alleging that the parties were "never married." With this claim, Michael hoped to avoid a property distribution and any spousal support obligation.

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\* The Author would like to recognize and thank Professor Jean M. Cary for inspiring this Comment. Without her support, insight, and dedication, this Comment would not have been written.

1. JOHN STEINBECK, *TRAVELS WITH CHARLEY IN SEARCH OF AMERICA 2* (Penguin Books 2012) (1962).

2. N.C. GEN. STAT. §§ 51-1, -6 (2011). Please note that for simplicity's sake, this Comment often refers to sections 51-1, 51-3, and 51-6 of the North Carolina General Statutes as simply "section 51-1," "section 51-3," and "section 51-6." When these sections are noted in the text, the Author is referring to only those sections contained in chapter 51 of the North Carolina General Statutes. Additionally, when the Comment refers to "the Marriage chapter," the Author is referring to chapter 51 of the North Carolina General Statutes.

Several North Carolina counties over, Brad and Sarah, who dated for three years, decided to formalize their union with a marriage ceremony in the Catholic Church. Brad and Sarah complied with all the procedural requirements of marriage, and they lived happily—for a time. After five years of marriage, Brad discovered a devastating piece of family history: he and Sarah were blood relatives, specifically, double first cousins. Brad struggled with whether to tell Sarah the news and ultimately decided to leave his wife without disclosing the horrifying truth behind his decision.

Although Brad was in misery for some time, he did eventually meet someone who distracted his mind from Sarah. Brad fell in love with Kristen and desperately desired to formalize their relationship, but he feared the disclosure of his forbidden marriage to Sarah. After consulting the Marriage chapter of the North Carolina General Statutes, Brad learned that his marriage to Sarah was void *ab initio*, i.e., void from the start;<sup>3</sup> he decided to marry Kristen without dissolving or annulling his marriage to Sarah. Six years later, Sarah uncovered both Brad's dark secret and his second marriage to Kristen. As an outlet for her rage and humiliation, Sarah took the necessary steps to have Brad prosecuted for bigamy.

After reading the stories of the above "marriages," which ones are valid? In the Michael-Natalie marriage, can Michael evade equitable distribution and his spousal support obligation by highlighting the procedural defects in his marriage? Is the lack of a marriage license and proper solemnization fatal? Should it be? Should the answer to that question change if the parties *intended* to violate the procedural requirements of marriage? What if Michael and Natalie intended to comply with North Carolina's procedural requirements but were misguided by a deficient statute? For instance, after consulting section 51-1 of the North Carolina General Statutes, entitled "Requisites of marriage," Michael and Natalie concluded a marriage license was unnecessary because it was not mentioned in the statutory text. Should their marriage nevertheless be invalidated on the application of either party?

As to the Brad-Sarah and Brad-Kristen marriages, which marriage should be upheld? According to section 51-3 of the North Carolina General Statutes, both a marriage between double first cousins and a bigamous marriage are void *ab initio*.<sup>4</sup> Therefore, was Brad unreasonable in deciding not to formally dissolve his void marriage to Sarah prior to marrying Kristen? Should he be prosecuted for bigamy?

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3. *See id.* § 51-3.

4. *Id.*

Unfortunately, the current state of North Carolina law makes it extremely difficult to answer these questions. Simply put, the statutes discussed in this Comment do not state what they “mean,” and worse, they do not fully outline what is actually required to establish a valid marriage.<sup>5</sup> The stories of Michael and Brad are not fairytales; rather, they exist in the realm of possibility and can be avoided with clearer statutory requirements for marriage.

This Comment considers the deficiencies and contradictions that make the stories above tragic realities and proposes an appropriate solution: statutory reform of chapter 51 of the North Carolina General Statutes, specifically sections 51-1 and 51-3. Part I of this Comment provides a brief overview of both the procedural and substantive statutory requirements for marriage in North Carolina. Parts II and III discuss the deficiencies within sections 51-1 and 51-3, respectively. Part IV proposes a statutory amendment to section 51-1, and Part V analyzes the annulment statutes of other states and proposes a statutory amendment to section 51-3. This Comment concludes with a call to action on the part of the North Carolina General Assembly to reform the Marriage chapter.

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5. In his famous story, “Through the Looking-Glass,” Lewis Carroll detailed, through a conversation between Alice and Humpty Dumpty, a problem similar to what readers of the Marriage chapter face:

[Humpty Dumpty asked,] “And how many birthdays have you?”  
 “One.”

...

“And only *one* for birthday presents, you know. There’s glory for you!”

“I don’t know what you mean by ‘glory,’” [sic] Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” [sic] Alice objected.

“When *I* use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” [sic] said Alice, “whether you *can* make words mean so many different things.”

LEWIS CARROLL, *Through the Looking-Glass, in ALICE’S ADVENTURES IN WONDERLAND & OTHER STORIES* 195–96 (Barnes & Noble, Inc. 2010). Since our State controls the institution of marriage, including defining its requirements and dictating methods of dissolution, it must explicitly and clearly tell us what its terms “mean” and what is required. Otherwise, parties entering into marriage in North Carolina are just as confused and lost as Alice in Lewis Carroll’s Wonderland.

## I. NORTH CAROLINA'S MARRIAGE REQUIREMENTS, GENERALLY

In North Carolina, “marriage” is a legal contract between a man and woman that makes them husband and wife.<sup>6</sup> Importantly, there are three parties to this contract—the husband, the wife, and the State of North Carolina.<sup>7</sup> Practically speaking, the State becomes a party to every marriage contracted within its boundaries because individual states control the institution of marriage.<sup>8</sup> A North Carolina marriage is complete “when parties, able to contract and willing to contract, actually have contracted to be man and wife in the forms and with the solemnities *required by law*.”<sup>9</sup> The forms and solemnities required by this State for marriage are found in chapter 51 of the North Carolina General Statutes, which is conveniently titled “Marriage.”

Sections 51-1 and 51-6 of the Marriage chapter detail the procedural requirements of marriage.<sup>10</sup> Section 51-1 outlines the first two requirements for a North Carolina marriage, consent and solemnization:

*A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:*

(1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and

b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.

Marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation.<sup>11</sup>

Additionally, section 51-6 articulates the requirement of a marriage license in the following prohibition:

No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a [marriage]

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6. *State v. Setzer*, 37 S.E.2d 513, 515 (N.C. 1946).

7. *State v. Lynch*, 272 S.E.2d 349, 353 (N.C. 1980) (citing *Ritchie v. White*, 35 S.E.2d 414, 415 (N.C. 1945)).

8. *Id.* (citing *Jones v. Bradley*, 590 F.2d 294, 296 (9th Cir. 1979)).

9. *Id.* (emphasis added).

10. See N.C. GEN. STAT. §§ 51-1, -6 (2011).

11. *Id.* § 51-1 (emphasis added).

ceremony . . . until there is delivered to that person a license<sup>12</sup> for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant.<sup>13</sup>

Importantly, an authorized person who solemnizes a marriage without a license is guilty of a Class 1 misdemeanor.<sup>14</sup>

While these sections focus on the procedural side of marriage, section 51-3 of the Marriage chapter details the substantive requirements of marriage, namely, who can and cannot marry.<sup>15</sup> Specifically, section 51-3 declares certain “types” of marriages void.<sup>16</sup> According to this section, marriages with (i) inappropriate kinship, (ii) inappropriate age, (iii) one party being impotent, (iv) one party lacking mental capacity to marry, or (v) one party lacking the ability to marry are void *ab initio*.<sup>17</sup> Section 51-3 will be discussed in further detail in Part III of this Comment.

In order to create a “valid and sufficient marriage”<sup>18</sup> contract, the parties to the marriage must: (1) be able and willing to contract and (2) fulfill the State’s statutory requirements.<sup>19</sup> Taken together, sections 51-1 and 51-6 detail three procedural requirements: (i) express consent; (ii) proper solemnization; and (iii) a marriage license.<sup>20</sup> Section 51-3 states the substantive requirements: (i) appropriate kinship; (ii) appropriate age; (iii) lack of impotence; (iv) mental capacity; and (v) ability to marry (i.e., absence of bigamy).<sup>21</sup> Now that the statutory requirements for marriage in North Carolina have been briefly identified, consider how they are applied in practice. Specifically, how have North Carolina courts defined the terms included in these statutes? How have courts handled violations of these statutes? Part II discusses the deficiencies related to section 51-1, and Part III analyzes the contradictions in section 51-3.

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12. For the proper form, see section 51-16 of the North Carolina General Statutes.

13. N.C. GEN. STAT. § 51-6.

14. *Id.* § 51-7.

15. *See id.* § 51-3.

16. *See id.*

17. *Id.*

18. *Id.* § 51-1.

19. *See State v. Lynch*, 272 S.E.2d 349, 353 (N.C. 1980).

20. *See* N.C. GEN. STAT. §§ 51-1, -6.

21. *Id.* § 51-3.

## II. DEFICIENCIES OF SECTION 51-1: THE “REQUISITES OF MARRIAGE”

Sections 51-1 and 51-6 require that parties to a marriage jump through certain hoops to marry in North Carolina. Currently, section 51-1 has at least three deficiencies. First, the statute, partially entitled “Requisites of marriage,” does not detail *all* procedural requirements; specifically, it fails to note the requirement of a marriage license. Second, it fails to highlight that noncompliance with the procedural requirements of marriage is *not* fatal to the creation of a valid and sufficient marriage. Finally, and even more troubling, section 51-1 does not state that, in some situations, noncompliance with procedural requirements will not be grounds for an annulment.

### A. Section 51-1’s Failure to Detail All “Requisites of Marriage”

One of the most glaring problems with section 51-1 lies in its name, “Requisites of marriage.”<sup>22</sup> After a close reading of the Marriage chapter, one understands that to create a valid North Carolina marriage, one must have consent, solemnization, and a marriage license.<sup>23</sup> However, this conclusion is reached by an inference that should not be required. Simply, while section 51-1 expressly requires consent and solemnization, the third requirement—a marriage license—is discovered by reading the prohibition outlined in section 51-6, five sections later. Section 51-6 states:

No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a [marriage] ceremony . . . until there is delivered to that person a license for marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant.<sup>24</sup>

Therefore, to adequately understand the requisites of marriage, the Marriage chapter’s reader must, first, continue reading beyond the statute entitled, “Requisites of marriage.” Then, the reader must infer from section 51-6, which lists a prohibition on third-party conduct, that the State requires parties to a marriage to obtain a marriage license.

While such statutory research and interpretation may seem like a simple, expected skill for a family law practitioner, it is not intuitive for lay persons lacking formal legal training. Given the importance of the institution of marriage, the governing legislation should be clear and simple. As foreshadowed by the opening quote of this Comment, it is a big

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22. *See id.* § 51-1.

23. *See id.* §§ 51-1, -6.

24. *Id.* § 51-6.

mistake for the parties to a marriage to believe that they control it; rather, the State of North Carolina defines and controls marriage. And, if the State sets out to do so, it needs to be done well and with clear instruction.<sup>25</sup> Part IV proposes an amendment to section 51-1 that would incorporate the marriage license requirement within the already listed requisites of marriage.

*B. Section 51-1's Silence on the True Meaning of Marriage "Requisites"*

As section 51-1 states, and the North Carolina Supreme Court has affirmed, "[t]o constitute a *valid* marriage in this State, the requirements [of section 51-1] *must* be met."<sup>26</sup> And, upon the application of either party to a marriage, the district court can declare a marriage void from the beginning if the marriage is: (1) "contracted contrary to the prohibitions" in chapter 51 of the North Carolina General Statutes; or (2) "declared void by said [c]hapter."<sup>27</sup> Arguably, the former element refers to sections 51-1, 51-3 and 51-6 while the latter refers to section 51-3 only. Sections 51-1 and 51-6 will be the focus of this subsection.

As outlined earlier, sections 51-1 and 51-6 list three requirements for North Carolina marriage: (i) express consent to marry; (ii) proper solemnization; and (iii) a marriage license. The Marriage chapter, which is used to guide family law practitioners and lay persons on their journeys of obtaining, defending, and even challenging marriage, does not state any exception to compliance. Actually, the opposite is stated: according to section 50-4, which is *not* within the Marriage chapter to begin with, a district court can declare a marriage void, upon application of either party to the marriage, if it fails to comply with these requirements.<sup>28</sup> Here, the statute effectively states that such a marriage is "voidable." Now, what does that mean?

Extensive research of case law interpretations of these sections reveals that a marriage in violation of procedural requirements will be valid until annulled.<sup>29</sup> Unlike a "void" marriage, which is "a nullity and may be

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25. This principle is the underlying purpose of this Comment. To avoid being redundant, it will be highlighted again in the Conclusion, but it should be kept in mind through this Comment's entirety.

26. *State v. Lynch*, 272 S.E.2d 349, 353 (N.C. 1980) (emphasis added).

27. N.C. GEN. STAT. § 50-4.

28. *See id.*

29. *See Pridgen v. Pridgen*, 166 S.E. 591, 593 (N.C. 1932); *Sawyer v. Slack*, 146 S.E. 864, 865 (N.C. 1929); *Fulton v. Vickery*, 326 S.E.2d 354, 358 (N.C. Ct. App. 1985).



impeached at any time,”<sup>30</sup> a “voidable” marriage is a *valid* marriage “for all civil purposes until annulled by a competent tribunal in a direct proceeding.”<sup>31</sup> Thus, section 50-4 indirectly states, and North Carolina courts have affirmed, that a marriage in violation of sections 51-1 and 51-6 is merely voidable and valid until annulled.<sup>32</sup>

Therefore, noncompliance with procedural requirements is not necessarily fatal to the creation of a valid and sufficient marriage, as section 51-1 would lead its readers to believe. And, marrying without a license—as required by section 51-6—is not fatal to such a marriage either. Noncompliance merely renders marriages voidable and, absent some direct action by either party to the marriage, the marriage is valid. The proposed amendment in Part IV of this Comment incorporates this necessary clarification.

### C. Refusing to Enforce the Procedural Requirements of Marriage

In addition to the deficiencies described above, section 51-1 fails to articulate that, in some cases, marriages that violate the procedural requirements of marriage will not be annulled; specifically, some marriages in violation of sections 51-1 and 51-6 are not even voidable!<sup>33</sup> So even assuming that some readers of the North Carolina General Statutes discover section 50-4 and its supporting case law and learn that a marriage in violation of section 51-1 is voidable rather than void, they still lack the full story because some North Carolina courts have refused to annul such marriages.<sup>34</sup> Specifically, our courts have stated that a marriage without a license, as required by section 51-6, is still “good, if valid in other respects.”<sup>35</sup> Section 51-1 should be amended to reflect this fact.

Adding to the confusion, in 2012, the North Carolina Supreme Court affirmed a trial court dismissal of an annulment action based on bigamy

30. *Pridgen*, 166 S.E. at 593.

31. *Id.*; *Ivery v. Ivery*, 129 S.E.2d 457, 461 (N.C. 1963).

32. *See Pridgen*, 166 S.E. at 593; *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358; *see also* N.C. GEN. STAT. § 50-4.

33. *See Sawyer*, 146 S.E. at 865 (refusing to annul a marriage because the parties failed to obtain the “special license” the State required at the time for persons under the age of sixteen).

34. *See, e.g., id.* (discussed in greater detail *infra*); *Mussa v. Palmer-Mussa*, 719 S.E.2d 192, 194 (N.C. Ct. App. 2011) (holding that a marriage lacking a license and proper solemnization is valid until annulled), *rev'd*, 731 S.E.2d 404 (N.C. 2012).

35. *Magget v. Roberts*, 16 S.E. 919, 920 (N.C. 1893); *see also Sawyer*, 146 S.E. at 865; *Wooley v. Bruton*, 114 S.E. 628, 629 (N.C. 1922); *State v. Parker*, 11 S.E. 517, 518 (N.C. 1890); *State v. Robbins*, 28 N.C. 23, 25 (1845).

when the plaintiff failed to establish that the defendant's prior marriage satisfied sections 51-1 and 51-6.<sup>36</sup> Essentially, compliance with procedural requirements is necessary to prove a "valid marriage" in this limited situation. How can the lack of a license result in a "good" marriage in one case, but result in an "invalid" marriage in another?

### 1. North Carolina's Policy of Honoring "Marriage"

When faced with marriages that fail to meet the requirements of sections 51-1, 51-6, or both, many North Carolina courts have nevertheless presumed that a "valid" marriage resulted.<sup>37</sup> According to the North Carolina Supreme Court, "[u]pon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage."<sup>38</sup> To overcome this presumption, the party challenging the marriage must prove, by the greater weight of the evidence, that there are grounds to void or annul the marriage.<sup>39</sup> How can this be reconciled with the statutory procedural requirements of marriage and the district court's power, pursuant to section 50-4, to declare marriages not in compliance void from the beginning? Essentially, North Carolina embraces a public policy in favor of "marriage" and the "marital family."<sup>40</sup> When possible, North Carolina courts uphold marriages, regardless of their noncompliance with the statutory requirements.<sup>41</sup> A 1929 North Carolina Supreme Court case, *Sawyer v. Slack*, illustrates this policy in action.

In *Sawyer*, an adult male and a female under sixteen, but over fourteen years of age, were married.<sup>42</sup> Importantly, while the parties did apply for and receive a marriage license, they did not receive the "special license"

36. See *Mussa v. Palmer-Mussa*, 731 S.E.2d 404, 410–11 (N.C. 2012) (holding that plaintiff's subsequent marriage to defendant carried with it a presumption of validity, rather than defendant's prior marriage to a third party; thus, since plaintiff could not sufficiently prove defendant's prior marriage satisfied the solemnization requirement, he could not prove that it was a "valid" marriage).

37. See *Pridgen*, 166 S.E. at 593; *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358; see also *Mussa*, 719 S.E.2d at 194.

38. *Kearney v. Thomas*, 33 S.E.2d 871, 876 (N.C. 1945).

39. *Pickard v. Pickard*, 625 S.E.2d 869, 872 (N.C. Ct. App. 2006).

40. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (holding that in light of our society's deep-rooted traditions of protecting the "marital family," a third-party could not inject itself into the marital unit by questioning the paternity of a child born to a married, cohabiting couple).

41. *Sawyer*, 146 S.E. at 865 (upholding a marriage lacking a sufficient marriage license); *Mussa*, 719 S.E.2d at 194 (holding that a marriage lacking a license and proper solemnization is valid until annulled), *rev'd*, 731 S.E.2d 404 (N.C. 2012).

42. *Sawyer*, 146 S.E. at 864.

required by the statute at that time.<sup>43</sup> The female subsequently filed a complaint to annul the marriage due to the license's deficiency.<sup>44</sup> The defendant then filed a demurrer to the complaint, and the trial court dismissed the action.<sup>45</sup>

On appeal, the North Carolina Supreme Court stated that courts are: [L]oathe to declare a marriage duly solemnized in accordance with statutory requirements, and therefore valid, at least *prima facie*, null and void, because the parties thereto . . . were not expressly authorized by statute to marry, at the time the marriage was solemnized, but could have lawfully married at a subsequent date.<sup>46</sup>

And, to avoid harsh consequences, the North Carolina Supreme Court held that the "marriage of [a female] over 14 years of age, although solemnized without a valid special license . . . is valid. Such marriage cannot be declared voidable . . . solely because such female was under the age of 16 at the date of the marriage."<sup>47</sup> Specifically, where a license has been issued that contravenes statutory requirements, a party "cannot maintain an action to have the marriage which has been *duly* solemnized on the *faith* of such license declared null and void."<sup>48</sup>

It is crucial to note that in this case, the parties to the marriage had the intent to marry and attempted to satisfactorily comply with the marriage license requirement.<sup>49</sup> Essentially, they did obtain a marriage license and substantially relied on its validity.<sup>50</sup> Unfortunately though, the license had a defect due to the fact that persons under sixteen years of age needed a "special license."<sup>51</sup> In this case, should the marriage be declared void by the court? Did the North Carolina Supreme Court rightly refuse to annul the marriage between an adult male and an underage female?

Clearly, the court relies on North Carolina's strong public policy in favor of marriage to save this particular marriage, despite its procedural defect. This outcome seems just in a situation like this one, where the parties intended to be validly married and attempted to comply with all of the State's requirements. However, what if the parties had not intended to

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 865.

47. *Id.*

48. *Id.* at 866 (emphasis added).

49. *See id.* at 864.

50. *See id.* at 866.

51. *See id.* at 864.

comply with North Carolina's requirements for marriage? Should their marriage be recognized by the State? Should their marriage be honored in this situation? In 2012, the North Carolina Supreme Court faced such a couple.<sup>52</sup>

## 2. *The Mussa Problem: Procedural Noncompliance in the Case of Two Marriages*

In *Mussa v. Palmer-Mussa*, the plaintiff, Mr. Mussa, sought to annul his twelve-year marriage to the defendant, Ms. Palmer-Mussa, pursuant to section 51-3 of the Marriage chapter.<sup>53</sup> Specifically, Mr. Mussa sought to annul his marriage due to his wife's alleged bigamy.<sup>54</sup> Ultimately, Mr. Mussa's claim proved unsuccessful, and his action for annulment failed.<sup>55</sup> Before determining whether the North Carolina Supreme Court correctly decided Mr. Mussa's case, we must first dive into the tangled web of facts before the court.

Mr. Mussa and Ms. Palmer-Mussa were married on November 27, 1997 in an Islamic ceremony in Raleigh, North Carolina.<sup>56</sup> The couple consented to take each other as husband and wife before an imam.<sup>57</sup> This individual was authorized to solemnize their marriage by both the State of North Carolina and the tenets of Islam.<sup>58</sup> Prior to their ceremony, Mr. Mussa and Ms. Palmer-Mussa obtained a marriage license and delivered it to the imam.<sup>59</sup> Thereafter, Mr. Mussa and Ms. Palmer-Mussa held themselves out as husband and wife.<sup>60</sup> As proof of this fact, the couple placed each other's names on insurance policies and real property purchases, filed joint tax returns, and had three children together.<sup>61</sup>

Based on the facts in the record, it would appear that Mr. Mussa and Ms. Palmer-Mussa complied with all the state's procedural requirements for marriage. However, as Mr. Mussa argued twelve years later, Ms. Palmer-Mussa was *technically* still married to her first husband, Mr.

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52. See *Mussa v. Palmer-Mussa*, 731 S.E.2d 404, 406 (N.C. 2012).

53. *Id.* at 405.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Braswell, when she exchanged her sacred vows of matrimony with Mr. Mussa.<sup>62</sup> Or was she?

After twelve years of marriage, Ms. Palmer-Mussa filed a complaint for divorce from bed and board against Mr. Mussa.<sup>63</sup> Mr. Mussa answered and counterclaimed for a divorce from bed and board plus child custody, child support, and equitable distribution.<sup>64</sup> Ultimately, Ms. Palmer-Mussa also filed for child custody, child support, postseparation support, alimony, and equitable distribution.<sup>65</sup> Importantly, in these pleadings, the parties did not dispute the validity of their marriage.<sup>66</sup> In September 2009, a Raleigh trial court awarded Ms. Palmer-Mussa \$212.24 per month in child support and \$250.00 per month in postseparation support, including arrearages on both obligations.<sup>67</sup> Three months later, Mr. Mussa challenged the validity of his marriage to Ms. Palmer-Mussa, and effectively his spousal support obligation.<sup>68</sup>

At this point, Mr. Mussa filed an annulment action to have his marriage to Ms. Palmer-Mussa declared void.<sup>69</sup> Mr. Mussa argued that Ms. Palmer-Mussa violated section 51-3 when she married him while her marriage to Mr. Braswell continued.<sup>70</sup> In other words, Mr. Mussa argued that Ms. Palmer-Mussa was not “eligible” to marry when she met him.<sup>71</sup> Since section 51-3 states that a bigamous marriage is void, Mr. Mussa rationally presented this argument to the court. The district court, however, did not agree with Mr. Mussa, and after a bench trial on the merits, found that Mr. Mussa could not produce sufficient evidence of Ms. Palmer-Mussa’s prior, continuing marriage to Mr. Braswell.<sup>72</sup> Therefore, the district court dismissed Mr. Mussa’s annulment action.<sup>73</sup> So, what was missing? Essentially, Mr. Mussa could not prove that Ms. Palmer-Mussa’s first marriage to Braswell complied with sections 51-1 and 51-6.<sup>74</sup>

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62. *See id.* at 406.

63. *Id.* at 405.

64. *Id.*

65. *Id.*

66. *Id.* at 405–06.

67. *Id.* at 405.

68. *Id.* at 406.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 405.

73. *Id.*

74. *Id.* at 407–08.

Ms. Palmer-Mussa and Mr. Braswell “married” in early 1997, prior to her marriage to Mr. Mussa.<sup>75</sup> Ms. Palmer-Mussa and Mr. Braswell consented to being husband and wife in an Islamic ceremony in Raleigh, North Carolina.<sup>76</sup> Their friend and local construction worker, Kareem, conducted the ceremony.<sup>77</sup> While the parties did intend to be married, they did *not* intend to comply with North Carolina’s procedural requirements for marriage, but rather just the tenets of Islam.<sup>78</sup> Thus, Ms. Palmer-Mussa and Mr. Braswell did not obtain a marriage license or request that an authorized minister or magistrate conduct their marriage ceremony.<sup>79</sup>

After two months of living together, in an unconsummated marriage, Ms. Palmer-Mussa and Mr. Braswell took the necessary steps required by their faith to dissolve their union.<sup>80</sup> However, they did not annul or in any way dissolve their marriage according to North Carolina law.<sup>81</sup> Ms. Palmer-Mussa then, that same year, married Mr. Mussa.<sup>82</sup>

Armed with the information about his wife’s prior “marriage” to Mr. Braswell, Mr. Mussa sought to annul his marriage to Ms. Palmer-Mussa on the grounds that it was bigamous.<sup>83</sup> As case law has determined (which will be addressed in the next section of this Comment), the only void marriage in North Carolina is a bigamous one.<sup>84</sup> All other marriages are merely voidable; in other words, all other marriages are valid until annulled.<sup>85</sup> Given North Carolina’s case law, it makes sense that Mr. Mussa argued that his marriage to Ms. Palmer-Mussa was void. Prior to the ceremonial marriage of Mr. Mussa and Ms. Palmer-Mussa, Ms. Palmer-Mussa participated in a wedding ceremony that, though flawed, was never dissolved.<sup>86</sup> The district court disagreed and dismissed Mr. Mussa’s

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75. *Id.* at 406.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 406–07.

80. *Id.* at 406.

81. *Id.*

82. *Id.* at 405.

83. *Id.*

84. *Id.* at 408; *Pridgen v. Pridgen*, 166 S.E. 591, 593 (N.C. 1932); *Sawyer v. Slack*, 146 S.E. 864, 865 (N.C. 1929); *Fulton v. Vickery*, 326 S.E.2d 354, 358 (N.C. Ct. App. 1985).

85. *Mussa*, 731 S.E.2d at 408; *Pridgen*, 166 S.E. at 593; *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358.

86. *Mussa*, 731 S.E.2d at 406.

annulment action after finding that he could not provide sufficient evidence of the prior marriage.<sup>87</sup>

Specifically, Mr. Mussa could not produce evidence that Ms. Palmer-Mussa and Mr. Braswell complied with sections 51-1 and 51-6.<sup>88</sup> Since neither party to the first marriage obtained a marriage license, and the ceremony was not conducted by an authorized minister or magistrate, the district court could not find that defendant “*married* Mr. Braswell as contemplated by the statute.”<sup>89</sup> With these procedural failings, the district court could not find that Mr. Mussa’s marriage to Ms. Palmer-Mussa was void as a result of Ms. Palmer-Mussa’s alleged bigamy.<sup>90</sup>

On appeal, the North Carolina Court of Appeals adopted Mr. Mussa’s reasoning described above, namely that the dispositive issue was whether Ms. Palmer-Mussa’s marriage to Mr. Braswell was void or voidable.<sup>91</sup> Relying on well-settled case law (to be discussed in Part III of this Comment) that the only void marriage is a bigamous one,<sup>92</sup> the Court of Appeals held that Ms. Palmer-Mussa’s marriage to Mr. Braswell was merely voidable and remained valid until annulled.<sup>93</sup> The court determined that since no annulment occurred, Ms. Palmer-Mussa was still married to Mr. Braswell when she married Mr. Mussa; therefore, her second marriage was bigamous and void.<sup>94</sup>

Judge Bryant dissented, arguing that the second marriage, with proof of a ceremony, is presumed valid and thus cannot be successfully challenged absent direct evidence.<sup>95</sup> In this case, the second marriage was duly solemnized with a license.<sup>96</sup> It should only be challenged, Judge Bryant argued, by the plaintiff’s direct evidence, not a presumption.<sup>97</sup> Plaintiff’s direct evidence failed to establish the existence of a valid prior

87. *Id.* at 405.

88. *Id.* at 407.

89. *Id.* at 410 (emphasis added).

90. *Id.* at 411.

91. *Mussa v. Palmer-Mussa*, 719 S.E.2d 192, 193 (N.C. Ct. App. 2011), *rev’d*, 731 S.E.2d 404 (N.C. 2012).

92. *Id.* at 194 (citing *Watters v. Watters*, 84 S.E. 703, 704 (N.C. 1915); *Fulton v. Vickery*, 326 S.E.2d 354, 358 (N.C. Ct. App. 1985)).

93. *Id.*

94. *Id.*

95. *Id.* at 195.

96. *Id.* at 196.

97. *Id.*

marriage as a result of the first ceremony.<sup>98</sup> Therefore, under this theory, the claim that the second marriage was void could not prevail.<sup>99</sup>

Judge Bryant's dissent ultimately led to the North Carolina Supreme Court's review.<sup>100</sup> The court agreed with the district court in its holding that, at least in the context of an annulment action based on bigamy, the inability to satisfy the license and solemnization requirements effectively means the inability to prove "marriage."<sup>101</sup> Essentially, the supreme court ultimately honored and presumed the validity of the *second* marriage.<sup>102</sup> In contrast, the North Carolina Court of Appeals honored and presumed the validity of the *first* marriage, despite its procedural defects.<sup>103</sup> By honoring the second marriage, the supreme court decided that "working backward" created the best result for these parties.<sup>104</sup> How did the court get there?

In this case, the supreme court faced two marriages. The first marriage, between Ms. Palmer-Mussa and Mr. Braswell, lasted less than a year and was never consummated.<sup>105</sup> And importantly, the parties had *no intent* to comply with sections 51-1 and 51-6 of the State's requirements of marriage.<sup>106</sup> The second marriage, between Mr. Mussa and Ms. Palmer-Mussa, lasted for twelve years and produced three children.<sup>107</sup> Mr. Mussa and Ms. Palmer-Mussa intended to and did comply with all the procedural requirements for marriage and even admitted to their marriage in their divorce pleadings.<sup>108</sup> When you compare the two marriages, it makes perfect sense to honor the second marriage rather than the first.

Contrast these facts with the situation in *Sawyer v. Slack*.<sup>109</sup> There, the supreme court only had to determine the validity of one marriage, a marriage that did not technically comply with the license requirement but was, however, *intended* to comply.<sup>110</sup> And there, the court honored that marriage.<sup>111</sup> When comparing *Sawyer* and *Mussa*, it appears that the North

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98. *Id.*

99. *Id.*

100. *See Mussa v. Palmer-Mussa*, 731 S.E.2d 404 (N.C. 2012).

101. *Id.* at 410–11.

102. *See id.*

103. *See Mussa*, 719 S.E.2d at 194.

104. *See Mussa*, 731 S.E.2d at 410–11.

105. *Id.* at 406.

106. *Id.*

107. *Id.* at 405.

108. *Id.* at 405–06.

109. *See Sawyer v. Slack*, 146 S.E. 864 (N.C. 1929).

110. *Id.* at 864.

111. *Id.* at 865.



Carolina courts will uphold marriages when doing so will further the strong public policy for honoring marriage. This Author would argue that such policy is furthered by honoring a marriage in which one or both parties *intend* to comply with the procedural requirements of marriage but somehow fail to do so. The public policy is not furthered, however, and marriages should not be upheld, when *both parties* to the marriage, like Ms. Palmer-Mussa and Mr. Braswell, blatantly and *intentionally* fail to comply with the State's procedural requirements for marriage.

### 3. *Party Intent Should Control the Voidability of Marriages Entered Into in Violation of the Procedural Requirements of Marriage*

The North Carolina Supreme Court decided *Mussa* and *Sawyer* correctly. While a marriage in violation of sections 51-1 and 51-6 is theoretically voidable, in some situations, a party's ability to rely on procedural defects should not be entertained. The court in *Mussa* addressed the issue by working backward and analyzing the validity of the latter marriage first.<sup>112</sup> Since the second marriage met all procedural requirements, the plaintiff, Mr. Mussa, carried the burden of proving its invalidity.<sup>113</sup> Mr. Mussa attempted—unsuccessfully—to meet his burden by alleging that his marriage to Ms. Palmer-Mussa was bigamous.<sup>114</sup> His claim did not prevail because he could not prove that Ms. Palmer-Mussa was “married” to Mr. Braswell, specifically because he failed to show that the procedural requirements of marriage were met.<sup>115</sup> In *Sawyer*, the court seemed to look to party intent to decide whether to uphold a marriage with procedural defects.<sup>116</sup> Though the parties did not comply with the “special license” requirement, they did *intend* to do so and relied on their defective license.<sup>117</sup> In this situation, the marriage should be honored despite its defects. Why should this be so?

As stated in Part I, a North Carolina marriage contract<sup>118</sup> has three parties—the husband, the wife, and the State of North Carolina.<sup>119</sup> If a “husband” and “wife” intentionally refuse to invite the State into their

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112. *See Mussa*, 731 S.E.2d at 410–11.

113. *Id.*

114. *Id.* at 405.

115. *Id.* at 410–11.

116. *See Sawyer*, 146 S.E. at 866.

117. *Id.*

118. *See State v. Setzer*, 37 S.E.2d 513, 515 (N.C. 1946).

119. *State v. Lynch*, 272 S.E.2d 349, 353 (N.C. 1980) (citing *Ritchie v. White*, 35 S.E.2d 414, 415 (N.C. 1945)).

marriage contract, the State should not be required to offer the benefits and enforce the consequences of a “marriage.” To deter such blatant disregard of North Carolina’s requirements, the State should refuse to uphold procedurally defective marriages that have such defects due to the intent of *both parties*. If parties can intentionally violate the procedural requirements of marriage and nevertheless continue to enjoy the benefits of a State-recognized marriage, then North Carolina may as well allow common law marriage,<sup>120</sup> which it currently does not.<sup>121</sup>

Importantly, the intent of both parties to circumvent marriage requirements is crucial to the deterrent effect of this thesis. If even one party is unaware of the marriage’s noncompliance with the State requirements, then a state’s refusal to honor such a marriage has no deterrent effect, and doing so may be detrimental to the innocent party and produce harsh consequences.

Again, while the *Mussa* and *Sawyer* courts reached the “right” result, without a doubt, the parties to these actions never predicted the confusion their cases would ignite. If some marriages are made voidable due to procedural noncompliance, the resultant “voidable” status should be clearly delineated in section 51-1. Again, the consequences and benefits of marriage are far too great for the validity rules to be unclear to readers who rely on the statutes for guidance. Part IV of this Comment proposes a statutory amendment to section 51-1 to correct the problems addressed above. Now, consider the deficiencies in section 51-3, which sets forth the substantive requirements of marriage.

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120. To be sure, a minority of states do recognize common law marriage. As an illustration, Iowa falls in this minority if the following conditions apply: (1) intent by both parties to be married; (2) agreement between the parties to marry; (3) continuous cohabitation of the parties; and (4) a “holding out” of marriage publicly by the parties. *In re Marriage of Winegard*, 257 N.W.2d 609, 615–16 (Iowa 1977); *Snyder-Murphy v. City of Cedar Rapids*, No. 4-665/03-1925, 2004 Iowa App. LEXIS 1253, at \*5 (Iowa Ct. App. Nov. 15, 2004). Clearly then, statutory procedural requirements are irrelevant to common law marriage. *See id.* If there is no penalty for both parties disregarding North Carolina’s requirements for marriage, and parties can simply seek marriage benefits by agreeing to be married, cohabitating, and “holding out” as a couple, then the State may as well adopt common law marriage similar to that of the minority states.

121. *State v. Alford*, 259 S.E.2d 242, 247 (N.C. 1979). However, it is important to note that while North Carolina itself does not recognize common law marriage, the State will recognize out-of-state common law marriages where the acts which allegedly created the union occurred in a state where common law marriage is valid. *Id.* (citing *Harris v. Harris*, 126 S.E.2d 83, 85 (N.C. 1962)); *see also* *Garrett v. Burris*, 735 S.E.2d 414, 416 (N.C. Ct. App. 2012).

### III. SECTION 51-3: CONFUSING LANGUAGE AND SEVERE CONTRADICTIONS

Currently, section 51-3 of the Marriage chapter outlines the substantive requirements of marriage.<sup>122</sup> This statute is also informally referred to and used as the “annulment statute” by family law practitioners. As written, this statute possesses at least three problems. First, it is extremely difficult to read and apply. Second, it has been *severely* contradicted by the supporting case law. And third, it does not expressly identify itself for its intended and appropriate use. The statute currently states the law as follows:

All marriages between any two persons nearer of kin than first cousins, or between double first cousins, or between a male person under 16 years of age and any female, or between a female person under 16 years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or between persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void. No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy. No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation.<sup>123</sup>

First, the wording and structure of this statute makes its content very difficult for readers to digest. A simple solution would be to break up the language into more comprehensible pieces. A great example of such a change is the recent revision to section 50B-2(c) of the North Carolina General Statutes.<sup>124</sup> This section details procedural steps and protections of *ex parte* orders in North Carolina domestic violence actions.<sup>125</sup> Like the current section 51-3, the various components of the statute were all compressed into one long, incomprehensible paragraph.<sup>126</sup> The revision

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122. See N.C. GEN. STAT. § 51-3 (2011).

123. *Id.*

124. See 2012 N.C. Sess. Laws 20.

125. See *id.*

126. See N.C. GEN. STAT. § 50B-2(c) (2011).

breaks up each component, giving each section its own numbered paragraph.<sup>127</sup> Incorporating this type of revision into section 51-3 would be a very simple change with invaluable improvements to both its readability and ease of use. A proposed revision will be detailed in Part V of this Comment.

Second—and arguably the grandest problem—this statute has been grossly contradicted by its interpretive case law. The statute clearly states that several marriages in this State will be declared void *ab initio*, in other words, void from their start.<sup>128</sup> According to this section, the following marriages are void: (1) those between persons nearer of kin than first cousins or between double first cousins;<sup>129</sup> (2) those where one or both parties are under the age of sixteen; (3) those where one or both parties is ineligible to marry (i.e., presence of bigamy); (4) those where one or both parties is impotent; and (5) those where one or both parties lacks mental capacity to marry.<sup>130</sup>

Regardless of the expressly stated severe consequences of entering into these types of marriages, North Carolina courts have repeatedly held and affirmed that the *only* void marriage in this State is a bigamous one.<sup>131</sup> Any and all other marriages are merely voidable.<sup>132</sup> Therefore, a marriage between a brother and sister, or double first cousins, is not “void” as the annulment statute states. Rather, it is merely “voidable” and valid until annulled.<sup>133</sup> This fact is a gross contradiction of the statute.

Why does this contradiction occur? One could argue that the same public policy in favor of marriage guides the courts’ interpretations of this statute. If parties intend to marry and attempt to fulfill all statutory requirements, save section 51-3’s substantive requirements, the State desperately wants to honor the union. The only union that will not be

127. See 2012 N.C. Sess. Laws 20.

128. N.C. GEN. STAT. § 51-3.

129. A set of double first cousins arises when two siblings from one family marry two siblings from another family. The resulting children of the two unions are “double first cousins.” For example, Trevor and Brandon are brothers. Erin and Olivia are sisters. If Trevor marries Erin, and Brandon marries Olivia, the children of each marriage would be double first cousins. According to section 51-3, a marriage between Trevor’s child, Brad, and Brandon’s child, Sarah, would be void *ab initio* for inappropriate kinship. See *id.*

130. *Id.*

131. *Mussa v. Palmer-Mussa*, 731 S.E.2d 404, 408 (N.C. 2012); *Fulton v. Vickery*, 326 S.E.2d 354, 358 (N.C. Ct. App. 1985).

132. *Id.*

133. See *Pridgen v. Pridgen*, 166 S.E. 591, 593 (N.C. 1932); *Sawyer v. Slack*, 146 S.E. 864, 865 (N.C. 1929); *Fulton*, 326 S.E.2d at 358.

honored is that constituting a bigamous marriage. But whatever its source, a contradiction is a contradiction.

North Carolina courts should be applauded for attempting to uphold marriages entered into in good faith; however, there still needs to be clarification in what is ultimately required to marry. While section 51-3 says that a marriage between double first cousins is void from the start,<sup>134</sup> North Carolina courts hold otherwise.<sup>135</sup> This contradiction needs to be corrected. If the State of North Carolina, as guided by its courts, seeks to void only bigamous marriages, then the General Assembly needs to clarify the substantive requirements of marriage. And, at a minimum, the General Assembly must rewrite this crucially important statute to correctly articulate the state of the law in North Carolina. Part V proposes an amendment to section 51-3 that addresses this problem.

Finally, section 51-3 does not expressly identify its appropriate purpose. The remedy for a party seeking to challenge the validity of a voidable marriage is to file a direct action for annulment.<sup>136</sup> North Carolina has no statutory law on how to actually obtain an annulment; rather, North Carolina case law provides the framework.<sup>137</sup> And that guidance extends to the following: "An action to annul a marriage for statutory reasons is in the nature of an action for divorce."<sup>138</sup>

While divorce procedure theoretically provides the technical steps for an annulment, it does not provide the grounds for an annulment; rather, section 51-3 does that. Since North Carolina courts have determined that section 51-3 declares certain marriages voidable,<sup>139</sup> and the remedy for a voidable marriage is an annulment,<sup>140</sup> this is the section that practitioners turn to in drafting their clients' annulment actions.<sup>141</sup> With its current title, "Void versus voidable marriages,"<sup>142</sup> its appropriate use is definitely not intuitive. When you couple this with its contradictory content, it is relatively unworkable. To correct this confusion, as well as the other two problems noted previously in this Subpart, this statute needs to be

134. N.C. GEN. STAT. § 51-3.

135. *Mussa*, 731 S.E.2d at 408 (holding that the only void marriage is a bigamous one); *Fulton*, 326 S.E.2d at 358.

136. *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358.

137. *See Pridgen*, 166 S.E. at 593.

138. *Sawyer*, 146 S.E. at 865.

139. *Id.*; *see also Mussa*, 731 S.E.2d at 408; *Fulton*, 326 S.E.2d at 358.

140. *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358.

141. *See Mussa*, 731 S.E.2d at 405.

142. N.C. GEN. STAT. § 51-3 (2011).

redrafted. The revision suggested in Part V incorporates the necessary changes.

#### IV. STATUTORY REFORM FOR SECTION 51-1

As stated in Part II of this Comment, section 51-1, entitled “Requisites of marriage,” does not thoroughly articulate North Carolina’s requisites for marriage. Specifically, the statute does not state that a North Carolina marriage requires a valid, signed marriage license.<sup>143</sup> Second, the statute does not state that noncompliance with one of the “requisites” of marriage will not be fatal to a marriage; rather, noncompliance makes such a marriage merely voidable.<sup>144</sup> And finally, the statute definitely does not explain the reality that, in some situations, the court will not even annul a marriage that is allegedly voidable due to noncompliance with the statute.<sup>145</sup>

As articulated above, correcting the first two problems is relatively simple. As an example, the State of California has a statute similar to North Carolina’s section 51-1.<sup>146</sup> This section is entitled “Procedural requirements; Effect of noncompliance,”<sup>147</sup> and it does just that. The section first details the requisites of marriage stating that such “shall be *licensed, solemnized, and authenticated*, and the authenticated marriage license shall be returned to the county recorder of the county where the marriage license was issued . . . .”<sup>148</sup> California, like North Carolina, requires a marriage license; but in contrast to North Carolina, California’s statute on the requirements of marriage actually states that to be so.

Next, while this section in the California Family Code does require a marriage license, solemnization, and authentication, it further states the “effect of noncompliance,” as its title suggests. The statute reads: “Noncompliance with this part by a nonparty to the marriage does not invalidate the marriage.”<sup>149</sup> Clearly then, not all violations of this section will render a California marriage invalid.<sup>150</sup> North Carolina needs to adopt a statute more in line with that of California. First, it should fully list the

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143. See N.C. GEN. STAT. § 51-1.

144. See *id.* § 50-4; *Pridgen*, 166 S.E. at 593; *Sawyer*, 146 S.E. at 865; *Fulton*, 326 S.E.2d at 358.

145. See *Sawyer*, 146 S.E. at 866.

146. See CAL. FAM. CODE § 306 (Deering 2012).

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

150. See *id.*

requisites of marriage, as its title suggests. And second, it needs to state the effect of noncompliance within the statute.

The final deficiency of section 51-1 is that it provides no indication that some marriages will be upheld notwithstanding noncompliance. Another simple statutory amendment is required. Specifically, the statute could incorporate language as to the State's strong public policy in favor of upholding marriages contracted with good faith intent to comply with the procedural requirements thereof; and where marriages are contracted without such good faith intent on the part of both parties to the marriage, the State will not honor the union. The following is a proposed statutory amendment that addresses all three deficiencies:

**§ 51-1. Procedural requirements of marriage; effect of noncompliance.**

(1) A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of other; either:

(a) In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate who consequently declares the persons are husband and wife; or

(b) In accordance with any mode of solemnization recognized by any religious denomination or federally or State recognized Indian Nation or Tribe.<sup>151</sup>

(2) Prior to a marriage ceremony that complies with either (1)(a) or (b) of this section, the persons to the marriage must obtain and deliver a marriage license, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant, to the authorized person conducting the ceremony. There must be two witnesses to the marriage ceremony.<sup>152</sup>

(3) Noncompliance with one or more requirements of this section does not invalidate a marriage unless both persons to the marriage intentionally disregard such requirements.<sup>153</sup>

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151. All of the preceding statutory language in this proposed amendment is currently included in section 51-1.

152. This language merely incorporates other implicit procedural requirements of marriage articulated elsewhere in the Marriage chapter, namely, a marriage license and two witnesses to the ceremony.

153. Finally, this language implicitly incorporates the public policy of North Carolina to honor marriage when possible. Specifically, it highlights the thesis that when both parties to a marriage intentionally circumvent procedural requirements, their marriage should not be upheld. This addition prevents North Carolina from effectively validating common law marriage. *See supra* notes 120 and 121.

## V. STATUTORY REFORM FOR SECTION 51-3

As discussed in Part III of this Comment, section 51-3 has at least three severe problems that require a prompt amendment. First, this statutory law is extremely difficult to read and apply. Second, it has been *grossly* contradicted by supporting case law. And third, it does not expressly identify itself for its intended and appropriate use. To correct the first two problems, a statutory amendment needs to better organize the section's content and correctly state the law on the validity of different types of marriages; specifically, the statute needs to be broken down into smaller, digestible pieces. Further, language needs to be both added and removed to accurately state that the only void marriage in North Carolina is a bigamous one. The proposed amendment *infra* incorporates these changes.

Next, section 51-3 is effectively the “annulment statute,” but it does not identify itself as such. Its guidance on effecting an annulment is even more inadequate. Other states have specific statutes which address not only annulment grounds but also the annulment procedure.<sup>154</sup> North Carolina should amend its section 51-3 to accurately reflect its purpose. Further, the State legislature should enact additional statutes to address annulment procedure in North Carolina. Before detailing the proposed amendment, let's look to how other states have organized their annulment statutory provisions.

*A. Statutory Law on Annulments and Void/Voidable Marriages in Other States*

To craft statutory provisions that more adequately articulate the procedure for annulment in North Carolina, our legislature should consider employing methods used by a few other states. This Comment looks to three states: Virginia, Connecticut, and California. These three states address annulment procedure and the voidability of certain marriages in differing ways. They will be discussed, in turn.

In Virginia, the state's code has both a statute detailing a “[s]uit to annul marriage”<sup>155</sup> and a “[s]uit to affirm marriage.”<sup>156</sup> As to the former

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154. See, e.g., CAL. FAM. CODE §§ 2000, 2250; CONN. GEN. STAT. § 46b-45 (2012); VA. CODE ANN. §§ 20-89.1, -90, -96, -97, -99, -99.2 (2012).

155. See VA. CODE ANN. § 20-89.1.

156. See *id.* § 20-90. While North Carolina would greatly benefit from a statutory provision on how to institute a “suit to affirm marriage,” this topic goes beyond the scope of this Comment. However, this Virginia statute is a great provision to highlight for future thought.



action, section 20-89.1 of the Virginia Code states the following: “When a marriage is alleged to be void or voidable for any of the causes mentioned in sections 20-13, 20-38.1, 20-45.1 or by virtue of fraud or duress, either party may institute a suit for annulling the same; and upon proof of the nullity of marriage, it shall be decreed void by a decree of annulment.”<sup>157</sup> Thus, Virginia’s annulment statute articulates a party’s ability to file for an annulment by cross-referencing to statutes defining certain marriages as void or voidable.<sup>158</sup> Section 20-13 lists Virginia’s procedural requirements of marriage: license and solemnization.<sup>159</sup> While section 20-38.1 details which marriages are prohibited in Virginia,<sup>160</sup> section 20-45.1 details the effect of entering into such marriages: certain marriages are void while others are voidable.<sup>161</sup> Finally, the Virginia Code has numerous statutes which detail the specific procedure to effect a valid annulment.<sup>162</sup>

In Connecticut, the state’s statutory provisions for annulment are also both more in depth and more clearly articulated than in North Carolina. Section 46b-40 of the Connecticut General Statutes, entitled “Grounds for dissolution of marriage; legal separation; annulment,” outlines the methods for dissolving a union.<sup>163</sup> In its opening paragraph, the section states: “A marriage is dissolved only by (1) the death of one of the parties or (2) a decree of annulment or dissolution of the marriage by a court of competent jurisdiction.”<sup>164</sup> The next paragraph within that section states: “An annulment shall be granted if the marriage is void or voidable under the laws of this state or of the state in which the marriage was performed.”<sup>165</sup> Other statutory sections in Connecticut’s code detail which marriages are prohibited and thus worthy of an annulment decree rather than a simple

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157. *Id.* § 20-89.1.

158. Please note that whether or not the foreign statutes referred to in this Part have been contradicted as to void versus voidability is also beyond the scope of this Comment. These statutes are not referenced due to the validity of their content; rather, they are utilized to illustrate potential organizational methods for a newly crafted section 51-3.

159. *See id.* § 20-13.

160. *See id.* § 20-38.1.

161. *See id.* § 20-45.1.

162. *See id.* §§ 89.1, 90, 96, 97, 99, 99.2. These statutes detail information on service, jurisdiction, residential requirements, trial procedure, and costs of annulment actions. *See id.*

163. CONN. GEN. STAT. § 46b-40 (2012).

164. *Id.* § 46b-40(a).

165. *Id.* § 46b-40(b).

divorce.<sup>166</sup> And, like Virginia, Connecticut has procedural statutes that outline how to properly effect an annulment.<sup>167</sup>

Finally, in California, section 310 of the state's Family Code details the three exclusive ways to dissolve a marriage: (1) death of one of the parties; (2) a judgment of divorce; and (3) a judgment of annulment.<sup>168</sup> Like Virginia, California has a section that details how to affirm the validity of a marriage<sup>169</sup> and a section on how to bring an annulment action.<sup>170</sup> California's annulment statute states that an action to nullify a marriage can be brought if the marriage is void or voidable.<sup>171</sup> Sections 2200 and 2201 describe marriages that will be void in the state: incestuous marriages and bigamous marriages, respectively.<sup>172</sup> And finally, section 2210 details the "causes for" annulment in stating, "[a] marriage is voidable and may be adjudged a nullity if any of the following conditions existed at the time of the marriage . . . ."<sup>173</sup>

Ultimately, North Carolina should adopt the various methods used by these three states to better articulate the State's grounds and procedures for obtaining an annulment. The following proposal is an amendment to section 51-3 which incorporates several pieces from the above state codes:

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166. *See, e.g., id.* § 46b-21 (marriages with inappropriate kinship void); *id.* § 46b-22 (marriages with inappropriate solemnization void); *id.* § 46b-24 (license and solemnization requirements); *id.* § 46b-30 (marriages with inappropriate age); *id.* § 46b-48 (annulment based on crimes against chastity).

167. *See, e.g., id.* § 46b-45 (detailing the proper methods of service and filing in an annulment action).

168. CAL. FAM. CODE § 310 (Deering 2012).

169. *See id.* § 309 ("If either party to a marriage denies the marriage, or refuses to join in a declaration of the marriage, the other party may proceed, by action pursuant to Section 103450 of the Health and Safety Code, to have the validity of the marriage determined and declared.").

170. *Id.* § 2250 (requisite petition for judgment of nullity, filing, and service).

171. *Id.* § 2250(a).

172. *See id.* §§ 2200, 2201.

173. *Id.* § 2210.

**§ 51-3. Methods of dissolution; grounds for annulment.**

(1) Marriage is dissolved by only one of the following:

- (a) The death of one of the parties to the marriage;
- (b) A judgment of divorce; or
- (c) A decree of annulment.<sup>174</sup>

(2) When a marriage is alleged to be void or voidable for any cause mentioned in this section, or pursuant to section 51-1 of this chapter, either party to the marriage may institute an action for annulment of the marriage; and upon proof of the nullity of the marriage, it shall be declared void by a decree of annulment.<sup>175</sup>

(3) A marriage between persons either of whom has a husband or wife living at the time of such marriage is illegal and void from the beginning.<sup>176</sup>

(4) A marriage is voidable and thus may be declared void by a decree of annulment if any of the following conditions existed at the time of the marriage:<sup>177</sup>

- (a) The parties to the marriage are nearer of kin than first cousins, or are double first cousins;
  - (b) Either party to the marriage is under 16 years of age, but subject to the limitation in subpart (6) of this section;
  - (c) Either party to the marriage is physically impotent;
  - (d) Either party to the marriage is incapable of contracting from want of will or understanding; or
  - (e) The parties to the marriage failed to comply with the procedural requirements of marriage as detailed in section 51-1 of this chapter.
- (5) No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy.

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174. This portion of the proposed amendment borrows language from section 310 of the California Family Code. While language to this effect should also be included in the statutes covering divorce procedure in North Carolina, having such language in this section helps orient the reader and address the intended function of this section.

175. This paragraph now has language similar to that within section 20-89.1 of the 1950 Annotated Code of Virginia; importantly, it incorporates the vital information contained in section 50-4 and addressed in Part II.B of this Comment.

176. This language is retained from the current section 51-3.

177. This paragraph correctly states the law surrounding void and voidable marriage as articulated by North Carolina courts subsequent to the current section 51-3's enactment. Again, for the cases interpreting section 51-3, see *Mussa v. Palmer-Mussa*, 731 S.E.2d 404, 408 (N.C. 2012) and *Fulton v. Vickery*, 326 S.E.2d 354, 358 (N.C. Ct. App. 1985).

(6) No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation.<sup>178</sup>

### CONCLUSION

John Steinbeck wrote, “[A] journey is like marriage. The certain way to be wrong is to think you control it.”<sup>179</sup> The parties to a marriage do not actually control the validity of their marriage; rather, the State of North Carolina does. North Carolina controls the procedures, benefits, and consequences of marriage in this State, and it should. However, if the State is going to invalidate certain marriages that fail to comply with its requirements, it needs to clearly articulate such requirements so parties to a marriage do not suffer from avoidable confusion and contradiction.

So, why is statutory reform to sections 51-1 and 51-3 so crucial at this time? The most basic answer is that marriage has harsh consequences and grand benefits.<sup>180</sup> It is vital that parties who intend to invite the State into their union create valid and sufficient marriages. Conversely, if one or both parties intend to be together but do not want to invite the State into their relationship, they should know what steps may create the opposite effect and thereby subject them to the harsh consequences of marriage.

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178. Please note that this proposed amendment does not incorporate the procedural steps for obtaining an annulment in North Carolina. Case law has stated that the procedure for such is identical to a divorce action. *See* *Pridgen v. Pridgen*, 166 S.E. 591, 593 (N.C. 1932). Therefore, the simplest method for clarifying the procedure for annulment is to add annulment language to the procedural statutes on divorce in the North Carolina General Statutes and provide cross-references to such in section 51-3. While this is beyond the scope of this Comment, it should be considered along with the proposed amendments.

179. JOHN STEINBECK, *TRAVELS WITH CHARLEY IN SEARCH OF AMERICA 2* (Penguin Books 2012) (1962).

180. For instance, some harsh consequences of marriage are equitable distribution laws and spousal support obligations. A few benefits of marriage arise in the context of insurance and inheritance laws, equitable distribution laws and spousal support obligations. And ironically, one of the grandest benefits of marriage is divorce. Parties to a marriage can seek the State’s help in the dissolution of their union; in contrast, parties not legally married must resort to their own lay devices.

Family law practitioners need clear statutes which accurately reflect the law as to marriage requirements. And, on a more basic level, laypersons should be able to do statutory research and find statutes that accurately reflect the law. This is especially crucial in an area of law that determines the validity of marriage and may potentially lead readers to commit bigamy, a felony in North Carolina.

In light of the statutory amendments noted in this Comment, answers to the introductory stories of Michael and Brad seem clear. First, in the Michael-Natalie marriage, the revised section 51-1 would apply. Clearly, procedural defects—the absence of a license and proper solemnization—do not render their marriage void; rather, their marriage is voidable. And, if Michael desires to challenge the validity of their union, he must do so through a direct action for annulment.

Ultimately though, the court may rely on and apply the State's strong public policy in favor of marriage to determine whether to annul Michael and Natalie's marriage. As argued in Part II, a suggested test for making this determination would be the intent of the parties. If both Natalie and Michael intended to violate North Carolina's procedural requirements, their marriage should not be validated. Otherwise, the State would appear to be honoring common law marriage. In contrast, if one or both of the parties honestly and in good faith felt they were complying with the State's requirements, their union should be upheld.

Now let's turn to the Brad-Sarah and Brad-Kristen marriages. The amended version of section 51-3 proposed in Part V of this Comment applies to both marriages. If Brad consulted this version prior to marrying Kristen, he would have learned that his marriage to Sarah, his double first cousin, was merely voidable. Therefore, Brad should have sought an annulment prior to marrying Kristen, but the Marriage chapter failed Brad. He attempted to comply with North Carolina requirements and consulted the correct statute; however, this statute misstated the law. Since North Carolina controls the institution of marriage, it can determine the voidability of marriages and appropriate remedies. However, the State must accurately provide this information to laypersons or, at a minimum, not provide blatant, inaccurate information. Because of the statute's inaccuracy and the continuing nature of Brad's voidable marriage to Sarah, he committed bigamy when he married Kristen. And now, since the only void marriage is a bigamous one, Brad's marriage to Kristen is void. This is a tragic outcome that could have been avoided by a simple revision to section 51-3.

Parts IV and V detail statutory amendments that need to be considered by the North Carolina General Assembly. Sections 51-1 and 51-3, in their

current form, do not correctly articulate the requirements of marriage in North Carolina. In 1929, the parties in *Sawyer v. Slack* were confused by the procedural requirements of marriage, and as *Mussa v. Palmer-Mussa* illustrates, in 2012, we are still confused.<sup>181</sup> Until the North Carolina General Assembly clarifies the procedural and substantive requirements of marriage, parties attempting to comply with sections 51-1 and 51-3 may as well be walking beside Alice in Lewis Carroll's Wonderland.

*Jessica T. Burgess*

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181. *See supra* Part II.C.