Marriage in North Carolina

Janet Mason

Sue and Ned live in Michigan and want to get married in Chapel Hill, where they met. They are busy making a guest list, engaging a caterer, looking for a photographer, writing their vows, selecting music. At some point they also need to ask, (1) Are we eligible to marry in North Carolina, and (2) what are the state's requirements for creating a valid marriage?

All couples planning to marry, regardless of where they reside or plan to reside, need to know how the place where they plan to marry answers these questions. A marriage created in another state or country almost always will be recognized in North Carolina if it is valid under the law where it was created.[1] Further, a valid North Carolina marriage is not likely to be challenged elsewhere.[2] Each state establishes its own requirements with respect to marriages that take place within its boundaries. Those requirements vary widely.[3]

Given the personal and legal significance of the marital relationship, one would expect states' laws to provide clear guidance for people who are planning to marry, for people who are asked to officiate at marriages, and for public officials responsible for issuing marriage licenses and maintaining a state's official records of marriages. But not all states' laws do.

This article examines North Carolina's answers to the two basic questions that Sue and Ned and other couples planning to marry in the state need to ask. Answering the first question is generally not difficult and only rarely involves ambiguities. Exploring the second, however, reveals surprising answers that differ from most people's assumptions about marriage and that in some respects lack the certainty people expect.

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Who Is Eligible to Marry?

The primary factors that determine whether a person may marry in North Carolina are age, competency, family relationship, marital status, and gender.[4] Neither residency nor citizenship is a prerequisite, and no medical examination or blood test is required.[5] If a couple marry while one or both of the parties are ineligible to marry, the marriage will be either void or voidable.[6] A "void" marriage is an absolute nullity from the moment it takes place. A "voidable" marriage is presumed to be valid unless a court declares it void in an annulment action.

Age

Eighteen is the age of majority in North Carolina and the age at and beyond which a person may marry without anyone else's consent.[7] Someone younger than eighteen who has obtained a court order of emancipation or has been married legally before, also may marry without consent.[8]

An unemancipated minor who is sixteen or seventeen years of age may marry with the written consent of (1) a parent who has "full or joint legal custody" of the minor; (2) a person, an agency, or an institution that has legal custody of the minor; or (3) a person, an agency, or an institution that is serving as the minor's guardian.[9] An agency or a person other than a parent who has legal custody of a minor or is a minor's legal guardian should have a court order to that effect.[10] A parent who is divorced, separated, or unmarried may have a court order or a separation agreement establishing that he or she has sole or joint legal custody of a couple's child. Most parents, however, are never involved in court actions or contractual agreements regarding custody of their children. These parents have equal rights to custody of their children, and thus each parent has a form of joint custody that is not reflected in any official document.

Some minors aged fourteen or fifteen may marry but only after obtaining a court order authorizing them to do so.[11] To obtain a court order, a minor must be either of the following:

- A fourteen- or fifteen-year-old female who is pregnant or has given birth and wants to marry the father of her child
- A fourteen- or fifteen-year-old male who is the father of a child, whether born or unborn, and wants to marry the child's mother

To seek a court order, a minor must file a civil action in district court. The minor must ensure that his or her parents (or guardian or custodian) are served with proper notice of the proceeding. The court will consider the parents' opinions and wishes. The parents' views—whether for or against the marriage—are not controlling, however. The court will authorize the minor to marry only if it finds that marrying will be in the minor's best interest. When the minor files the action, the court will appoint an attorney to act as the minor's "guardian ad litem," not to argue the minor's wishes but to conduct an investigation and make a recommendation to the court about the minor's best interest.[12]

It is unlawful for any person younger than fourteen years of age to marry in North Carolina.[13]

A marriage that takes place in violation of any of these age requirements is voidable.[14] If a minor marries after obtaining a license by fraud or misrepresentation, an action to annul the marriage may be brought by the minor's parent, legal custodian, or legal guardian, or by the guardian ad litem who was appointed in the proceeding in which the minor obtained a court order authorizing him or her to marry.[15]

Ralph, who is seventeen, and Maria, who is fifteen, are the parents of a two-month-old infant. They decide to marry, and their mothers go with them to give consent when they apply for a marriage license. The register of deeds will not issue a license. Ralph, whose mother has sole legal custody of him, can marry with his mother's written consent. Maria, however, must have a court order, for she is not yet sixteen. Because she has given birth, is at least fourteen years old, and wants to marry the father of her child, she is eligible to file a court action and ask the court to find that marrying Ralph is in her best interest.

If Maria gets the court order but Ralph's mother changes her mind and will not consent to his marrying, the couple may not marry. The court order applies only to Maria and does not affect the requirement that Ralph have parental consent. To marry in North Carolina, they must wait until Ralph is eighteen, unless he files a petition for emancipation and obtains a court order emancipating him.

According to the 2000 Census, almost 60 percent of the people in North Carolina age fifteen or older are married. In 2004, more than 62,000 marriages took place in the state. The most popular date for marrying was February 14; the most popular month, June; and the least popular month, January.

Competency

A person who is "incapable of contracting from want of will or understanding" cannot enter into a valid marriage.[16] Applicants for a marriage license are not required first to have a medical examination, and the registers of deeds who issue marriage licenses are not required to conduct inquiries aimed at determining whether applicants are competent.[17] Occasionally it might be obvious to a register of deeds that a party is extremely inebriated or incapable of contracting for some other reason. A register of deeds in that circumstance should refuse to issue a license. Even if a couple have a license, if a party's incapacity is obvious to the person who is asked to officiate at the wedding, that person should refuse to perform the ceremony.

The fact that a court has adjudicated a person incompetent and appointed a guardian to manage the person's affairs does not necessarily mean that the person lacks the capacity to consent to marry. Conversely, a person may lack that capacity even if no court has made a determination about the person's competence. An individual's mental capacity "at the precise time when the marriage is celebrated controls its validity or invalidity."[18] Even if a person is competent and consents to marry, a marriage may be challenged and declared void if the person's consent was procured by undue influence.[19]

If a party to a marriage lacked the necessary capacity at the time of the marriage, the marriage is voidable.[20]

Family Relationship

First cousins may lawfully marry in North Carolina, but double first cousins or others who are nearer of kin than first cousin may not.[21] (When a pair of brothers marries a pair of sisters, their children are double first cousins: The children have both sets of grandparents in common. The same is true when a brother and a sister have spouses

who also are brother and sister.) In determining relationships, the law specifies that "the half-blood shall be counted as the whole-blood."[22] Unlike some other states' laws, the North Carolina statute on prohibited degrees of kinship does not mention relationships that result from adoption or marriage, as in the case of step-siblings.[23] Although North Carolina appellate courts have not interpreted the statute with respect to people in those relationships, the prohibitions likely apply to them as well.[24] A marriage in violation of the prohibited kinship rule is voidable.[25]

Marital Status

A fundamental criterion for marrying is that both of the parties be unmarried when the marriage takes place. A marriage in violation of this requirement is absolutely void, regardless of whether a court ever declares it so. In addition, marrying someone while one still is married to someone else (bigamy) is a Class I felony in North Carolina.[26]

With surprising frequency, people apply for marriage licenses and marry before the dissolution of an earlier marriage, usually under the mistaken belief that a pending divorce is final or that the other party to the marriage obtained a divorce. For that reason most registers of deeds require applicants who indicate that they are divorced to produce copies of their divorce judgments. Occasionally, applicants are not certain whether a prior marriage was valid or whether they are divorced.

Sue and Ned arrive from Michigan and go to the office of the Orange County Register of Deeds to apply for a marriage license. Sue indicates on the application that this will be her first marriage. She tells the register of deeds, however, that she was "sort of" married in Iowa when she was fifteen but never lived with the boy and does not think the marriage was valid because she forged her mother's signature on the consent form. It is clear from her tone that she wants the register of deeds to confirm that she was not married.

The register of deeds is not in a position to know, and has no duty to find out, what Iowa law would say about the validity of Sue's first marriage. In circumstances similar to this, registers of deeds frequently are asked for legal opinions or advice, and generally they are steadfast in refusing to give either. The register of deeds in this case should encourage Sue to seek legal advice before proceeding with her application for a North Carolina marriage license. Every register of deeds should stress to applicants the importance of having accurate, truthful information on the application and should encourage people who have any question about their marital status to seek legal advice before applying for a license. Ultimately the register of deeds must rely on the information that an applicant for a license gives under oath on the application.

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Gender

Whether two people of the same gender may marry each other has been the subject of headline news, legislation, and litigation all over the country in recent years.[27] In North Carolina the question has not come before the appellate courts. Nonetheless, it has been manifest.[28]

As a matter of statutory law in this state, same-sex couples are not eligible to marry. North Carolina law does not define "marriage," but it makes the opposite genders of the parties an essential element in the creation of a marriage. A valid marriage in this state is created "by the consent of a male and female person" to take each other as husband and wife.[29]

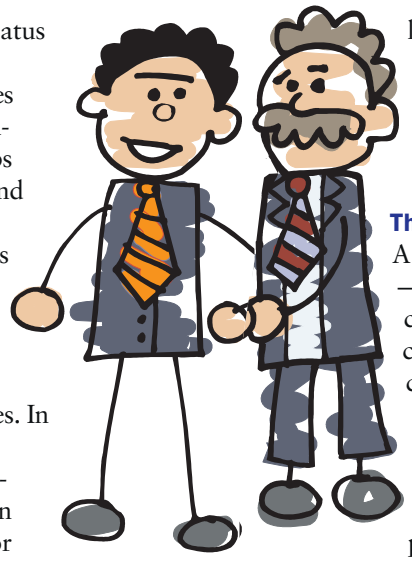
Since 1996 a North Carolina statute also has provided that "[m]arriages . . . between individuals of the same gender are not valid in North Carolina," regardless of where or how they are created.[30] North Carolina, like many other states, added this statement to its marriage law following the enactment by Congress of the federal Defense of Marriage Act in 1996.[31] That law gives states permission to disregard a law of any other state that permits or recognizes same-sex marriages:

> *No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.*[32]

The Defense of Marriage Act also defines "marriage," for purposes of any federal law, rule, or interpretation, as meaning "only a legal union between one man and one woman as husband and wife," and it specifies that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[33] These definitions apply to the broad range of federal laws

in which marital status is a factor.[34]

Same-sex couples often establish committed relationships that in their eyes and the eyes of their friends and families are marriages or the equivalent. Sometimes these are solemnized in religious ceremonies. In North Carolina, however, these couples may not obtain marriage licenses or create relationships that automatically result in the rights, duties, and privileges that attach as a matter of law to legally recognized marriages.



The debate about the law and public policy relating to same-sex marriage continues in legislatures and courts around the country. It includes constitutional challenges to the Defense of Marriage Act and to some states' versions of the act. Sometimes, as in Massachusetts, the issue arises under a state's constitution.[35] In North Carolina there have been proposals to amend the state's constitution to add a prohibition against same-sex marriage.[36] At the federal level, there have been proposals both to amend the constitution and to limit federal courts' jurisdiction to decide cases involving the Defense of Marriage Act.[37]

Ron and Don have lived together in a committed relationship for ten years. They go to the office of the register of deeds and apply for a marriage license. The register of deeds is not authorized to issue them a marriage license.[38] Further, if Ron and Don marry in another state or country that does permit same-sex marriages, their marriage will not be recognized as valid in North Carolina.

What Are the Minimum Requirements for Creating a Valid Marriage?

In states that do not recognize common law marriages, a valid marriage generally must satisfy requirements pertaining to the solemnization, the officiant, and the license. North Carolina law addresses each of those but does not directly tie the license requirements to the validity of a marriage.

The Solemnization

A "common law marriage"—one brought about by a couple's agreement and cohabitation, without a ceremony—may not be created in North Carolina.[39] Further, state law does not permit "proxy marriages" (in which a person stands in for one party) or marriages in which one party participates through video or other remote means. A ceremony or another kind of solemnization is required, and both parties must be physically present.

In North Carolina, a valid marriage between two people who are eligible to marry is created when

- in the presence of each other, they freely, seriously, and plainly express their consent to take each other as husband and wife; and
- they do so either
  - in the presence of an ordained minister, a minister authorized by a church, or a magistrate, who then declares that they are husband and wife; or
  - in accordance with any mode of solemnization recognized by a religious denomination or a federally recognized or state-recognized Indian nation or tribe.[40]

Whether someone is an ordained minister or a minister authorized by a church is not always easily answered, especially when ordination certificates are available via the Internet

This wording dates from 2001, when the General Assembly rewrote the marriage laws, in part to broaden the ways in which marriages may be performed.[41] Before the rewriting, the statute authorized the solemnization of marriages only by magistrates, by ordained or authorized ministers, in accordance with the custom of the Society of Friends, or by a local spiritual assembly of the Baha'is.[42]

Although the current statutory language is much more inclusive and accommodating of different religions and cultures than the earlier wording was, it continues to leave unanswered some questions that go to the heart of requirements for creating a valid marriage. Arguably, current law results in more uncertainty by extending acceptable solemnization procedures to include "any mode of solemnization" recognized by a religious denomination or by a federally recognized or state-recognized Indian nation or tribe. Whether a ceremony satisfies that requirement seems particularly unsuited for resolution by the courts that decide cases involving the validity of marriages.[43]

The Officiant

Most marriages involve a minister, a magistrate, or another individual who officiates at a civil or religious ceremony. Magistrates, as appointed North Carolina public officers, are easy to identify, and once they are identified, their authority to officiate at weddings in the state is clear.[44] There are more than seven hundred magistrates in North Carolina.

Questions about whether someone is an ordained minister or a minister authorized by a church, or whether an

entity even is a church or a religious denomination, are not always answered so easily. Similarly, whether a particular mode of solemnization is recognized by a religious denomination or by a federally recognized or state-recognized Indian nation or tribe may be difficult to determine.

Churches, denominations, and religions do not depend on the state for their existence or their legitimacy. Rather, for purposes of creating the legally significant status of marriage, the state largely defers to them and other nongovernmental entities. The fact that marriage for many people is both religiously and legally significant makes this overlap of religious and governmental authority understandable. In some instances, though, the overlap generates uncertainties that the law is not well equipped to resolve.[45]

Sue and Ned, having resolved the issue of Sue's first marriage, were married in Chapel Hill by Ned's brother Larry. In anticipation of the wedding, Larry completed an application on the Internet and, a few days later, printed out a certificate stating that he was an ordained minister of the Universal Life Church.[46] *Now a friend has told Sue that her marriage might not be valid. Is Larry an "ordained minister" or "a minister authorized by a church" to perform marriages? Is the Universal Life Church a church for purposes of the marriage statute, when the only doctrine the organization espouses is "freedom of religion"?*[47]

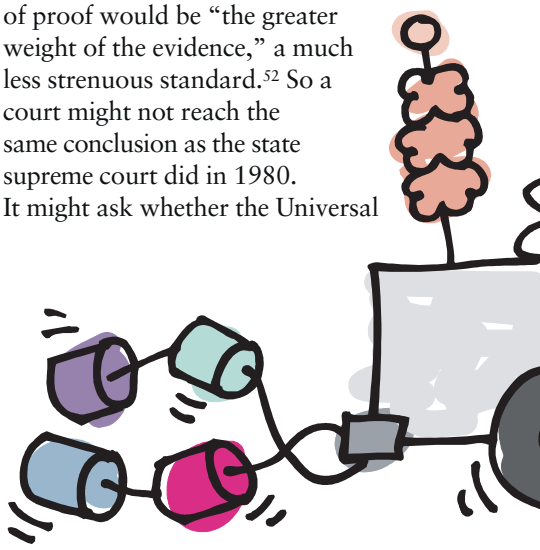
Some states require people to register with or be authorized by a government agency before officiating at marriage ceremonies.[48] North Carolina has no such requirement and does not charge any public official with responsibility for determining before or after a marriage ceremony whether an officiant is legally qualified to perform marriages. Similarly, it is not the role of any government official to determine, before or after a marriage, whether a particular mode of solemnization is recognized by a religious denomination or by an Indian nation or tribe. The parties who are marrying and the person who is performing the ceremony must assess whether the ceremony falls within one of the statutorily authorized modes of solemnization.

So, even if Sue and Ned had tried to find out before their wedding whether Larry could officiate lawfully based on his ordination certificate, they would not have gotten a definite answer. They might have learned that in 1980, the North Carolina Supreme Court held that a marriage performed by a minister of the Universal Life Church was not a valid marriage. The defendant in that case had been convicted of bigamy on the basis of evidence that he had married his second wife without divorcing his first wife. The trial court rejected his argument that the first marriage was not valid because the ceremony was performed by the bride's father, whose only relevant qualification was a mail-order certificate of ordination. In *State v. Lynch*, the supreme court reversed the conviction, saying,

> *A ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc.—whatever that is—is not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of North Carolina.*[49]

The year after the *Lynch* case was decided, the legislature passed a law validating any North Carolina marriage ceremony performed by a minister of the Universal Life Church *before* July 3, 1981, if the marriage "would have been valid if performed by an official authorized by law to perform wedding ceremonies."[50] This statute says nothing about marriages performed by Universal Life Church ministers after July 3, 1981, but its language certainly implies that a minister of the Universal Life Church is not "an official authorized by law to perform wedding ceremonies" in North Carolina.[51]

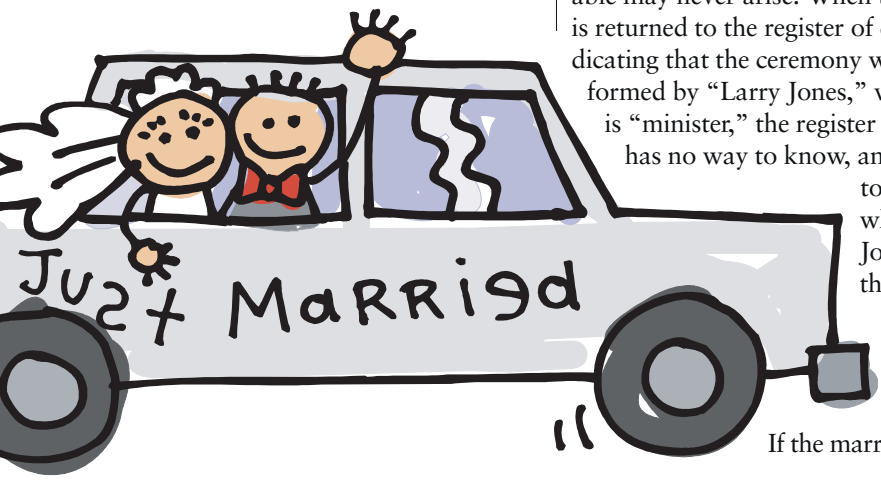
In a bigamy case, as *Lynch* was, the state has the burden of proving each element of the offense "beyond a reasonable doubt." If the validity of the marriage was being challenged in a different context, however, such as a civil dispute between the parties over the equitable distribution of their property or a proceeding contesting the disposition of an estate, the burden of proof would be "the greater weight of the evidence," a much less strenuous standard.[52] So a court might not reach the same conclusion as the state supreme court did in 1980. It might ask whether the Universal



Life Church had changed in character since 1981 or whether the officiant had some qualifications in addition to a mail-order (or Internet-generated) certificate, or whether he or she actually functioned as a minister in ways other than by performing marriages.[53]

In a dispute between the parties, a court also would look at the conduct of the parties. If an invalid marriage was created because of one party's negligence, bad faith, or deception, the court might apply the doctrine of "equitable estoppel" to preclude that party from denying the validity of the marriage. Or if both parties participated in the marriage knowing exactly the risk they took, and acted as a married couple thereafter, a court might conclude that both should be estopped from denying the validity of the marriage. The court's reaching such a conclusion would not be the same as its declaring the marriage valid. Rather, application of the doctrine of equitable estoppel would prevent a culpable party from asserting the marriage's invalidity, usually in an attempt to avoid obligations that arose from the marriage.[54]

For Sue and Ned and other couples married by a minister ordained via the Internet or via mail order, the question of whether their marriage is void or voidable may never arise. When the license is returned to the register of deeds indicating that the ceremony was performed by "Larry Jones," whose title is "minister," the register of deeds has no way to know, and no duty to determine, whether Larry Jones is authorized to perform marriages in North Carolina. If the marriage is challenged later, it is impossible to predict with certainty what a North Carolina court would say about the validity of a marriage performed by someone whose only credential was a certificate printed off the Internet. The court likely would consider, among other factors, the context in which the issue arises, the characteristics of the particular officiant, and the conduct of the parties.[55]



The License

North Carolina law describes the procedures for obtaining a marriage license, specifies that a license is valid for sixty days, and sets out the duties of registers of deeds to issue and record marriage licenses.[56] The marriage statutes also authorize both civil and criminal penalties against any person who performs a marriage ceremony without first receiving a license, who performs a ceremony after the license has expired, or who fails to complete the license and the certificate properly and return them within ten days to the register of deeds.[57] Nowhere, however, does the law make obtaining a license a prerequisite for the creation of a valid marriage, make it illegal for a couple to marry without a license, or invalidate marriages that take place without a license or after expiration of a license. What the law requires is what appears earlier in this article: that both parties be physically present, freely consent to marriage, and do so in one of two specified ways.[58]

One might think that the legislature, by including in the marriage statutes detailed provisions about marriage licenses, intended to require a valid license in order to create a valid marriage. North Carolina courts, however, have consistently held otherwise.[59] Most of the cases addressing the issue were decided before 1930, but the language of the statute has not changed in ways that would appear to affect that result. As recently as 1980, the North Carolina Supreme Court said, "Though the marriage license is competent evidence tending to prove a marriage, . . . the absence or presence of a marriage license is of minimal consequence in establishing a valid marriage to support a bigamy prosecution."[60]

Even if a valid marriage exists without a license and can be proved in court

by the testimony of the parties, witnesses, an officiant, or others, the practical difficulties for couples who marry without a license can be huge.

Sue and Ned completely forgot to apply for and obtain a marriage license before their wedding. As a result, although the qualifications of the officiant and the method of solemnization were in complete compliance with statutory requirements for creating a valid marriage, there was no license or certificate for the officiant to complete and return to the register of deeds. When Sue tried to have her name changed on her driver's license, she was asked for a copy of her marriage certificate.[61] *She did not have one that was acceptable for obtaining a new driver's license. (Certificates generated by a church or another nongovernmental entity are not acceptable for this purpose.) She was equally stymied when she tried to change her Social Security card and her official college records.*[62]

Sue and Ned decided that they must have a certificate. They applied for and obtained a marriage license and a certificate from the register of deeds, making no mention of their marriage ceremony. (Had they stated that they already were married, the register of deeds would not have issued the license.) Larry (who may be assumed for the moment to have qualified to perform the ceremony) completed the forms, giving the date of the actual wedding, and mailed both copies to the register of deeds after he and the two witnesses signed them.

State law appears to say that the marriage is valid, but the license is not because it was issued after the marriage took place.[63] When the register of deeds notices that the marriage predates the issuance of the license, it is not clear what he or she should do with the returned license and certificate. Neither statutes nor state administrative rules address that question.[64] In some counties, technology answers the question in part, because the computer systems used to record marriage information will not accept data about a marriage that occurred before the date on which the license was issued.

Some couples facing the dilemma that Sue and Ned confronted not only apply for and obtain a license and a certificate but also have another marriage ceremony. When the license and the certificate are completed reflecting the date of this second ceremony and then returned to the register of deeds, nothing irregular appears on the face of the certificate. When the two ceremonies are only a few days apart, this practice may be harmless, and it is easy to understand why couples engage in it and why some registers of deeds advise couples to do so. Sometimes, however, the need to document a marriage arises long after the ceremony, such as when one spouse dies.

Margaret and Paul created a different dilemma for the register of deeds. They properly applied for and obtained a marriage license from a North Carolina register of deeds. They were married within sixty days of the license's issue, and within ten days of the wedding, the minister who performed the ceremony returned both completed copies to the register of deeds who issued the license. The returned license, however, indicated that the marriage took place in Bristol, Tennessee.[65] *Whether Margaret and Paul are legally married is a question that now depends on Tennessee law, for the marriage took place in Tennessee. The North Carolina license is irrelevant with respect to whether they are married. The register of deeds probably should neither file the returned license and certificate nor send a copy to the state Vital Records Unit in Raleigh, for they do not document a marriage that took place in North Carolina.*

So some people who are legally married in North Carolina have great difficulty proving so because they married without a license. Others who appear as a matter of public record to be legally married may not be.

Q & A
on Marriage in North Carolina

Q: May I apply for a marriage license in North Carolina, which is where I will be living, but have my wedding in another state?
A: No.

Q: May a pregnant fifteen-year-old marry?
A: Yes, but only with a court order—and only the father of her child.

Q: May a nonpregnant fifteen-year-old marry?
A: No, with one exception: if she has given birth to a child who is still living and she has a court order authorizing her to marry, she may marry the child's father.

Q: A seventeen-year-old male whose parents are divorced and have joint custody wants to get married. Must he get approval from both parents?
A. No. The consent of one parent who has joint custody is sufficient.

Q: Do I have to prove mental competence to marry?
A: No.

Q: What if a drunken person applies for a marriage license?
A: The register of deeds can refuse to issue the license.

Q: May persons of the same sex marry in North Carolina?
A: No.

Q: Does North Carolina recognize same-sex marriages in other states as valid?
A: No.

Q: Do religious officiants at weddings need to be registered with the county or state government?
A: No.

Conclusion

People who want to know whether they are eligible to marry in North Carolina should not have much difficulty arriving at definite answers. Eligible couples who want to marry or have married in the state, however, face some possible pitfalls with regard to creating and proving valid marriages.

Few events in people's lives have more significance than entering into a marital relationship. A basic premise of any state's marriage laws should be that people know whether they are legally married and that when they are, they can readily establish that fact. The state has a strong interest in facilitating legal marriages and preventing marriages that appear proper but are fatally flawed.[66] That interest encompasses not only the need to meet citizens' expectations but also the need to implement properly the many benefits, laws, and policies for which marital status is a relevant consideration.

A "common law marriage"—one brought about by a couple's agreement and cohabitation, without a ceremony—may not be created in North Carolina.

Although North Carolina's marriage laws were revised and improved substantially as recently as 2001, they still do not provide the clarity and the certainty required to satisfy the governmental and personal interests just identified. A further examination of these laws might address the following questions:

- Should North Carolina have a procedure for establishing that particular persons are qualified to perform marriages or that particular customs or rituals suffice to create a valid marriage?
- What is the function of the marriage license, and what if any relationship should it have to the validity of a marriage?

- Should the state have a procedure whereby a couple who marry or have married without a license, on proper proof, could obtain a license documenting the marriage?
- To what extent should the validity of marriages for civil purposes depend on religious and cultural traditions and practices?
- What are the responsibilities of registers of deeds with respect to returned licenses and certificates that are incomplete or irregular?
- Should North Carolina have a curative statute, like the one enacted in 1981, to validate marriages performed since 1981 by ministers of the Universal Life Church or similar organizations?
- Is there a need for a simple judicial procedure whereby couples may obtain legal determinations of whether they are legally married under North Carolina law?

Notes

1. Exceptions to this general rule include polygamous marriages, marriages of very young children, or other marriages that violate strong public policies. A statute provides specifically that same-sex marriages, regardless of where they were created, are not valid in North Carolina. N.C. GEN. STAT. § 51-1.2 (hereinafter G.S.). See the discussion of gender, later in the text.

2. A somewhat different issue may arise if a person is not able to show documentation or proof that a valid marriage took place here.

3. *See* the table, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, available at http://straylight.law.cornell.edu/topics/Table_Marriage.htm, a site of the Legal Information Institute at Cornell University Law School. The National Conference of Commissioners on Uniform State Laws approved a Uniform Marriage and Divorce Act in 1970 and amended it in 1971 and 1973. During the 1970s several states adopted portions of the act. Since then, however, the act has received little attention. Information about it can be found at www.law.cornell.edu/uniform/vol9.html. Information about the National Conference of Commissioners on Uniform State Laws can be found at www.nccusl.org/Update/.

4. Additional factors are inherent in the provision that a marriage may be declared invalid if either party is physically impotent at the time of the marriage or if the parties married under a representation and belief that the female was pregnant, the parties then separated within forty-five days of marrying and remained separated for a year, and no child was born within ten lunar months of the parties' separating. G.S. 51-3.

5. Almost half of the states have some requirement relating to medical examinations or tests. See the table, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, described in note 3.

6. G.S. 51-3. Usually, however, the parties may ratify a voidable marriage if it is not annulled by a court and the couple live together as husband and wife. If the parties to a voidable marriage have a child, the court may be precluded from declaring the marriage void.

7. G.S. 48A-2.

8. G.S. 51-2(a1) states that an emancipated minor is not required to have written consent to marry if a court order or a certificate of emancipation is filed with the register of deeds. In North Carolina, only minors who are at least sixteen years of age may petition for emancipation. G.S. 7B-3500. Because a minor's marriage automatically emancipates the minor and relieves his or her parents of all parental duties and responsibilities, proof of a minor's prior marriage also should preclude the need for consent. *See* G.S. 7B-3507, -3509.

9. G.S. 51-2. As originally enacted in 2001 by SL 2001-62, G.S. 51-2 required that the consent be acknowledged before a notary public or signed in the presence of the register of deeds. Later that year, in SL 2001-487, § 60, the General Assembly amended G.S. 51-2 to delete that requirement.

10. The district court may appoint a guardian for a minor in a juvenile proceeding in which the minor is alleged or found by the court to be abused, neglected, dependent, undisciplined, or delinquent. G.S. 7B-600, -2001. The clerk of superior court may appoint a "guardian of the person" for a minor who does not have a living parent. *See* G.S. 35A-1220 through -1228.

11. *See* G.S. 51-2.1. This law, enacted in 2001, almost certainly supersedes a portion of G.S. 51-3, last amended in 1977, which says that "[a]ll marriages . . . 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 . . . shall be void." This older section also says that the marriage of someone younger than sixteen, if that person otherwise was competent to marry, may not be declared void if the female is pregnant or a child has been born to the parties, unless the child is deceased at the time of the annulment action.

12. G.S. 51-2.1.

13. G.S. 51-2(b1).

14. See the text accompanying note 6. A court may not declare the marriage void after one of the parties dies if the parties cohabited and a child was born of the marriage. G.S. 51-3.

15. G.S. 51-2(c).

16. G.S. 51-3.

17. Before the 2001 rewriting of the marriage laws, G.S. 51-8 directed registers of deeds to issue marriage licenses to applicants "if it appears" that they are authorized to marry. As amended in 2001, G.S. 51-8 directs registers of deeds to issue licenses if they determine, on the basis of the applicants' responses to questions about age, marital status, and intention to marry, that the applicants are authorized to marry.

18. Geitner By and Through First Nat'l Bank of Catawba County v. Townsend, 67 N.C. App. 159, 162, 312 S.E.2d 236, 238 (1984) (holding that prior adjudication of incompetency is not conclusive on issue of later capacity to marry and does not bar party from entering contract to marry).

19. *See, e.g.,* Clark v. Foust-Graham, ___ N.C. App. ___, 615 S.E.2d 398 (2005). In this case a jury declined to find incompetence or lack of consent but did find "undue influence" by the much younger wife. The court of appeals affirmed the trial court's order of annulment, holding that when a person's consent to marry is procured by undue influence, that person is "incapable of contracting from want of will," and the marriage is voidable.

20. See the text accompanying note 6. A court may not declare the marriage void after one of the parties dies if the parties cohabited and a child was born of the marriage. G.S. 51-3.

21. G.S. 51-3.

22. G.S. 51-4.

23. In 2001, in SL 2001-62, §4, the legislature amended the article in which these provisions appear, to add G.S. 51-2.2. It provides that as used in the article, the terms "parent," "father," and "mother" include people who have that status as a result of adoption. The change was made in connection with revision of the laws relating to marriage by minors, and was not aimed at the kinship provisions, which do not use the terms "parent," "father," and "mother."

24. For a discussion of kinship issues in marriage, *see* SUZANNE REYNOLDS, 1 LEE'S NORTH CAROLINA FAMILY LAW § 2.9 (5th ed. Charlottesville, Va.: Michie Co., 1998 & Supp. 2004).

25. See the text accompanying note 6. A court may not declare the marriage void after one of the parties dies if the parties cohabited and a child was born of the marriage. G.S. 51-3.

26. G.S. 14-183. From 1997 through 2004, there were thirty-five convictions for bigamy in North Carolina. Telephone Interview with Patrick Tamer, Statistician, N.C. Admin. Office of the Courts (Oct. 11, 2005).

27. For a discussion and a timeline of legal developments relating to same-sex marriages, *see* Kavan Peterson, Washington Gay Marriage Ruling Looms (Mar. 29, 2005, updated Nov. 23, 2005), available at www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=2069. For an article

discussing the debate about same-sex marriage in the context of the historical and anthropological evolution of marriage, *see* Mike Anton, *Marriage: The State of the Union,* Los Angeles Times, Mar. 31, 2004, at E1. *See also, e.g.*, Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: "Same-Sex" Marriage Issue Dominates Headlines,* 38 Family Law Quarterly 777, 799–801 (2005); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harvard Law Review 2684 (2004).

28. *See, e.g.,* Cristina Breen Bolling, *Gay Men Told Polite No on License,* Charlotte Observer, May 6, 2004, at 2B; Benjamin Niolet & Michael Biesecker, *Gay Couple's License Suit Rebuffed,* News & Observer (Raleigh), May 11, 2004, at B1; Yonat Shimron & Jim Nesbitt, *Rally Seeks Marriage Law Amendment,* News & Observer (Raleigh), May 11, 2005, at B1.

29. G.S. 51-1. This wording has been in the statute since at least 1871. See 1871–72 N.C. Sess. Laws ch. 193, § 3.

30. G.S. 51-1.2.

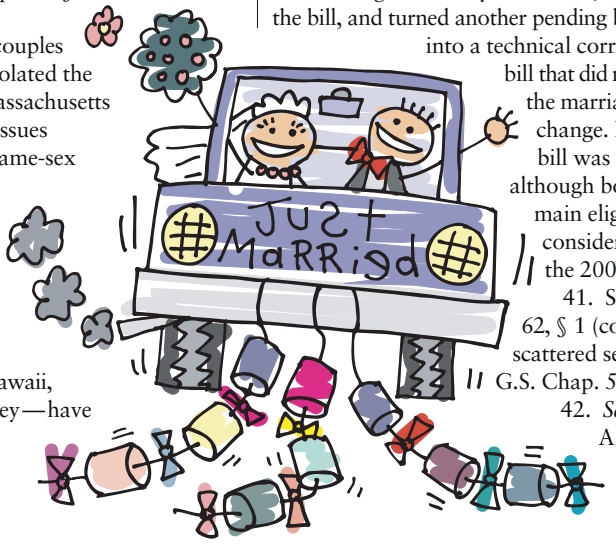
31. 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996). The acronym for the act is DOMA. The state statutes sometimes are referred to as "mini–DOMAs."

32. 28 U.S.C. § 1738C (1996). This provision represents a divergence from both the federal government's usual practice of treating domestic relations laws as matters for individual states to decide, and the general rule that states recognize the laws of sister states. The law applies with respect to territories, possessions of the United States, and Indian tribes, as well as states.

33. 1 U.S.C. § 7 (1996).

34. A 1997 report by the General Accounting Office identified more than one thousand such laws. Letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to Hon. Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives (B-275860, GAO/OGC-97-16 Defense of Marriage Act (Jan. 31, 1997)), available at www.gao.gov/archive/1997/og97016.pdf.

35. *See* Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003), in which the Massachusetts Supreme Judicial Court held that state action limiting marriage to couples of the opposite sex violated the state constitution. Massachusetts is the only state that issues marriage licenses to same-sex couples. Two states' legislatures have adopted laws providing for civil unions: Vermont's in 1999 and Connecticut's in 2005. A few states—California, Hawaii, Maine, and New Jersey—have domestic partnership laws that provide some rights associated with marriage to same-gender couples. Peterson, Washington Gay Marriage Ruling Looms.



36. Early in the 2005 session of the North Carolina General Assembly, two such bills were introduced: Senate Bill 8 (filed January 27, 2005) and House Bill 55 (filed February 2, 2005). No action was taken on either bill.

37. For proposals to amend the constitution, *see, e.g.,* H.R. Res. 39, 109th Cong. (2005); S.J. Res. 1, 109th Cong. (2005); S.J. Res. 13, 109th Cong. (2005). For proposals to limit federal courts' jurisdiction, *see, e.g.,* H.R. 3313, 108th Cong. (2d Sess. 2003); H.R. 1100, 109th Cong. (1st Sess. 2005). *See also* Carl Hulse, *House Backs Bill to Limit Power of Judges,* New York Times, July 23, 2004, available at www.theocracywatch.org/marriage_act_protection_times_july23_04.htm.

38. Responding to an inquiry from a register of deeds, the North Carolina Attorney General's Office issued an advisory opinion, dated March 29, 2004, stating that "a register of deeds would violate North Carolina law in issuing a marriage license to persons of the same gender. If, in issuing such a license, the register of deeds operates in bad faith he may subject himself to the penalties provided in N.C. Gen. Stat. § 161-27." 2004 WL 871437 (N.C.A.).

39. A common law marriage that is valid under the law of the state in which it was created will be recognized in North Carolina. *See, e.g.,* State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); Bowlin v. Bowlin, 55 N.C. App. 100, 285 S.E.2d 273 (1981); Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

40. G.S. 51-1. The General Assembly periodically enacts laws, of very short duration, authorizing district court judges or other specified categories of people to perform marriages. *See, e.g.*, An Act Allowing a District Court Judge to Perform Marriage Ceremonies, SL 2005-56, which became effective June 23, 2005, and expired June 27, 2005.

In the 2005 session of the General Assembly, a "technical corrections" bill was amended in the Senate to authorize all district and superior court judges permanently to perform marriages. The House of Representatives rejected that and other changes made by the Senate, abandoned the bill, and turned another pending bill, S 602, into a technical corrections bill that did not include the marriage law change. Neither bill was enacted, although both remain eligible for consideration in the 2006 session.

41. SL 2001-62, § 1 (codified at scattered sections of G.S. Chap. 51).

42. *See* William A. Campbell, *North Carolina Marriage Laws: Some Questions*, Popular Government, Winter 1998, at 2, discussing that statute's vulnerability to constitutional challenge.

43. From 2000 through 2004, annulment issues were raised in 220 civil court actions in North Carolina per year, on average. Telephone Interview with Patrick Tamer, Statistician, N.C. Admin. Office of the Courts (Nov. 8, 2005).

44. Because the term "magistrate" refers to a specific public official with prescribed responsibilities under North Carolina law, the term probably does not encompass people who are designated as magistrates pursuant to federal law or the laws of other states. A magistrate's authority to perform marriage ceremonies is not restricted to the county in which the magistrate serves. Because a magistrate who performs a marriage ceremony is doing so in his or her capacity as a public official, the magistrate may assess only the fee required by statute—currently $20—for performing a marriage. G.S. 7A-309.

45. In a bigamy case, the North Carolina Supreme Court said, "Whether defendant is married in the eyes of God, of himself or of any ecclesiastical body is not our concern. Our concern is whether the marriage is one the State recognizes." State v. Lynch, 301 N.C. 479, 488, 272 S.E.2d 349, 354 (1980).

46. From the number of inquiries I have received, I conclude that this scenario is not unusual. A newspaper account of such a scenario reported that in June 2004, two sisters in North Carolina created a wedding chapel offering packages ranging from $50 to $325. The article stated that they "obtained online ordination to conduct weddings through the Universal Life Church based in Modesto, Calif." Melissa Turner, *Chapel Offers Quick Weddings*, News & Record (Greensboro), published in the News & Observer (Raleigh), Aug. 8, 2004, at 7B, 7B.

47. The website for the Universal Life Church (at http://ulc.net/, last visited Jan. 13, 2006) includes the following statements:

ULC ministers come from all walks of life and spiritual traditions. Our common thread is our adherence to the universal doctrine of religious freedom: "Do only that which is right."

Every person has the natural right (and the responsibility) to ***peacefully*** *determine what is right. We are advocates of religious freedom.*

The Universal Life Church wants you to pursue your spiritual beliefs without interference from any outside agency, including government or church authority.

You may become a legally ordained minister for life, without cost, and without question of faith.

48. For example, Virginia requires ministers to establish their qualifications and obtain a court order authorizing them to perform

marriages. A court may authorize others to perform marriages, and those people or people acting for a religious society that does not have a minister must post a $500 bond before performing marriages. CODE OF VIRGINIA, §§ 20-23, -25, -26 (1981, 2004).

49. *Lynch,* 301 N.C. at 488, 272 S.E.2d at 354.

50. G.S. 51-1.1.

51. *Id.* The statute has been characterized as "curative," meaning that the legislature intended only to validate otherwise invalid marriages that occurred before the statute was enacted (when people might innocently have assumed that such marriages were valid), not to change the law prospectively to authorize the performance of marriages by people whose only qualification was a mail-order ordination certificate. *See, e.g.,* Fulton v. Vickory, 73 N.C. App. 382, 385, 326 S.E.2d 354, 357 (1985).

52. *See, e.g.,* Dodrill v. Dodrill, 2004 WL 938476 (Ohio Ct. App. Apr. 28, 2004) (unpublished), *appeal denied*, 103 Ohio St. 3d 1463, 815 N.E.2d 678 (2004), in which the executor of an estate filed an action to determine whether the defendant was the surviving spouse of the decedent, because the minister who officiated at the defendant's marriage to the decedent had not obtained the required license from the secretary of state. The court held that the marriage was voidable, not void, and that the defendant did qualify as the surviving spouse.

The issue arises in contexts other than marriage disputes. *See, e.g.,* Tex. Att'y Gen. Op. JC-0535, 2002 WL 1804633 (Tex. A.G.) (Aug. 5, 2002) (addressing who is a "recognized member of the clergy" for purposes of exemption under state's Psychologists Licensing Act); Anthony L. Scialabba et al., *Mail-Order Ministries under the Section 170 Charitable Contribution Deduction: The First Amendment Restrictions, the Minister's Burden of Proof, and the Effect of TRA '86*, 11 CAMPBELL LAW REVIEW 1 (1988).

53. A federal court struck down a Utah statute providing that ordinations, certifications, or licensures received through application over the Internet or through the mail were invalid for purposes of qualifying a person to perform marriages. The court held that distinguishing that group of ministers, rabbis, and priests from those who received the same documentations by telephone, by fax, or in person lacked a rational relationship to a legitimate state interest and violated the Equal Protection Clause. Universal Life Church v. Utah, 189 F. Supp. 2d 1302 (2002).

54. Chance v. Henderson, 134 N.C. App. 657, 667, 518 S.E.2d 780, 786 (1999). *See also, e.g.*, McIntyre v. McIntyre, 211 N.C. 698, 191 S.E. 507 (1937) (estopping husband from denying validity of marriage, in circumstances in which he obtained invalid divorce from his first wife); Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659, *review denied,* 311 N.C. 760, 321 S.E.2d 140 (1984) (estopping husband who helped wife obtain invalid divorce from her first husband from denying validity of divorce in action with wife); Redfern v. Redfern, 49 N.C. App. 94, 270 S.E.2d 606 (1980) (estopping husband from asserting invalidity of marriage, in circumstances in which he was negligent in not obtaining signed divorce judgment from his first wife).

55. The North Carolina Court of Appeals recently upheld a trial court's determination that a couple's marriage in 1991 had not been properly solemnized. It had been performed by a Cherokee Indian who lectured at the UNC Medical School as a shaman or "medicine man," who "performed healings and conducted ceremonies in accordance with Cherokee traditions," and who also possessed a certificate of ordination as a minister in the Universal Life Church. Pickard v. Pickard, ___ N.C. App. ___, ___ S.E.2d ___ (2006). The court of appeals also upheld the trial court's denial of the husband's claim for annulment, however. In doing so, it relied on the doctrine of judicial estoppel to prevent him from taking a position contrary to the one he had presented to the court when he adopted his wife's daughter—that is, that he and the child's mother were married. One judge on the three-judge panel dissented, concluding that the husband had not presented evidence sufficient to prove that the marriage was not properly solemnized or to overcome the presumption that the marriage was valid. *Id. See also* Anita Badrock, *What's a Marriage in North Carolina?* NEWS & OBSERVER (Raleigh), May 24, 2004, at A11.

56. G.S. 51-6 through -21. In North Carolina a three-part form serves as the application, the license, and the certificate of marriage.

57. G.S. 51-6, -7. A person who violates these provisions may be liable in a civil action for $200, prosecuted for a Class 1 misdemeanor, or both.

58. G.S. 51-1.

59. *See, e.g.,* Sawyer v. Slack, 196 N.C. 697, 146 S.E. 864 (1929) (holding that marriage of minor without required special license was valid); Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922) (holding that marriage was not invalid because solemnized without marriage license or under illegal license); Magget v. Roberts, 112 N.C. 71, 16 S.E. 919 (1893) (holding that marriage under invalid license, or with no license, is good if valid in other respects); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890) (holding that in prosecution for bigamy, first marriage was valid despite failure to comply with license requirements); State v. Robbins, 28 N.C. 23 (1845) (holding that proof of marriage without license was sufficient for bigamy prosecution).

60. State v. Lynch, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980).

61. Chapter 1 (*Your License: Renewal and Duplicate Licenses*) of the DRIVER'S HANDBOOK of the North Carolina Division of Motor Vehicles, available at www.ncdot.org/dmv/driver_services/drivershandbook/, says the following about name changes:

A person whose name changes from the name stated on a driver license must notify the Division of the change within 60 days after the change occurs and obtain a duplicate driver license stating the new name. Name changes can be completed with:

- *A marriage certificate issued by a governmental agency.*
- *Documented proof from the courts or the Register of Deeds establishing that the name change was officially accomplished.*
- *Divorce decrees which include the name change.*

Id. at 23.

62. For Social Security Administration policy, Preferred Proof of Ceremonial Marriage, GN 00305.020, *see* http://policy.ssa.gov/poms.nsf/lnx/0200305020. Although the Social Security Administration does accept original or certified copies of religious as well as civil marriage records, the policy states that preferred proof of marriage does not include "a souvenir certificate (SC), also known as a keepsake, ornate, ceremonial, complimentary, goodwill, memento, or heirloom certificate." *Id.*

63. A similar issue arises when a license is issued properly but, on return, indicates that the marriage occurred after the license expired. In this situation the license is not valid, but the marriage probably is.

64. G.S. 51-18 requires registers of deeds to maintain an index for marriage licenses and returns, and states, "The original license and return shall be filed and preserved." G.S. 51-19 subjects a register of deeds who fails to record a return within ten days to a $200 penalty. Interpreting that statute in 1893, the North Carolina Supreme Court held that the penalty did not apply when the license was invalid because the register of deeds who signed it had left office before the license was issued to the applicants. *Magget*, 112 N.C. at 71, 16 S.E. at 919. State administrative rules adopted by the state registrar of vital statistics pursuant to G.S. 130A-92(7) are found at 10A NCAC 41H. Information about the Vital Records Unit in the state Department of Health and Human Services can be found at http://vitalrecords.dhhs.state.nc.us/vr/index.html.

65. One register of deeds sent me a copy of a returned North Carolina license showing that the marriage had taken place in Denmark.

66. *See* Utah v. Green, 99 P.3d 820 (2004) (Durrant, J., concurring), discussing the state's compelling interest in and control over the institution of marriage and quoting from numerous other cases that have characterized the state's interest as compelling.