

815.04 VOID MARRIAGE - ISSUE OF BIGAMY.¹

The (*state number*) issue reads:

"Was the (*name alleged bigamist*) married to another living person at the time of *his* marriage to (*name alleged second spouse*)?"

On this issue the burden of proof is on the plaintiff.² This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that (*name alleged bigamist*) married³ (*name first spouse*).

Second, that (*name alleged bigamist*) thereafter married (*name alleged second spouse*).

Third, that (*name first spouse*) was alive at the time of the marriage between (*name alleged bigamist*) and (*name alleged second spouse*).

Fourth, that at the time of the marriage between (*name alleged bigamist*) and (*name alleged second spouse*), the marriage between (*name alleged bigamist*) and (*name first spouse*) had not been ended by death, divorce or a decree of annulment.

(It is no defense, under the law, that (*name alleged bigamist*) believed that *his* first marriage had been ended by [death] [divorce] [annulment] at the time of *his* second marriage if *his* first marriage was, in fact, still valid.)⁴

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*name alleged bigamist*) was married to another living person at the time

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of *his* marriage to (*name alleged second spouse*), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, it would be your duty to answer this issue "No" in favor of the defendant.

1. N.C. Gen. Stat. § 51-3 provides that ". . . [a]ll marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void." Bigamous marriages are absolutely void. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963); *Pridgen v. Pridgen*, 203 N.C. 533, 166 S.E. 591 (1932); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). A "void" marriage is considered a nullity *ab initio*, with no rights flowing therefrom. *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). A "voidable" marriage, by contrast, is valid for all civil purposes until annulled by a court of competent jurisdiction. *Geitner ex rel First Nat'l. Bank v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 *cert. denied*, 310 N.C. 744, 315 S.E.2d 702 (1984).

2. Void marriages are subject to collateral attack. *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). Thus, the plaintiff need not be one of the parties purportedly married.

3. A rebuttable presumption of marriage is created when a man and woman hold themselves out as husband and wife. Proof of this "holding out" by reputation evidence meets this burden. See *Chalmers v. Womack*, 269 N.C. 433, 152 S.E.2d 505 (1967) and *Howard v. Sharp*, 69 N.C. App. 555, 317 S.E.2d 426 (1984). The burden then shifts to the other party to prove that there was no marriage. See N.C.P.I.-Civil 815.00 (Void Marriage - Issue of Lack of Personal Consent) and 815.02 (Void Marriage - Issue of Lack of Proper Solemnization).

4. Lee, *North Carolina Family Law* (5th ed.), § 3.19 at 179; *c.f. Scarboro v. Scarboro*, 233 N.C. 449, 64 S.E.2d 422 (1951) and *Woodruff v. Woodruff*, 215 N.C. 685, 3 S.E.2d 5 (1939).