

815.27 VOIDABLE MARRIAGE (ANNULMENT)<sup>1</sup> - ISSUE OF DURESS.<sup>2</sup>

*NOTE WELL: If one of the parties to the marriage has died, submission of N.C.P.I.-Civil 815.30 may also be necessary.<sup>3</sup>*

The (*state number*) issue reads:

“Was the consent of the [plaintiff] [deceased]<sup>4</sup> to marry the defendant procured by duress?”

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence,<sup>5</sup> that at the time of the [plaintiff's] [deceased's] marriage to the defendant, the [plaintiff's] [deceased's] consent to marry the defendant was procured by duress.

Duress occurs where, by the wrongful act or threat or coercion of another,<sup>6</sup> a person is [induced][forced] to make a contract, or to perform or forego some act, under circumstances which deprive that person of the exercise of free will<sup>7</sup> and *his* will is actually overcome.<sup>8</sup> Duress may exist even though that person is fully aware of all the facts material to *his* decision.<sup>9</sup>

The duress must have existed and must have acted upon the free will of the [plaintiff] [deceased] at the precise time of the marriage ceremony.<sup>10</sup>

The existence of duress is for you to determine from all the evidence. You may consider, together with all the other facts and circumstances in evidence, the [plaintiff's] [deceased's]:<sup>11</sup>

[age]

[physical condition]

[mental condition]

[access to or opportunity to receive independent advice]

[relationship with the person [making the threat] [exerting coercion]]

*[state any other relevant factors supported by the evidence].*

You may also consider:

[the degree to which the [plaintiff] [deceased] was in personal distress or an emergency situation]<sup>12</sup>

[the intent<sup>13</sup> of the person [making the threat] [exerting coercion]]<sup>14</sup>

[whether alternatives to marriage were reasonably available to the [plaintiff] [deceased]]<sup>15</sup>

[the source of the power of the person [making the threat] [exerting coercion]].<sup>16</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the consent of the [plaintiff][deceased] to marry the defendant was procured by duress at the time of the marriage ceremony, 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, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. In addition to bigamy, N.C. Gen. Stat. § 51-3 (1977) also describes certain other marriages as "void"; in those other instances, "the statute should be read to mean 'voidable.'" Suzanne Reynolds, 1 *Lee's North Carolina Family Law* § 3.16A (5th ed. Rev. 1993) (hereinafter "Reynolds"); see also *Sawyer v. Slack*, 196 N.C. 697, 699-700, 146 S.E. 864, 865 (1929) ("void" in statute (now N.C. Gen. Stat. § 51-3) construed to mean "voidable" as applied to marriage of person under statutory age). A "voidable" marriage is "valid for all civil purposes until annulled" by a court of competent jurisdiction; a "void" marriage is a "nullity and may be impeached at any time." *Geitner ex rel First Nat'l Bank v. Townsend*, 67 N.C. App. 159, 161, 312 S.E.2d 236, 238 (1984) (quoting *Ivery v. Ivery*, 258 N.C. 721, 726, 129 S.E.2d 457, 461 (1963)).

2. Although "there are few cases in North Carolina about duress in the setting of annulment," *Reynolds* § 3.22 at 201 (see, e.g., *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912), *Bryant v. Bryant*, 171 N.C. 746, 88 S.E. 147 (1916)), the marriage of a party whose consent to marry was "procured by duress . . . should be voidable," *Reynolds* § 3.22 at 200, as such party is "incapable of contracting from want of will," N.C. Gen. Stat. § 51-3. See also N.C. Gen. Stat. § 51-1 ("valid and sufficient marriage [is created by] consent . . . freely, seriously and plainly expressed (emphasis added)); *Clark v. Foust-Graham*, 171 N.C. App. 707, 715, 615 S.E.2d 398, 403-04 (2005) (person whose consent to marry was procured by undue influence is "incapable of contracting from want of will," N.C. Gen. Stat. § 51-3, such that the marriage is voidable pursuant to the statute and "may be annulled on this ground where the facts and circumstances so warrant").

Also note that "ratification," see N.C.P.I.-Civil 815.32, MAY be a defense to annulment based upon duress. This issue has not yet been addressed by appellate decision or statute. Cf. *Taylor*, 160 N.C. at 41, 75 S.E. at 942 (*dicta* that marriage entered into under duress never ratified absent post marriage cohabitation); see *Reynolds*, § 3.23 at 205 ("ratification is generally available as a defense to the annulment of a voidable marriage" and, in the setting of duress, "voluntary cohabitation after the threat is no longer perceptible should suffice"), *id.* at 199 (the "law might . . . find that the incompetent who recovers might have ratified the marriage by long cohabitation") (citing *Watters v. Watters*, 168 N.C. 411, 413, 84 S.E. 703, 704 (1915) (in cases other than where the marriage is void (*i.e.*, bigamy), "the marriage can be ratified by the conduct of the party who is entitled to make the application for such [action]. The ground for such application can be put forward only by the party who has been imposed on and who has not subsequently ratified the contract and waived the disqualification."); see also *Koonce v. Wallace*, 52 N.C. 194, 196, (1859); *Parks v. Parks*, 218 N.C. 245, 250, 10 S.E.2d 807, 810 (1940); *Sawyer v. Slack*, 196 N.C. 697, 700, 146 S.E. 864, 865 (1929) (ratification applicable in context of marriage of person under statutory age).

3. See N.C. Gen. Stat. § 51-3 providing that "[n]o marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties to the marriage, except for bigamy." If a party to the marriage has died, it may be necessary to submit an issue (N.C.P.I.-815.30) to establish the lack of cohabitation AND birth of issue. See *Clark*, 171 N.C. App. at 711-12, 615 S.E.2d at 401.

4. Under N.C. Gen. Stat. § 50-4 (1979), an annulment may be sought by "either party to a marriage contracted contrary to the prohibitions [of chapter 51] entitled Marriage." However, although "the victim of the duress has standing, in light of the rationale of the action, unless the other spouse also was a victim of duress, the other spouse should not. By the same reasoning, no third parties-only the spouse who was the victim of duress-should be able to maintain the action." *Reynolds, supra* note 1. Under N.C.

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Gen. Stat. § 51-3, *supra* note 3, however, North Carolina case law has approved annulments on grounds of undue influence and of lack of mental capacity to be sought by the person under the disability or his guardian [or after the death of such person in the absence of cohabitation and birth of issue of the marriage, by a person whose legal rights depend on the validity of the marriage]. *Clark*, 171 N.C. App. at 711-12, 615 S.E.2d at 401; *Ivery*, 258 N.C. at 730, 129 S.E.2d at 463.

5. No North Carolina case has directly addressed the burden of proof in annulment proceedings. *Cf. Johnson v. Johnson*, 141 N.C. 91, 93-4, 53 S.E. 623, 624 (1906) (Connor, J., concurring) (action to have a marriage declared void "so far as the procedure is concerned, is an action for divorce . . .") (citing *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889)); N.C.P.I. Civil-815.40 ('greater weight of the evidence' set out as the burden of proof for divorce on grounds of one year's separation; 1 *Reynolds* § 6.28 (in an action for divorce from bed and board under N.C. Gen. Stat. § 50-7 (1985), "the complaining party must establish the elements by the greater weight of the evidence.") *But see* 1 *Reynolds* § 3.8 ("Fairly consistently among courts in other states that have analyzed the issue, the opinions have required the party [seeking annulment] to prove the case by clear and convincing evidence. [See N.C.P.I. 101.11.] Although no North Carolina cases treat the weight of the burden, by analogy to other issues on marriage validity, one would expect . . . the law to require more than a preponderance of the evidence").

6. "In North Carolina and other states, relatively few cases have developed the kind, amount, or source of the duress that will avoid a marriage," *Reynolds, supra* note 2, at 200. Duress "may avoid the marriage even though it comes from a third party instead of the other spouse." *Id.* at 203.

Possible examples of duress include: 1) the use or threatened use of physical violence, see *id.* at 200-02; *cf. Bryant*, 171 N.C. at 747, 88 S.E. at 148 (demurrer sustained to husband's action based upon threats of physical violence by spouse's father for failure to allege any overt acts); 2) threats of criminal or civil proceedings for seduction or for support of the wife and child, see *Reynolds, supra* note 1, at 204 (in these instances, "the North Carolina appellate courts, like the courts of most states, have refused to annul" on the apparent basis that, under the circumstances, "not only were the threats lawful, they were proper as well"); see H. Clark, 1 *Law of Domestic Relations* § 2.17, 190 (Second Ed. 1987) ("today, when pre-marital sexual relations have become almost a matter of course . . .

[m]arriages contracted out of fear of legal proceedings should . . . be annulled under the same circumstances as . . . any marriage induced by force or threats"); *Link v. Link*, 271 N.C. 181, 194, 179 S.E.2d 697, 705 (1971) ("The threat to institute legal proceedings, criminal or civil, which might be justifiable *per se*, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings."); 3) in action to void wife's assignments to husband of stocks and bonds, threats to turn wife out of house and take children from her, *Link*, 278 N.C. at 195, 179 S.E.2d at 705-06; 4) in action to rescind separation agreement, threats to expose wife's infidelity, disgrace her in court and expose children to custody proceedings, *Coppley Coppley*, 128 N.C. App. 658, 664, 496 S.E.2d 611, 616-17 (1998) (quoting *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307-08 (1990)); 5) economic duress, *Reynolds, supra* note 1, at 202.

7. *Coppley*, 128 N.C. App. at 664, 496 S.E.2d at 616-17; *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703-05 (1971).

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8. *Stegall*, 100 N.C. App. at 401, 397 S.E.2d at 308.

9. *Id.*

10. *Reynolds*, *supra* note 1, at 203; *Geitner*, 67 N.C. App. at 162, 312 S.E.2d at 238 (“the mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity”).

11. *Coppley*, 128 N.C. App. at 664, 496 S.E.2d at 616-17, quoting *Stegall*, 100 N.C. App. at 401-02, 397 S.E.2d at 308.

12. *Id.*

13. For an analysis of intent, see N.C.P.I.-Civil 101.46 (defining intent as when one desires to cause the consequences of his act or those consequences that are certain to occur).

14. *Reynolds*, *supra* note 1, at 202.

15. *Id.*

16. *Id.*