

815.44 DIVORCE - ABSOLUTE - ISSUE OF INCURABLE INSANITY.¹

The (*state number*) issue reads:

"Is the plaintiff entitled to a divorce from the defendant based upon incurable insanity?"

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

First, that the plaintiff and the defendant have lived separate and apart, without cohabitation, for three consecutive years. (An experimental or trial release of an insane spouse from confinement to the custody of the other spouse is not a resumption of cohabitation or a cessation of living separate and apart.)²

Second, that the incurable insanity of the defendant was the reason for the parties' separation.³

Third, that the plaintiff and the defendant continue to live separate and apart because of the incurable insanity of the defendant.

Fourth, (*choose one or more of the four options below, as applicable*)

[that the defendant is suffering from incurable insanity and [has been confined⁴ or examined for three consecutive years prior to this action in an institution for the care and treatment of the mentally disordered] [has been examined at least three years prior to this action and found to be incurably insane by two qualified,⁵ reputable physicians]]

[that the defendant has been examined at least three years prior to this action by two qualified⁶ physicians who found the defendant to be incurably insane and then again after the initiation of this action by one of them who found that the defendant had remained continuously incurably insane]

[that the defendant was adjudicated to be insane more than three years prior to this action, that the defendant's insanity has continued without interruption⁷ since *he* was adjudicated to be insane, and that the defendant has not been adjudicated to be sane since *he* was adjudicated to be insane]

[that the defendant was examined by qualified⁸ medical doctors at least three years prior to this action who determined that the defendant was incurably insane, and that the defendant was examined by two qualified,⁹ reputable physicians after this action was commenced who determined that the defendant remains incurably insane].

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 that the plaintiff is entitled to a divorce from the defendant based upon incurable insanity, 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. § 50-6. Note that one of the parties must have resided in North Carolina for six months next preceding the institution of an action under this section. If this fact is in dispute, it must be submitted as a fifth element.

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2. *Id.*

3. *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955); *Vaughan v. Vaughan*, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

4. The insane spouse need not be under lock and key for the period of "confinement." Probationary home visits do not interrupt the running of the three year period. *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955); *Vaughan v. Vaughan*, 4 N.C. App. 253, 166 S.E.2d 530 (1969). A discharge, however, does end the running of the three year period. *Id.*

5. Two reputable physicians must provide proof. One must be a staff member or the superintendent of the institution where the insane spouse is confined. The other must be a regularly practicing physician in the community where the husband and wife reside but who has no connection with the institution where the insane spouse is confined. N.C. Gen. Stat. § 50-5.1.

6. This evidence must come from a licensed physician who is a member of the staff of one of North Carolina's accredited four year medical schools or a state supported mental institution. The first physician's opinion must be supported by another physician licensed by the State. One of these two physicians must also conduct the second examination. N.C. Gen. Stat. § 50-5.1.

7. Proof of incurable insanity existing after the institution of the divorce proceeding must be furnished by the testimony of two reputable, regularly practicing physicians, one of whom must be a psychiatrist. N.C. Gen. Stat. § 50-5.1.

8. These medical doctors must be members of the staff of one of North Carolina's accredited four year medical schools. N.C. Gen. Stat. § 50-5.1.

9. This evidence must be provided by a psychiatrist on the staff of one of North Carolina's accredited four year medical schools and a physician practicing regularly in the community in which the insane person resides. N.C. Gen. Stat. § 50-5.1.