

815.70 ALIMONY - ISSUE OF MARITAL MISCONDUCT.

The (*state number*) issue reads:

“Did the [plaintiff] [defendant]<sup>1</sup>, (*state name of offending spouse*), commit marital misconduct during the marriage [and prior to or on the date of separation]<sup>2</sup> of the plaintiff and the defendant?”

On this issue the burden of proof is on the [plaintiff] [defendant]. This means the [plaintiff] [defendant] must prove, by the greater weight of the evidence, that during the marriage [and prior to or on the date of separation] of the plaintiff and the defendant, the [plaintiff] [defendant] committed marital misconduct.

Marital misconduct<sup>3</sup> is

[illicit sexual behavior voluntarily engaged in by the [plaintiff] [defendant] with someone other than *his* spouse.<sup>4</sup> Illicit sexual behavior means [acts of sexual intercourse<sup>5</sup>] [deviate sexual intercourse] [deviate sexual acts] [cunnilingus] [fellatio] [analingus] [anal intercourse] [the penetration, however slight, by any object into the genital or anal opening of another person’s body] voluntarily engaged in by a spouse with someone other than *his* spouse.]<sup>6</sup> A single act of illicit sexual behavior is sufficient.]

[involuntary separation as a consequence of a criminal act committed by the [plaintiff] [defendant] prior to this proceeding.<sup>7</sup>]

[abandonment of the [plaintiff] [defendant] without provocation.<sup>8</sup> One spouse abandons the other when *he* brings their cohabitation to an end without the intent<sup>9</sup> to renew it and without the consent of the other spouse.<sup>10</sup> (One spouse may abandon the other without physically leaving

the home.<sup>11</sup> For example, if one spouse treats the other with such cruelty<sup>12</sup> or neglect<sup>13</sup> or withholds support<sup>14</sup> so that the other spouse is forced to leave or flee the home, then the offending spouse is deemed to have abandoned the other.<sup>15</sup>]

However, the [plaintiff's] [defendant's] abandonment must not have been provoked by *his* spouse.<sup>16</sup> What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the [plaintiff] [defendant] has been such as would likely render it impossible for *his* spouse to continue the marital relationship with safety, health and self-respect.<sup>17</sup>]

[maliciously turning the [plaintiff] [defendant] out of doors [without provocation].<sup>18</sup> A spouse is turned out of doors when ejected from or forced to leave the marital home by the other spouse.<sup>19</sup> (This may be accomplished by force or by threat of violence. It may also be accomplished by cruelty that causes the spouse to leave the marital home. Cruelty may consist of an affirmative act<sup>20</sup> or a willful failure, such as failing to provide adequate support as required by law.<sup>21</sup>) (Malice means hatred, ill will or spite. It also means the intentional doing of an act which is calculated to cause injury or harm and which is done without justification or excuse.)

[However, the [plaintiff's] [defendant's] conduct must not have been provoked by *his* spouse.<sup>22</sup> What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the [plaintiff] [defendant] has been such as would likely render it impossible for *his* spouse to continue the marital relationship with safety, health and self-respect.<sup>23</sup>]

[cruel or barbarous treatment endangering the life of the [plaintiff] [defendant] [without provocation].<sup>24</sup> Whether particular acts constitute cruelty or barbarous conduct depends on the facts and circumstances of each case. Factors you may consider include, among other things, the status of the parties and their sensibilities, social position, refinement, intelligence, temperament, state of health, habits and feelings, as well as the character and nature of the acts or violence alleged. Acts of cruelty or barbarous treatment may be mental, physical or both.<sup>25</sup>

[However, the [plaintiff's] [defendant's] conduct must not have been provoked by *his* spouse.<sup>26</sup> What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the [plaintiff] [defendant] has been such as would likely render it impossible for *his* spouse to continue the marital relationship with safety, health and self-respect.<sup>27</sup>]

[engaging in indignities rendering the condition of the [plaintiff] [defendant] intolerable and life burdensome without provocation.<sup>28</sup> Indignities to the person amount to a type of mental cruelty.<sup>29</sup> Actual physical violence, or the threat of it, is not required.<sup>30</sup> The acts need not endanger life or health. The fundamental characteristic of indignities is that they must consist of a course of conduct or continued treatment which renders the condition of the other party intolerable and life burdensome.<sup>31</sup> The indignities must be repeated or continued over a period of time so that they may appear to have been offered willfully and intentionally, or at least consciously, to the annoyance of the [plaintiff] [defendant] rendering *his* condition intolerable and life burdensome.<sup>32</sup>

Whether the indignities of one spouse render the other spouse's condition intolerable and life burdensome depends upon the facts and circumstances in each case. Factors you may consider include, among

other things, the status of the parties and their sensibilities, social position, refinement, intelligence, temperament, state of health, habits and feelings, as well as the character and nature of the indignities alleged.<sup>33</sup>

However, the [plaintiff's] [defendant's] conduct must not have been provoked by *his* spouse.<sup>34</sup> What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the [plaintiff] [defendant] has been such as would likely render it impossible for *his* spouse to continue the marital relationship with safety, health and self-respect.]<sup>35</sup>

[the [plaintiff] [defendant] recklessly spending [his income] [the income of his spouse].<sup>36</sup>

[destroying, wasting, diverting or concealing assets.<sup>37</sup>

[engaging in the excessive use of [alcohol] [drugs] so as to render the condition of the [plaintiff] [defendant] intolerable and life burdensome.<sup>38</sup> Whether the excessive use of [alcohol] [drugs] by one spouse renders the other spouse's condition intolerable and life burdensome depends upon the facts and circumstances in each case. Factors you may consider include, among other things, the status of the parties and their sensibilities, social position, refinement, intelligence, temperament, state of health, habits and feelings, as well as the character and nature of the acts of excessive use alleged.]

[willfully failing to provide necessary subsistence according to the [plaintiff's] [defendant's] means and conditions so as to render the condition of the [plaintiff] [defendant] intolerable and life burdensome.<sup>39</sup> "Subsistence" means support, maintenance or livelihood. A spouse's

failure to provide required subsistence is willful when, having the means to provide necessary subsistence, the spouse neglects or refuses to do so. (In determining necessary subsistence according to a spouse's means and condition in life, you may consider earnings, earning capacity, and holdings of money and other property, if any.<sup>40</sup>)

The fundamental characteristic of a willful failure to provide support is that it must consist of a course of conduct or continued treatment. The willful failure to provide support which renders one spouse's condition intolerable and life burdensome depends upon the facts and circumstances in each case. Factors you may consider include, among other things, the status of the parties and their sensibilities, social position, refinement, intelligence, temperament, state of health, habits and feelings, as well as the character and nature of the failure to provide support.]

Finally, as to this (*state number*) issue on which the [plaintiff] [defendant], (*state name of offended spouse*), has the burden of proof, if you find by the greater weight of the evidence, that during the marriage [and prior to or on the date of separation] of the plaintiff and the defendant, the [plaintiff] [defendant], (*state name of offending spouse*), committed marital misconduct, then it would be your duty to answer this issue "Yes" in favor of the [plaintiff] [defendant].

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 [plaintiff] [defendant].

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1. See N.C. Gen. Stat. § 50-16.3A(d) (stating that "[i]n the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in [N.C. Gen. Stat.] § 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct.").

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2. The acts set out in the instruction are included within the definition of "marital misconduct" under N.C. Gen. Stat. § 50-16.1A(3) if such acts "occur[red] during the marriage and prior to or on the date of separation." "Date of separation" refers to the "[t]he date upon which the husband and wife begin to live 'separate and apart.'" *Romulus v. Romulus*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 715 S.E.2d 308, 328 (2011). The words "separate and apart" mean "that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation." *Id.* (quoting *Myers v. Myers*, 62 N.C. App. 291, 294, 302 S.E.2d 476, 479 (1983)) (internal quotation marks omitted).

3. If a party has properly invoked the Fifth Amendment privilege against self-incrimination upon being questioned regarding certain acts of marital misconduct, then N.C.P.I.-Civil 101.38 ("Evidence-Invocation by Witness of Fifth Amendment Privilege Against Self-Incrimination") may be appropriate. *See, e.g., In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991) (privilege invoked when wife questioned concerning adultery).

4. Unlike several of the statutory acts of marital misconduct set out in the instruction, "it is not necessary to couple the allegation of [adultery] with a denial of provocation." *Brooks v. Brooks*, 226 N.C. 280, 285, 37 S.E.2d 909, 912 (1946). *See also* 6 Suzanne Reynolds, *Lee's North Carolina Family Law* § 6.9 (noting that "no conduct by the complaining spouse justifies the other spouse to commit adultery or become an habitual drunkard; therefore, neither of these grounds requires the complaining spouse to allege and prove that the conduct was 'unprovoked.'" ) and *Greene v. Greene*, 15 N.C. App. 314, 316-18, 190 S.E.2d 258, 260 (1972) (noting that "[c]onivance in the law of divorce is the plaintiff's consent, express or implied, to the misconduct alleged as a ground for divorce." (citation omitted). 'Connivance, or procurement, denotes direction, influence, personal exertion, or other action with knowledge or belief that such action would produce certain results and which results are produced.' (Citation omitted). 'The basis of connivance is the maxim "volenti non fit injuria," or that one is not legally injured if he has consented to the act complained of or was willing that it should occur. It is also said that the basis of the defense of connivance is the doctrine of unclean hands.'" (citation omitted)).

5. "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient." *Romulus*, \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 326 (citing N.C. Gen. Stat. § 14-23).

6. N.C. Gen. Stat. § 50-16.1A(3)a. A party wishing to prove an adulterous act by circumstantial evidence may resort to the "opportunity and inclination" doctrine, which creates a presumption of adultery if the party can show: "(1) the adulterous disposition, or inclination, of the [spouse and her purported lover]; and (2) the opportunity created to satisfy their mutual adulterous inclinations." *Romulus*, \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 326 (quoting *State v. Bowman*, 232 N.C. 374, 375-76, 61 S.E.2d 107, 108 (1950)).

7. *Id.* at N.C. Gen. Stat. § 50-16.1A(3)b. If the issue is raised, and in the absence of an applicable decision from North Carolina's appellate courts, the Civil Subcommittee of the North Carolina Pattern Jury Instruction Committee recommends that the date of filing be referenced as the date of "this proceeding."

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8. *Id.* at N.C. Gen. Stat. § 50-16.1A(3)c. For cases involving indignities, abandonment and cruelty see *Earp v. Earp*, 52 N.C. App. 145, 277 S.E.2d 877 (1981), *Privette v. Privette, Sr.*, 30 N.C. App. 305, 227 S.E.2d 137 (1976), and *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964).

On the issue of including lack of provocation as an element of abandonment, see n.15 *infra*.

9. For an instruction on intent, see N.C.P.I.-Civil 101.46.

10. See *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E.2d 387, 392 (1971); *Murray v. Murray*, 37 N.C. App. 406, 409, 246 S.E.2d 52, 54 (1978), *aff'd*, 296 N.C. 405, 250 S.E.2d 276 (1979); *Lin v. Lin*, 108 N.C. App. 772, 776, 429 S.E.2d 9, 11 (1993).

11. See *Panhorst*, 277 N.C. at 671, 178 S.E.2d at 392. Abandonment without physically leaving the home is generally referred to as "constructive abandonment." See, e.g., *Walker v. Walker*, 143 N.C. App. 414, 420-21, 546 S.E.2d 625, 630 (2001) (evidence that husband "drank excessively, would not come home in the evenings after work, spent many weekends at the coast without his family, and was removed from the home [pursuant to a Chapter 50B emergency protective order] due to his violent behavior towards" the wife would allow a verdict in favor of, the wife "on the issue of constructive abandonment," notwithstanding "that he could not have actually abandoned [the wife] because he was forcibly removed from the marital home pursuant to a[n] . . . emergency protective order"), and *Somerset v. Somerset*, 3 N.C. App. 473, 476, 165 S.E.2d 33, 35 (1969) ("We perceive no reason why [wife]'s seeking the aid of the Domestic Relations Court should detract from her cause of action. It was for the jury to determine whether [husband]'s conduct prior to the [emergency protective] order . . . would justify [the wife] in seeking the aid of the Courts and thereby constitute a constructive abandonment by him. Defendant cannot hide behind the order which his own improper conduct brought about.").

12. See *Eggleston v. Eggleston*, 228 N.C. 668, 679, 47 S.E.2d 243, 250 (1948).

13. See generally *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 121-23, 362 S.E.2d 584, 586-87 (1987) (discussing neglect and constructive abandonment).

14. See *Brady v. Brady*, 273 N.C. 299, 303-05, 160 S.E.2d 13, 16-18 (1968).

15. Merely sleeping in a separate bedroom is not abandonment. See *Oakley v. Oakley*, 54 N.C. App. 161, 162, 282 S.E.2d 589, 590 (1981). Nor does abandonment occur when spouses separate by agreement. See *Sauls v. Sauls*, 288 N.C. 387, 390, 218 S.E.2d 338, 341 (1975). "However, where the agreement to separate is induced by the misconduct of one spouse, the other can still maintain the charge of voluntary abandonment . . . . Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary . . . . Nor under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving." *Id.*

16. See 6 Lee's at § 6.8 (stating that "[a] spouse who ends marital cohabitation has not abandoned the other spouse if ending it was justified; therefore, the law imposes the requirement that a spouse not provoke the separation . . . . Procedurally, North Carolina recognizes the doctrine of provocation by requiring that the spouse alleging abandonment

specifically allege and prove absence of provocation.”).

17. See *Caddell v. Caddell*, 236 N.C. 686, 690-91, 73 S.E.2d 923, 926 (1953).

18. N.C. Gen. Stat. § 50-16.1A(3)d; see also n.21 (discussing lack of provocation as an element of maliciously turning out of doors).

19. See 6 *Lee’s* at § 6.9 (noting that “[t]he ground is self-explanatory, requiring the guilty spouse wrongfully to evict the other spouse.”).

20. See generally *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918) (finding that malicious turning out of doors is an instance of abandonment).

21. See *Ritchie v. White*, 225 N.C. 450, 452-53, 35 S.E. 414, 415 (1945) (noting that “[i]t is the public policy of the State that a husband shall provide support for himself and family. This duty . . . is an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment.”).

22. Inclusion of lack of provocation as an element in a malicious turning out-of-doors instruction has been questioned. See 6 *Lee’s* at § 6.9 (stating that “[a]n issue that might arise involves the requirement that the innocent spouse plead and prove absence of provocation. The law has required the complaining spouse to prove lack of provocation as a way to balance the conduct of the spouses: if the conduct of the complaining spouse justified the other spouse to leave or withdraw, then the complaining spouse is not entitled to the relief sought . . . . [I]t is unclear whether malicious turning out of doors [requires specific pleading and proof of lack of provocation]. Since the ground involves malice and extreme conduct, the balancing implicit in the element of ‘without provocation’ may be inappropriate. At any rate, in the North Carolina cases on malicious turning out of doors, the appellate courts rarely discuss provocation. It may be that when the conduct is egregious enough to raise malicious turning out of doors, the accused parties have lacked the temerity to suggest that the conduct of the evicted spouse excused their own.” (citations omitted)).

23. See *Caddell*, 236 N.C. at 690-91, 73 S.E.2d at 926.

24. N.C. Gen. Stat. § 50-16.1A(3)e; see also n.6 *supra* and n.25 *infra* (discussing the lack of provocation as an element of cruel and barbarous treatment).

25. See *Pearce v. Pearce*, 226 N.C. 307, 310, 37 S.E.2d 904, 906 (1946).

26. See 6 *Lee’s* at § 6.10 (explaining that “[t]o establish cruelty . . . the complaining party must show . . . the absence of provocation . . . . [T]he requirement to prove absence of provocation has become clearer as the definition of cruelty has expanded. When the law considered only physical violence as cruelty, public policy may have dispensed with the need to establish lack of provocation: surely no conduct of the complaining spouse would justify the other to inflict physical injury. As the law recognized cruelty in conduct that did not involve force, however, establishing lack of provocation became more important. A number of appellate cases in North Carolina have reiterated that cruelty requires allegation and proof that the complaining spouse did not provoke the conduct of the offending spouse.” (citations omitted)).

27. See *Caddell*, 236 N.C. at 690-91, 73 S.E.2d at 926.



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28. See N.C. Gen. Stat. § 50-16.1A(3)f, *Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E.2d 597, 599 (1947), *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976), *Presson v. Presson*, 12 N.C. App. 109, 111, 182 S.E.2d 614, 616 (1971), and n.13 *supra*; see also n.33 *infra* (discussing the issue of including lack of provocation as an element of rendering a spouse's condition intolerable and *his* life burdensome).

29. See 6 *Lee's* at § 6.11 ("Cruelty, especially mental cruelty, is a close cousin of indignities . . . , and the development of indignities in this state parallels the development of cruelty in other states.").

30. See *id.* at § 6.12A ("Indignities need not involve force or the fear of it.").

31. See *Traywick*, 28 N.C. App. at 295, 221 S.E.2d at 88; see also *Miller v. Miller*, 78 N.C. 102, 106-07 (1878) ("It would be impossible . . . to decide with any precision the course of conduct which will amount to . . . 'indignities.'").

32. See *Miller*, 78 N.C. at 106-07 (stating that "the indignity, whatever may be its form or nature, must be *such as may be expected seriously to annoy a [person] of ordinary good sense and temper* . . . . Generally speaking, the conduct of the [offending spouse] must be such as might reasonably be expected to annoy a [person] of an ordinarily sound and healthy nature. *It must be repeated* or continued in, so that it may appear to have been done *willfully and intentionally*, or at least *consciously* by the [offending spouse] to the annoyance of [his spouse]. [The offending spouse] must have reason to believe that [his] act or course of conduct will greatly and naturally annoy [his spouse], and must persist in it regardless of such annoyance."); see generally *Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946) (adulterous behavior of husband, disavowal of affection for wife, ejection of wife from bed and exclusion from marital home); *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911) (long course of neglect, cruelty, humiliation and insult of wife); *Green v. Green*, 131 N.C. 533, 42 S.E. 954 (1902) (insulting and injurious accusations against wife, "refusal to stay in the dwelling house and sleep" with her and denial that they were married); *Scoggins v. Scoggins*, 85 N.C. 348 (1881) (drunken husband cursed wife and drove her from the home and away from bedside of dying child); *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E.2d 243, *cert. denied*, 302 N.C. 634, 280 S.E.2d 449 (1981) (husband moved to basement of home, withdrew from family, viewed "hardcore" pornographic materials in basement, permitted his minor children to view these materials and requested wife "to indulge him in various unnatural sexual desires" before leaving the home for good).

33. See *Sanders*, 157 N.C. at 233, 72 S.E. at 877-78 ("The station in life, the temperament, state of health, habits and feelings of different persons are so unlike that treatment which would send the broken heart of one to the grave would make no sensible impression upon another.").

34. See 6 *Lee's* at § 6.14 ("As developed in the North Carolina law of indignities, the provocation element requires the fact finder to weigh the conduct of the spouses and decide their relative responsibility. If the accused spouse is more blameworthy, then the complaining spouse has satisfied lack of provocation. The complaining spouse need not establish total absence of blame . . . . If the indignities cannot be explained away by the conduct of the complaining spouse, then the complaining spouse has not provoked the indignities." (citations omitted); *id.* at § 6.14(A) ("In North Carolina, the law requires not only allegations of lack of provocation but sufficient specificity to enable the accused spouse to counter them." (citations omitted)); and *id.* at § 6.14(B) ("To establish lack of provocation for indignities . . . , the complaining party need not establish that his or her

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conduct was perfect; only that it does not excuse the conduct of the accused spouse . . . . At least in the appellate cases, the complaining parties almost always prove absence of provocation, and when they do not, it is usually because the provoking conduct itself amount to marital misconduct . . . . [However, the] provoking conduct may not need to amount to marital misconduct. Whether the complaining party has satisfied the absence of provocation rests with the finder of fact, and often the appellate cases suggest that the complaining party has carried the burden of proving lack of provocation without offering much evidence of it." (citations omitted)).

35. See *Caddell*, 236 N.C. at 690-91, 73 S.E.2d at 926.

36. N.C. Gen. Stat. § 50-16.1A(3)g; see also *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 562 (1986).

37. N.C. Gen. Stat. § 50-16.1A(3)g.

38. N.C. Gen. Stat. § 50-16.1A(3)h; see, e.g., *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214,(1947) (finding that the wife's allegations that the husband was a habitual drunkard stated a cause of action for alimony without divorce under North Carolina law).

Similar to the adultery, the "law apparently does not require the spouse who complains of excessive use of alcohol or drugs to establish lack of provocation." 6 *Lee's* at § 6.15.

39. N.C. Gen. Stat. § 50-16.1A(3)i; see also *VanDooren v. VanDooren*, 37 N.C. App. 333, 335, 246 S.E.2d 20, 22, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

40. See *id.* at 335, 246 S.E.2d at 22.