

815.71 ALIMONY - ISSUE OF CONDONATION.¹

NOTE WELL: Condonation is generally an affirmative defense and must usually be alleged in the pleadings.² However, if facts alleged in the complaint constitute condonation (such as resumption of the marriage after the defendant's misconduct), the defendant is not required to plead the affirmative defense of condonation in the answer.³ Further, a party who is not permitted to file a responsive pleading that would contain allegations of condonation may raise that defense at trial.⁴

The (*state number*) issue reads: Did the [plaintiff] [defendant], (*state name of offended spouse*), condone marital misconduct⁵ committed during the marriage and prior to or on the date of separation by the [plaintiff] [defendant], (*state name of offending spouse*)?⁶

You will answer this issue only if you have answered Issue (*state number*) in favor of the [plaintiff] [defendant].

For purposes of this instruction, condone means forgive, and I will use the words condone and forgive, and condonation and forgiveness, interchangeably as I discuss this issue with you.

On this issue, the burden of proof is on the [plaintiff] [defendant].⁷ This means that the [plaintiff] [defendant] must prove, by the greater weight of the evidence that the [plaintiff] [defendant], with knowledge of *his* spouse's marital misconduct, condoned or forgave *his* spouse for that conduct.⁸

The definition[s] and explanation[s] of [the different types of] marital misconduct which I gave you in discussing Issue (*state number*) apply equally to this issue and I charge you to remember and use [that] [those] definition[s] and explanation[s] in your deliberations on this issue.

In order to condone or forgive marital misconduct, a spouse must know that such marital misconduct occurred. This means that before marital misconduct can be forgiven, the spouse must have actual knowledge of the marital misconduct or have knowledge of facts which would satisfy a reasonably prudent person that the marital misconduct had been committed.⁹ Mere suspicion without facts or knowledge to support such suspicion will not suffice.¹⁰ In addition, it must appear that a spouse not only knew of the marital misconduct, but also accepted it as true.¹¹

A spouse condones or forgives marital misconduct when *he* voluntarily elects to [continue] [resume] the marital relationship with the spouse who has committed marital misconduct.¹² [Continuation] [Resumption] of the marital relationship means voluntary [continuation] [renewal] of the husband and wife relationship, as shown by the totality of the circumstances.¹³

[Evidence that the plaintiff and defendant engaged in sexual intercourse after the [plaintiff] [defendant] forgave *his* spouse for act(s) of marital misconduct is not required.¹⁴]

[Evidence of voluntary sexual intercourse between the plaintiff and the defendant after the [plaintiff] [defendant] has actual knowledge of the adultery of *his* spouse, or has knowledge of facts which would satisfy a reasonably prudent person that *his* spouse had committed adultery, is considered evidence of a spouse's forgiveness of adultery on the part of the offending spouse,¹⁵ and should be considered with all the other facts and circumstances in evidence].

Forgiveness may be express or implied. Express forgiveness is when a [husband] [wife] states to *his* spouse who has committed marital misconduct, "I forgive you for (*state alleged marital misconduct*)" or

similar words to that effect.¹⁶

Forgiveness is implied when a husband and wife [continue] [resume] the marital relationship after a spouse has knowledge of marital misconduct by *his* spouse.¹⁷ [However, forgiveness is not implied simply because spouses live in the same residence.¹⁸] [Isolated incidents of sexual intercourse between the parties do not constitute resumption of marital relations.¹⁹]

Finally, as to this (*state number*) issue on which the [plaintiff] [defendant] has the burden of proof, if you find by the greater weight of the evidence, that the [plaintiff] [defendant], with knowledge of the marital misconduct of *his* spouse, forgave *his* spouse for that 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].

1. "Condonation . . . is strictly a technical word. It had its origin in the ecclesiastical court of England and means 'forgiveness with condition.' The condition is, that the original offense is forgiven, if the delinquent will abstain from the commission of a like offence afterwards, and moreover, treat the forgiving party in all respects with conjugal kindness. Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation and operates as a reviver of former acts." *Gordon v. Gordon*, 88 N.C. 45, 50-51 (1883) (quoting *Bishop on Divorce* § 53).

"Condonation restores equality before the law. If the injured party is willing to forgive the offense the law may well give full effect to that forgiveness, and not extend to such party the temptation, the encouragement, the license, to run through the whole calendar of matrimonial offenses without redress at the hands of the other party." *Cumming v. Cumming*, 135 Mass. 386, 391 (1883).

As defined by the North Carolina Supreme Court, "[c]ondonation in law is the conditional forgiveness by a husband or wife of a breach of marital duty by the other, whereby the forgiving party is precluded, so long as the condition is observed, from claiming redress for the breach so condoned." *State v. Mantos*, 204 N.C. 52, 53, 167 S.E. 493, 493

(1933).

2. See *Blakely v. Blakely*, 186 N.C. 351, 351, 119 S.E. 485, 486 (1923) and *Roberts v. Roberts*, 68 N.C. App. 163, 165, 314 S.E.2d 781, 784 (1984).

3. See *Earp v. Earp*, 52 N.C. App. 145, 148-49, 277 S.E.2d 877, 880 (1981), and *Cushing v. Cushing*, 263 N.C. 181, 187, 139 S.E.2d 217, 222-23 (1964).

4. See *Malloy v. Malloy*, 33 N.C. App. 56, 58, 234 S.E.2d 199, 201 (1977).

5. NOTE WELL: In the event that evidence of more than one type of marital misconduct has been presented, it appears that the offending spouse must establish that the offended spouse has condoned each type of misconduct. See *Earles v. Earles*, 26 N.C. App. 559, 563, 216 S.E.2d 739, 742 (1975) (finding no error in denying husband's motion to amend his answer to allege condonation where the "issue of indignities was not submitted to the jury," and "the only evidence of condonation offered by [the husband] tended to show that the [wife] condoned the indignities to which [the husband] subjected her.").

To avoid confusion in the event it is contended that more than one type of marital misconduct has been condoned, it may be necessary to specify with particularity the types of marital misconduct involved and to submit a separate sub-issue as to each.

6. N.C. Gen. Stat. § 50-16.3A(d) provides that "in 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." N.C. Gen. Stat. § 50-16.3A(a) states that "[a]ny act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court."

The defense of condonation is not limited to acts of illicit sexual behavior, but is also available for any act of marital misconduct. See 6 Suzanne Reynolds, *Lee's North Carolina Family Law* § 6.19 (5th Ed.) (explaining that "[e]ven if a spouse is guilty of misconduct that would entitle the other to a divorce from bed and board, the guilty spouse may successfully defend by proving that the complaining spouse forgave the misconduct and restored the guilty party to the former marital status. If so, the complaining spouse has condoned the marital misconduct.").

7. See *id.* at § 6.19(A) (noting that "[t]he law places the burden of proving the defense [of condonation] on the accused spouse [T]he complaining spouse does not carry the burden of proving that no condonation occurred.").

8. See n.5 *supra*.

9. See 6 *Lee's* at § 6.19(B) (stating that "[o]ne can condone only with knowledge of what there is to forgive. Suspicion that the other spouse has committed a matrimonial offense like adultery will not make continued cohabitation amount to condonation [T]he accused must demonstrate that the complaining spouse had actual knowledge of the marital offense or had facts which would satisfy a reasonably prudent person that the offense had been committed. In addition, it must appear that the complaining spouse not only 'knew' of the marital misconduct, but also accepted it as true. Moreover where the accused spouse is guilty of several acts of marital misconduct and the complaining spouse knows of only one of them, the complaining spouse has condoned only the known misconduct. A spouse might forgive certain acts of adultery with certain people, for

example, but not forgive others.”).

10. *See id.*

11. *See* n.9 *supra*.

12. *See Cushing v. Cushing*, 263 N.C. 181, 187, 139 S.E.2d 217, 222-23 (1964) (stating that “[n]othing else appearing, the resumption of marital relations after a separation imports . . . a condonation of previous offenses.”).

13. *See* N.C. Gen. Stat. § 52-10.2 (defining “presumption of marital relations”).

14. *See* 6 *Lee’s* at § 6.19(C) (explaining that “the law should hesitate to find condonation from merely living together . . . [or] from cohabitation even if it is accompanied by sexual intercourse On the other hand, neither cohabitation nor sexual intercourse is indispensable to condonation.”).

15. Use this instruction only in a case in which adultery is the act of marital misconduct allegedly condoned. *See Sparks v. Sparks*, 94 N.C. 527, 531 (1886) (stating that had husband, following wife’s adultery, “kept up their connubial relations, it would have been a condonation of her proved faithlessness to her marriage vows”) and *Malloy v. Malloy*, 33 N.C. App. 56, 60, 234 S.E.2d 199, 202 (1977) (explaining that “[v]oluntary sexual intercourse by the innocent spouse, with knowledge or reason to know that the other has committed adultery, usually operates as a condonation of the offense.”); *but see* 6 *Lee’s* at § 6.19(C) (noting that “[a]t one time, proof of sexual intercourse after knowledge of the marital offense, particularly if the marital offense were adultery, was conclusive. In order to encourage attempts at reconciliation, however, the law no longer treats either cohabitation or sexual intercourse or even the combination as conclusive.”).

NOTE WELL: The statement from Lee’s North Carolina Family Law may well represent the current view in the scholarship of domestic relations law, but be cautioned that no North Carolina appellate case has yet expressly incorporated this view. Moreover, neither Sparks nor Malloy have been overruled or disapproved.

16. *See* 6 *Lee’s* at § 6.19(B) (noting that “where the accused spouse is guilty of several acts of marital misconduct and the complaining spouse knows of only one of them, the complaining spouse has condoned only the known misconduct. A spouse might forgive certain acts of adultery with certain people, for example, but not forgive others.”).

17. *Earp v. Earp*, 52 N.C. App. 145, 147-48, 277 S.E.2d 877-79 (1981).

18. *See* 6 *Lee’s* at § 6.19(C) (explaining that “[i]n general, the law has not found condonation from cohabitation without sexual intercourse The law of North Carolina . . . treat[s] cohabitation-with or without sexual intercourse-merely as rebuttable evidence of cohabitation.”); *Privette*, 30 N.C. App. at 309, 227 S.E.2d at 140 (finding evidence of living in the same house without sharing the same marital bed insufficient to show condonation as a matter of law); and *Jenkins v. Jenkins*, 27 N.C. App. 205, 207, 218 S.E.2d 518, 519-20 (1975) (finding evidence of living in same house by wife who alleged she and the children “had no other place to go” without evidence of sexual intercourse insufficient as a matter of law to constitute condonation).

19. *See* N.C. Gen. Stat. § 52-10.2

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