

815.40 DIVORCE - ABSOLUTE - ISSUE OF ONE YEAR'S SEPARATION.¹

The (*state number*) issue reads:

"Is the plaintiff entitled to a divorce from the defendant based upon a one-year separation?"

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, three things:

First, that the plaintiff and the defendant were lawfully married to each other.

(All of the evidence tends to show that the plaintiff and defendant were married on the (*state date of marriage*).)

Second, that the plaintiff or the defendant has resided in North Carolina for a period of six months before (*state date action was commenced*). (In order to be a resident for six months, a person, during that period, must not only reside here but also have the intention² of making North Carolina *his* permanent home, to which, whenever absent, *he* intends to return and from which *he* has no present intention of moving.)

And Third, that the plaintiff and the defendant lived separate and apart for an uninterrupted period of one year before (*state date action was commenced*) and their physical separation was accompanied by an intention on the part of at least one of them to make their separation permanent.

(Separation means ceasing to live together as husband and wife. In determining whether and when the parties separated, you should

consider all the facts and circumstances of the parties' relationship, including whether a reasonable person, under the same or similar circumstances, would conclude that the parties had ceased to live together as husband and wife.³ The separation need not be with the consent of both parties. There must be a period of at least one year prior to (*state date action was commenced*) that one of the parties had an intent to remain permanently separated.⁴ (The one year period of separation is interrupted if the parties resume marital relations, that is, they voluntarily renew their husband and wife relationship. In determining whether and when the parties resume living together as man and wife, you should consider all the facts and circumstances of the parties' relationship, including whether a reasonable person, under the same or similar circumstances, would conclude that the parties had resumed their marital relationship. Isolated incidents of sexual intercourse between the parties do not constitute a resumption of marital relations.)⁵

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 the plaintiff is entitled to a divorce from the defendant based upon a one year separation, 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.

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

3. *Wen Chouh Lin v. Lin*, 108 N.C. App. 772, 425 S.E.2d 9 (1993).

4. *Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988); *Bruce v. Bruce*, 79

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N.C. App. 579, 339 S.E.2d 855, *cert. denied*, 317 N.C. 701, 347 S.E.2d 36 (1986).

5. N.C. Gen. Stat. §§ 50-6 and 52-10.2.