

815.50 DIVORCE - FROM BED AND BOARD - ISSUE OF ABANDONMENT.¹

The (*state number*) issue reads:

"Did the defendant willfully and without provocation abandon the plaintiff (and *his* family)?"

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, two things:

First, that the defendant willfully² abandoned the plaintiff (and *his* family). One spouse willfully abandons the other when *he* purposely and deliberately brings their cohabitation to an end without the intent³ to renew it and without the consent of the other spouse.⁴ (One spouse may abandon the other without physically leaving the home.⁵ For example, if one spouse treats the other with such cruelty⁶ or neglect⁷ or withholds support⁸ so that the other spouse is forced to leave or flee the home, then the offending spouse is deemed to have abandoned the other.)⁹

And Second, that the plaintiff did not engage in conduct which provoked the defendant to abandon the plaintiff (and *his* family).¹⁰ What constitutes provocation depends on the facts and circumstances of each case. Ordinarily, provocation does not exist unless the conduct of the plaintiff has been such as would likely render it impossible for the defendant to continue the marital relationship with safety, health and self-respect.¹¹

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 defendant willfully and without provocation abandoned the plaintiff (and *his* family), 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.

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1. N.C. Gen. Stat. § 50-7(1).
 2. *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952).
 3. For an instruction on intent, see N.C.P.I.-Civil 101.46.
 4. *Roberts v. Roberts*, 68 N.C. App. 163, 314 S.E.2d 781 (1984); *Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381, *aff'd*, 301 N.C. 525, 272 S.E.2d 1 (1980).
 5. *Blanchard v. Blanchard*, 226 N.C. 152, 36 S.E.2d 919 (1946).
 6. *Bailey v. Bailey*, 243 N.C. 412, 90 S.E.2d 696 (1956); *Eudy v. Eudy*, 24 N.C. App. 516, 211 S.E.2d 536, *aff'd*, 288 N.C. 71, 215 S.E.2d 782 (1975); *Hudson v. Hudson*, 21 N.C. App. 412, 204 S.E.2d 697 (1974); *Somerset v. Somerset*, 3 N.C. App. 473, 165 S.E.2d 33 (1969).
 7. *Ellinwood v. Ellinwood*, 94 N.C. App. 682, 381 S.E.2d 162 (1989).
 8. *Brady v. Brady*, 273 N.C. 299, 160 S.E.2d 13 (1968); *Lin v. Lin*, 108 N.C. App. 772, 425 S.E.2d 9 (1993).
 9. Merely sleeping in a separate bedroom is not abandonment. *Oakley v. Oakley*, 54 N.C. App. 161, 282 S.E.2d 589 (1981). Nor does abandonment occur when spouses separate by agreement. *Sauls v. Sauls*, 288 N.C. 387, 218 S.E.2d 338 (1975).
 10. The burden of proof is on the plaintiff to show that the defendant's conduct was not caused by the plaintiff's acts. *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E.2d 848, *cert. denied*, 320 N.C. 633, 360 S.E.2d 92 (1987). What must be proven, however, is not the negation of every possible justification for the defendant's leaving. Instead, the plaintiff must prove only that he or she did not engage in conduct that provoked or justified the defendant's conduct. *Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381, *aff'd*, 301 N.C. 525, 272 S.E.2d 1 (1980).
 11. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953). "Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health and self-respect . . ." *See also, Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381 *aff'd*, 301 N.C. 525, 272 S.E.2d 1 (1980).