

VOID MARRIAGE--ISSUE OF LACK OF PROPER SOLEMNIZATION.<sup>1</sup>

NOTE WELL: Use this instruction only for marriages solemnized in North Carolina.<sup>2</sup>

The (state number) issue reads:

"Did (name person) and (name person) fail to marry as required by law?"

On this issue the burden of proof is on the plaintiff.<sup>3</sup> This means that the plaintiff must prove, by the greater weight of the evidence, that:

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<sup>1</sup>N.C.G.S. §51-1 sets forth the requisites for a valid marriage. To be valid, a marriage must be solemnized by the man and woman in each other's presence, to each other and before an ordained minister of any religious denomination, a minister authorized by his church or a magistrate. *State v. Lynch*, 301 N.C. 479, 272 S.E.2d 349 (1980) and *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897). North Carolina does not recognize common law marriages (i.e., by consent alone). *State v. Lynch*, 301 N.C. 479, 272 S.E.2d 349 (1980); *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979). A "void" marriage is considered a nullity *ab initio*, with no rights flowing therefrom. *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). A "voidable" marriage, by contrast, is valid for all civil purposes until annulled by a court of competent jurisdiction. *Geitner ex rel First Nat'l. Bank v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 cert. denied, 310 N.C. 744, 315 S.E.2d 702 (1984).

<sup>2</sup>Persons who engage in a ceremonial marriage outside of North Carolina are entitled to a presumption that such marriage is valid. *Overton v. Overton*, 260 N.C. 139, 144, 132 S.E.2d 349, 352 (1963); *Parker v. Parker*, 46 N.C. App. 254, 265 S.E.2d 237 (1980). In the event the issue is whether the marriage was lawfully solemnized in another jurisdiction, the burden is on the party challenging the validity of the marriage to show the legal requisites for a valid marriage in the nuptial jurisdiction. This instruction can be adapted for use where the nuptial jurisdiction's requirements differ.

<sup>3</sup>Void marriages are subject to collateral attack. *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E.2d 606 (1980). Thus, the plaintiff need not be one of the parties purportedly married.

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[(*name person*) and (*name other person*) were not married in each other's presence]<sup>4</sup> (or)

[(*name person*) and (*name other person*) failed to express to each other freely, seriously<sup>5</sup> and plainly their consent to take each other presently as husband and wife] (or)

[(*name person*) and (*name other person*) failed to express their consent freely, seriously and plainly to take each other presently as husband and wife in the presence of [an ordained minister of any religious denomination] [a minister authorized by his church<sup>6</sup>] [a magistrate]]<sup>7</sup>(or)

[(*name person*) and (*name other person*) were not declared by

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<sup>4</sup>"Proxy" or "stand in" weddings do not satisfy the "presence" requirement.

<sup>5</sup>Sham weddings are nullities. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897).

<sup>6</sup>Whether a body constitutes a "religious denomination" or "church" is an issue of ecclesiastical law and is not a question for the jury. *State v. Lynch*, 46 N.C. App. 608, 265 S.E. 2d 491, *rev'd on other grds.*, 301 N.C. 479, 272 S.E.2d 349 (1980).

<sup>7</sup>There are statutory exceptions for the rite of marriage practiced among the Society of Friends and marriages solemnized and witnessed by the local spiritual assembly of the Baha'is. See N.C.G.S. §51-1.

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the presiding [minister] [magistrate] to be husband and wife].<sup>8</sup>

The failure of the plaintiff and the defendant to meet [this requirement] [any one or more of these requirements] means that they did not marry as required by law.

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 (*name person*) and (*name other person*) failed to marry as required by law, 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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<sup>8</sup>N.C.G.S. §51-6 provides that solemnization of a marriage without a marriage license is unlawful. However, neither the failure to procure a license, *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922) and *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893), nor a marriage solemnized under an illegal license, *id.*, invalidates a marriage otherwise valid.

