

VOIDABLE MARRIAGE (ANNULMENT)--ISSUE OF IMPOTENCE.¹

NOTE WELL: *If one of the parties to the marriage has died, also give N.C.P.I.--Civil 815.30.*²

The (state number) issue reads:

"Was (name person claimed to be impotent) physically, permanently and incurably impotent at the time of his marriage to (name other person)?"

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, that (name person claimed to be impotent) was physically, permanently and incurably impotent³ at the time of his marriage to (name other person).

¹N.C.G.S. §51-3 provides that "[a]ll marriages...between persons either of whom is at the time physically impotent...shall be void." Nonetheless, the courts have held that such marriages are voidable, not void. *Smith v. Morehead*, 59 N.C. 360 (1863). Note that the phrase "is at the time" has been interpreted to mean at the time of the marriage. See, Lee, *North Carolina Family Law* (5th ed.), §3.20 at 191, n. 386, 387.

²N.C.G.S. §51-3 provides that "[n]o marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties except for bigamy." If a party to the marriage has died, the jury should be instructed on the defense of lack of cohabitation or the birth of issue (N.C.P.I.--Civil 815.30).

Also note that another defense to annulment based on impotence is "ratification." See N.C.P.I.--Civil 815.32.

³Lee, *North Carolina Family Law* (5th ed.), §3.20 at 191, n. 386, 387; 4 Am.Jur.2d, *Annulment of Marriage*, §32, §34; 52 Am.Jur.2d, *Marriage*, §26, *Stapanek v. Stapanek*, 193 Cal. App. 2d 760, 14 Cal. Rpter. 793 (1961); *Payne*, 46 Minn. 467, 49 N.W. 230 (1891).

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Impotence is the lack of capacity for ordinary sexual intercourse in the marriage relationship. It is a condition that might affect either a man or a woman. It is not sterility or lack of capacity to conceive or bear children. Impotence may be caused by disease, by physical disorder or by psychological condition.⁴ Impotence must have existed at the time of the marriage and must be permanent and incurable. (Temporary impotence or impotence first occurring after the beginning of the marriage is not sufficient.)

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 claimed to be impotent*) was physically, permanently and incurably impotent at the time of his marriage to (*name other person*), 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.

⁴Lee, *North Carolina Family Law* (5th ed.), §3.20 at 190, n. 381, 382; *T. v. M.*, 100 N.J. Super. 530, 242 A.2d 670 (1968); *Helen v. Thomas*, 52 Del. 1, 150 A.2d 833 (1959).