

DIVORCE--FROM BED AND BOARD--ISSUE OF MALICIOUS TURNING OUT-OF-DOORS.¹

The (*state number*) issue reads:

"Did the defendant maliciously and without provocation turn the plaintiff out-of-doors?"

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 defendant turned the plaintiff out-of-doors. A spouse is turned out-of-doors when ejected from or forced to leave the marital home. (This may be accomplished by force or by threat of violence. It may also be accomplished by cruelty that causes the spouse to leave the marital home. Cruelty may consist of an affirmative act or a willful failure, such as failing to provide adequate support as required by law.)²

Second, that the turning out-of-doors was done with malice. Malice means hatred, ill will or spite. It also means the intentional doing of an act which is calculated to cause injury or harm and which is done without justification or excuse.

¹N.C.G.S. §50-7(2).

²Malicious turning out-of-doors is an instance of abandonment. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957); *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918).

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Third, that the plaintiff did not engage in conduct which provoked the defendant to turn her out-of-doors.³ 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.⁴

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 maliciously and without provocation turned the plaintiff out-of-doors, 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.

³The 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 conduct. 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).

⁴See *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953).