

VOIDABLE MARRIAGE (ANNULMENT)--ISSUES OF MARRIAGE TO CLOSE BLOOD KIN, MARRIAGE OF PERSON UNDER 16, MARRIAGE OF PERSON BETWEEN 16 AND 18, IMPOTENCE AND LACK OF SUFFICIENT MENTAL CAPACITY AND UNDERSTANDING--DEFENSE OF COHABITATION AND BIRTH OF ISSUE.¹

NOTE WELL: Use only where one of the parties to the marriage has become deceased.

The (state number) issue reads:

"Did (name spouse) and (name other spouse) live together as man and wife after their marriage and was a child born to them after their marriage?"

You will answer this issue only if you answer the (state number) issue "Yes" in favor of the plaintiff.

¹N.C.G.S. §51-3 provides that "...no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for bigamy." Thus, this instruction should be used whenever it is shown that either party to the marriage has died at the time of the annulment action, unless the ground for annulment is bigamy.

In *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963), the court stated that where a marriage is not followed by cohabitation and the birth of issue, an action to annul may be brought after the death of one of the parties by a person whose "legal rights depend on whether such marriage is valid or void." The Committee has historically expressed uncertainty whether, in a case where one party to the marriage has died, it is essential for the plaintiff to show that there was no cohabitation or no birth of issue. There is a description of the statutory proviso in *Baity v. Cranfill*, 91 N.C. 293 (1884), which suggests the court might have considered the statutory proviso to be analogous to a statute of limitations: "[The proviso] simply limits the time in which legal proceedings may be instituted to annul the marriage, or in which its nullity may be adjudged collaterally in a pending case...." Where the defendant raises a statute of limitations defense it has been held that the burden of proving compliance with the statute of limitations is on the plaintiff. See, for example, *Willets v. Willets*, 254 N.C. 136, 118 S.E.2d 548 (1961). Other than *Baity*, the Committee has found no other applicable authority. While *Baity* limits that proof of the non-occurrence of cohabitation and the non-birth of issue could be the plaintiff's burden, the Committee has determined that, for sound policy reasons, it is better to treat cohabitation and birth of issue as a defense and allocate the burden of proof to the defendant.

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(Continued).

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that (*name spouse*) and (*name other spouse*) lived together as man and wife following their marriage and that a child was born to them² after their marriage.

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that (*name spouse*) and (*name other spouse*) lived together as man and wife following their marriage and that a child was born to them after their marriage, then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, it would be your duty to answer this issue "No" in favor of the plaintiff.

²In the event there is an issue regarding paternity, it will be necessary to give N.C.P.I.--Civil 815.75.