

ALIMONY—ISSUE OF CONDONATION—VIOLATION OF CONDITION.¹

The (*state number*) issue reads: Did the [plaintiff] [defendant],² (*state name of offending spouse*), violate the condition[s] of the condonation of *his* marital_misconduct by the [plaintiff] [defendant] (*state name of offended spouse*)?

You will answer this issue only if you have answered issue (*state number*) “Yes” in favor of the [plaintiff] [defendant]. As I told you when instructing on that issue, condonation means forgiveness, and I will use the words condone and forgive, and condonation and forgiveness, interchangeably while discussing this issue.

On this issue the burden of proof is on the [plaintiff] [defendant]. This means the [plaintiff] [defendant] must prove, by the greater weight of the evidence,² two things: first, that *he* forgave the [plaintiff] [defendant] for *his* act[s] of marital misconduct, and second, that after *he* did so, the [plaintiff] [defendant] committed [an additional act] [additional acts] of marital misconduct or failed to treat *his* spouse in all respects with marital kindness.

When a spouse forgives *his* spouse for marital misconduct, the law provides that the

1. Use this instruction only when it is alleged by the forgiving spouse that the offending spouse violated the terms of the “conditional forgiveness” by committing additional marital misconduct or by failing to treat the forgiving spouse with conjugal kindness after being forgiven for prior marital misconduct.

“Condonation . . . is strictly a technical word. It had its origin in the ecclesiastical court of England and means ‘forgiveness with condition.’ The condition is, that the original offense is forgiven, if the delinquent will abstain from the commission of a like offence afterwards, and moreover, treat the forgiving party in all respects with conjugal kindness. Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation and operates as a reviver of former acts.” *Gordon v. Gordon*, 88 N.C. 45, 50-51 (1883) (quoting *Bishop on Divorce* § 53).

“Condonation restores equality before the law. If the injured party is willing to forgive the offense the law may well give full effect to that forgiveness, and not extend to such party the temptation, the encouragement, the license, to run through the whole calendar of matrimonial offenses without redress at the hands of the other party.” *Cumming v. Cumming*, 135 Mass. 386, 391 (1883).

As defined by the North Carolina Supreme Court, “[c]ondonation in law is the conditional forgiveness by a husband or wife of a breach of marital duty by the other, whereby the forgiving party is precluded, so long as the condition is observed, from claiming redress for the breach so condoned.” *State v. Mantos*, 204 N.C. 52, 53, 167 S.E. 493, 493 (1933).

2. See N.C. Gen. Stat. § 50-16.3A(d) (“In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in [N.C. Gen. Stat.] § 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct.”).

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forgiveness is conditional, regardless of whether or not the forgiving spouse tells *his* spouse that it is conditional. The conditions that are implied by law when a spouse forgives *his* spouse for marital misconduct are (1) that the forgiven spouse will not repeat the marital misconduct or engage in any other act of marital misconduct and (2) that the forgiven spouse will treat *his* spouse in all respects with marital kindness.³

The definition[s] and explanation[s] of [the different types of] marital misconduct which I gave you in discussing Issue (*state number*) apply equally to this issue, and I charge you to remember and use [that] [those] definition[s] and explanation[s] in your deliberations on this issue.

The requirement that the [plaintiff] [defendant] treat *his* spouse in all respects with marital kindness does not require perfection of the [plaintiff] [defendant].⁴ However, it does mean that if the [plaintiff] [defendant] repeats the previous marital misconduct or commits other serious acts, even of a different character or degree,⁵ then a condition of the [plaintiff's] [defendant's] condonation of the previous misconduct has been breached.

Finally, as to this (*state number*) issue on which the [plaintiff] [defendant], (*state name of offended spouse*), has the burden of proof, if you find by the greater weight of the evidence, that the [plaintiff] [defendant], (*state name of offending spouse*), after *he* had

3. See *Malloy v. Malloy*, 33 N.C. App. 56, 58, 234 S.E.2d 199, 201 (1977).

4. See 6 Suzanne Reynolds, *Lee's North Carolina Family Law* § 6.191D (explaining that "the condition makes the reconciliation precarious, giving the forgiving spouse the power to end the reconciliation at the first sign of bad behavior from the forgiven spouse. The condition does not require perfection of the forgiven spouse, but it does mean that if the forgiven spouse repeats the misconduct or commits other serious acts—even of a different character or degree—the old grounds are revived.").

5. See *id.* (noting that "the law is not clear on what conduct breaches the condition and revives the right to relief based on the original misconduct. Certainly, repetition of the forgiven conduct breaches the condition, but other conduct, different in kind and degree, constitutes a breach as well. Just how slight a marital offense breaches the condition remains in doubt . . . [I]n an early case [it was held] that, following the forgiveness, misconduct that might not have constituted grounds is sufficient to revive the original cause of action."); see also *Lassiter v. Lassiter*, 92 N.C. 129, 135-36 (1885) (finding that husband's conduct in failing to supply wife "with sufficient food and clothing," in using and applying "opprobrious epithets to her in the presence of his children," such as "old devil," "old liar," and "no account," and in encouraging the children "to abuse her" constituted "such treatment as was sufficient to obliterate the condonation and revive the original causes of complaint.").

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been forgiven for marital misconduct by the [plaintiff] [defendant], (*state name of aggrieved spouse*), violated the condition[s] of *his* forgiveness [by engaging in [an additional act] [additional acts] of marital misconduct] [[or] by failing to treat the [plaintiff] [defendant] with marital kindness], then it would be your duty to answer this issue “Yes” in favor of the [plaintiff] [defendant].

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No” in favor of the [plaintiff] [defendant].

