

## ALIENATION OF AFFECTION—STATUTE OF LIMITATIONS.

*NOTE WELL: Actions arising from acts occurring prior to October 1, 2009, are governed solely by the North Carolina Supreme Court decision in *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620 (2006), upon which this instruction is based. For actions arising from acts occurring on or after October 1, 2009, use N.C.P.I.—Civil 800.23A (“Alienation of Affection—Statute of Limitations”).*

The (*state number*) issue reads:

“Did the plaintiff file this action within three years of the date the alienation between the plaintiff and his spouse became complete?”<sup>1</sup>

If you have answered the (*state number*) issue “Yes” in favor of the plaintiff, the plaintiff’s claim may nonetheless be legally barred by what is called the statute of limitations.<sup>2</sup> The law provides that a lawsuit claiming alienation of affection must be filed within three years of the date the alienation between the plaintiff and *his* spouse became complete.<sup>3</sup> The plaintiff filed the present lawsuit on (*state date of filing of alienation of affection action*).

On this issue, the burden of proof is on the plaintiff.<sup>4</sup> This means that the plaintiff must

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1. The three year statute of limitations set out in N.C. GEN. STAT. § 1-52(5)(2005) applies to a claim of alienation of affection. *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006). “The question of when alienation occurs is ordinarily one for the factfinder.” *Id.* at 284, 624 S.E.2d at 624 (citation omitted).

2. A “statute of limitations” is “the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable.” *South Dakota v. North Carolina*, 192 U.S. 286, 346 (1904). “Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact.” *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984).

3. “It is only after the diminution or, when applicable, the destruction of love and affection is complete that plaintiff’s cause of action accrues and the statute of limitations begins to run.” *McCutchen*, 360 N.C. at 284, 624 S.E.2d at 624 (citation omitted).

4. “While the plea of the statute of limitations is a positive defense and must be pleaded, . . . when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred.”

*Hudson v. Game World, Inc.*, 126 N.C. App. 139, 145, 484 S.E.2d 435, 439 (1997) (quoting *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957)). See also *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (stating that the burden rests on plaintiff to prove claims were timely filed when the defendant asserts the statute of limitations as an affirmative defense).

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prove, by the greater weight of the evidence, that the alienation of the genuine marital relationship between the plaintiff and *his* spouse became complete less than three years before (*state date of filing of alienation of affection action*).

Alienation is complete at that point in time when the genuine marital relationship between spouses becomes seriously diminished or destroyed.<sup>5</sup> The law recognizes that this diminishment or destruction may not happen all at once. You must determine when the genuine marital relationship between the plaintiff and *his* spouse became seriously diminished or destroyed based upon all of the evidence.

[If you find, by the greater weight of the evidence, that there came a point in time when there was no longer a chance of reconciliation between the plaintiff and his spouse, then the diminishment or destruction of the genuine marital relationship between the plaintiff and *his* spouse would have become complete at that point in time.<sup>6</sup>]

You may consider whether the plaintiff and *his* spouse resided together in your determination of this issue.<sup>7</sup> It is not required that spouses be living together at the time the

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5. The “wrong” in an alienation claim “is a continuing one,” and “[i]t is only after the diminution or, when applicable, the destruction of love and affection is complete that [the] cause of action accrues and the statute of limitations begins to run.” *McCutchen*, 360 N.C. at 284, 624 S.E.2d at 623–24 (citations and internal quotations omitted).

6. *See id.* at 284–85, 624 S.E.2d at 623–24. In *McCutchen*, although the parties had separated on September 9, 1998, the Court observed that the jury “could determine alienation did not occur until as late as February 2001” because the wife “apparently had reason to believe the couple would reconcile until [the husband] made a final decision in February 2001 to end their marriage.” *Id.* at 286, 624 S.E.2d at 625. The bracketed language may therefore be helpful in factual situations resembling that in *McCutchen*.

The *McCutchen* Court also reasoned that setting accrual of an alienation of affection claim as of the date of separation “would force spouses to take prompt legal action, often to the detriment of reconciliation efforts. Such a rule would prejudice those who reasonably believe love and affection remains in their marriage and postpone legal action until the chance of reconciliation no longer exists.” *Id.* at 284–85, 624 S.E.2d at 624.

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diminishment or destruction of a genuine marital relationship becomes complete.<sup>8</sup> The diminishment or destruction may become complete even though spouses continue to live together;<sup>9</sup> likewise, although the circumstance that spouses are not living together may be strong evidence of alienation,<sup>10</sup> the diminishment or destruction may not be complete even though spouses are no longer living together.<sup>11</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence, that the plaintiff filed this action within three years of the date the alienation between the plaintiff and *his* spouse became complete, 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, then it would be your duty to answer this issue "No" in favor of the defendant.

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7. See *Litchfield v. Cox*, 266 N.C. 622, 623, 146 S.E.2d 641, 642 (1966) (stating that although spouses continued to live together affected the "credibility" of the plaintiff's evidence, the issue of alienation remained "a question for the jury"); *Jones v. Skelley*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 673 S.E.2d 385, 391 (2009) ("[T]he fact that the plaintiff and her or his spouse continue to live in the same house after the spouse's affections have allegedly been alienated affects only the credibility of the plaintiff's testimony, and is not a defense to a claim of alienation of affections[.]" (citation and internal quotations omitted)).

8. *McCutchen* specifically overruled the Court of Appeals holding in *Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855 (2001), "to the extent it requires an alienation of affections claim to be based on pre-separation conduct alone." *McCutchen*, 360 N.C. at 285, 624 S.E.2d at 625.

9. See *id.* at 284, 624 S.E.2d at 624 ("[T]he fact that spouses continue living together after the alleged alienation does not preclude the possibility that alienation of affections has already occurred." (citation omitted)).

10. See *id.* ("Although separation may be strong evidence of alienation, and may affect the damages available to the plaintiff, we have never held that plaintiff and spouse must live together at the time the cause of action arises.").

11. See *id.* at 286, 624 S.E.2d at 625 (finding that there existed "a genuine issue of material fact as to whether there was love and affection following [plaintiff's] separation from [her spouse]"). Cf. SUZANNE REYNOLDS, 1 LEE'S NORTH CAROLINA FAMILY LAW § 5.46(A) 395 (5th Ed. 2009) (noting that the claim endures even if the alleged misconduct occurs while the spouses are living apart "since the spouses could have reconciled").

