N.C.P.I.—Civil 860.15
WILLS—ISSUE OF LACK OF TESTAMENTARY CAPACITY.
GENERAL CIVIL VOLUME
APRIL 2017

860.15 WILLS—ISSUE OF LACK OF TESTAMENTARY CAPACITY.

The (*state number*) issue reads:

"Did the deceased lack sufficient mental capacity to make and execute a will at the time the propounder's exhibit (*state number*) was executed?"

You will answer this issue only if you have answered the (*state number*) issue(s) in favor of the propounder.

On this issue the burden of proof is on the caveator.[1] This means the caveator must prove, by the greater weight of the evidence, that the deceased did not possess sufficient mental capacity to make and execute a will at the time the propounder's exhibit (*state number*) was executed.[2]

A person has sufficient mental capacity to make and execute a will if *he* understands that *he* is making a will, if *he* knows what property *he* has, if *he* understands the effect the act of making a will would have on *his* property, if *he* understands who would naturally be expected to receive *his* property at *his* death, and if *he* knows to whom *he* intends to give *his* property. A person's inability to understand any one of these things at the time the writing is executed means that *he* lacks sufficient mental capacity to make a will.[3]

However, the lack of sufficient mental capacity may not be presumed from the mere fact a person

[is old]

[is feeble]

[is eccentric][4]

[is intellectually weak][5]

[is physically infirm][6]

[makes what others might consider an unwise, unreasonable or unjust decision concerning *his* property].[7]

In considering whether the deceased had sufficient mental capacity to make a will at the time the propounder's exhibit (*state number*) was executed, you may consider all facts and circumstances in evidence as to whether *he* understood *he* was making a will, whether *he* knew what property *he* had, whether *he* understood the effect the act of making a will would have on *his* property, whether *he* understood who would naturally be expected to receive *his* property at *his* death, and whether *he* knew to whom *he* intended to give *his* property.

(NOTE WELL: Use only in cases where there is some evidence tending to show that the deceased attempted to commit suicide or committed suicide:

> Lack of mental capacity to make a will may not be presumed from the mere fact that the deceased [attempted suicide] [committed suicide]. However, you may consider the deceased's [attempted suicide] [suicide] together with all of the other evidence in the case in determining whether the deceased had sufficient mental capacity to make a will at the time the propounder's exhibit (*state number*) was executed.[8]*)*

Finally, as to this issue on which the caveator has the burden of proof, if you find by the greater weight of the evidence that the deceased lacked sufficient mental capacity to make and execute a will at the time the

propounder's exhibit (*state number*) was executed, then it would be your duty to answer this issue "Yes" in favor of the caveator.

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 propounder.

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1 *In re Will of Simmons*, 268 N.C. 278, 279, 150 S.E.2d 439, 440 (1966); *see also Wing v. Wachovia Bank & Trust*, 301 N.C. 456, 463, 272 S.E.2d 90, 95 (1980); *In re Will of Womack*, 53 N.C. App. 221, 223, 280 S.E.2d 494, 496 (1981). Persons are presumed to be competent unless there has been an adjudication of incompetency. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943). Thus, the burden of proving lack of mental capacity rests with the person taking that position. *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E.2d 614, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982). Where a person has been adjudicated incompetent, he is presumed to lack mental capacity. *Medical College of Va. Med. Div. v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952). This presumption may be rebutted by persons who were not privy to the incompetency proceedings. *Id*. Under such circumstances, the burden of proof falls to the proponent of the will and should be added as an additional element to N.C.P.I.-Civil 860.05 (Wills-Attested Written Will-Requirements) (*See* note 2) and N.C.P.I.-Civil 860.10 (Wills-Holographic Wills-Requirements) (*See* note 1).

2 "To establish lack of testamentary capacity, a caveator need only show that any one of the essential elements of testamentary capacity is lacking." *In re James Junior Phillips*, __ N.C. App. __, __, 795 S.E.2d 273, 282 (2016) (citing *In re Will of Kemp*, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951)). Lack of testamentary capacity is not established where there is no specific evidence "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *In re James Junior Phillips*, __ N.C. App. at __, 795 S.E.2d at 282 (quotations omitted). Witness opinions based solely on general testimony regarding the decedent's deteriorating physical health and mental confusion are insufficient to show testamentary capacity is lacking; however, specific evidence of deteriorating physical health or mental confusion may be sufficient to negate testamentary capacity and support a caveat. *See id.* (holding that genuine issue of material fact exists as to whether testator lacked capacity when caveator introduced death certificate documenting that testator suffered from dementia and affidavit testimony that testator was heavily medicated during time will was executed).

3 *In re Shute's Will*, 251 N.C. 697, 699, 111 S.E.2d 851, 853 (1960); *In re Will of Rose*, 28 N.C. App. 38, 220 S.E.2d 425 (1975).

4 *Dyer v. State*, 102 N.C. App. 480, 482, 402 S.E.2d 464, 466 (1991). The Supreme Court reversed, 331 N.C. 374 (1992), finding that the Court of Appeals improperly weighed the evidence and came to a different conclusion from the jury (*i.e.*, appeals court found that testator was eccentric but that alone did not prove incapacity). Although the Supreme Court does not reject the notion that someone who is eccentric might be mentally capable of

forming proper intent to execute, it is strongly suggested by the Supreme Court that in this case the testator's eccentricity was so extreme that incapacity was the proper verdict.

5 *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993); *In re Craven's Will*, 169 N.C. 561, 568, 86 S.E. 587, 591 (1915); *see also Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 616 (1982).

6 *In re Will of Jarvis*, 334 N.C. at 144, 430 S.E.2d at 924 (noting that validity of the will is not affected by testator's infirmity alone).

7 *In re Frank's Will*, 231 N.C. 252, 259, 56 S.E.2d 668, 674 (1949); *see also In re Will of Jarvis*, 334 N.C. at 145, 430 S.E.2d at 925.

8 *Matthews v. James*, 88 N.C. App. 32, 41, 362 S.E.2d 594, 600 (1987) (holding that mental incapacity may not be presumed only from suicide or attempted suicide, but that suicide or attempted suicide may be considered with all other proper evidence).