

860.20 WILLS—ISSUE OF UNDUE INFLUENCE.

The (*state number*) issue reads:

“Was the execution of propounder's exhibit (*state number*) procured by undue influence?”¹

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

On this issue the burden of proof is on the caveator.² This means that the caveator must prove, by the greater weight of the evidence, that the execution of propounder's exhibit (*state number*) was procured by undue influence.

Undue influence occurs when a decedent's professed act is not the decedent's own but is, in fact, the act of another person exerting the influence.³ Influence is undue when it causes the decedent to make a will which the decedent would not have otherwise made.⁴ The undue influence must act upon the free will of the person at the time the person executes the will.⁵

The existence of undue influence is for you to determine from all the facts and circumstances in evidence.⁶ You may consider, together with all the other relevant facts and circumstances:⁷

1. Old age and physical and mental weakness.
2. That the person signing the paper is in the home of the beneficiary and subject to the beneficiary's constant association and supervision.
3. That others have little or no opportunity to see the person.
4. That the will is different from and revokes a prior will.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of the decedent's bounty.

7. That the beneficiary has procured its execution.

[(*state any other relevant factors supported by the evidence*)]

(Undue influence does not necessarily involve moral turpitude or even a bad or improper motive.)⁸

(Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to execute a will in *his or her* favor.)⁹

(Influence gained by kindness and affection, without more, is not undue, even if it induces a person to make an unequal or unjust disposition of the decedent's property.)¹⁰

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 execution of propounder's exhibit (*state number*) was procured by undue influence, 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.

1. When the will is procured by undue influence, the entire will is invalid. If undue influence has been exerted to procure only a part of the will, the part of the will not caused by undue influence may be held valid. However, when only a portion of the will is alleged to have been procured by undue influence, the court may submit an issue as to which legacy or devise was procured by undue influence and which portion of the document constitutes the will of the decedent. *See McDonald v. McLendon*, 173 N.C. 172, 177, 91 S.E. 1017, 1019 (1917); *Sumner v. Staton*, 151 N.C. 198, 204, 65 S.E. 902, 906 (1909).

2. *In re Simmons' Will*, 268 N.C. 278, 278, 150 S.E.2d 439, 440 (1966); *In the Matter of Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713 (1993). When the caveator contends that a fiduciary relationship existed between the propounder and the decedent, it may be necessary to submit an issue as to the existence of such fiduciary relationship. A fiduciary relationship exists where "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *see also McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616 (1943). For further definition and explanation of the fiduciary relationship, as well as a list of fiduciary relationships that exist as a matter of law, *see* N.C.P.I. 900.10 ("Definition of Fiduciary; Explanation of Fiduciary Relationship").

In those cases in which a fiduciary relationship is found to exist, the burden of proof shifts to the propounder to prove “that the will was the free and voluntary act of the testator”. *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (quoting *In re Will of Everett*, 153 N.C. 83, 68 S.E. 924, 925 (1910)); see also *In re Estate of Ferguson*, 135 N.C. App. 102, 106, 518 S.E.2d 796, 799 (1999) (citing *In re Will of Atkinson*, 225 N.C. 526, 530, 35 S.E.2d 638, 640 (1945)) (“When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption.”). In such cases the burden of proof paragraph and the mandate will need to be altered so as to reflect the shift in the burden of proof.

3. *In re Thompson's Will*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958). *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998) (“There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.”).

4. *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993) (indicating that caveators failed to identify who allegedly asserted undue influence or how the will did not conform to testator's intent); *In re Craven's Will*, 169 N.C. 561, 568, 86 S.E. 587, 591, 594 (1915); see also *In re James Junior Phillips*, 251 N.C. App. 99, 112, 795 S.E.2d 273, 283 (2016) (quoting *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974)) (“Undue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.”).

5. *Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983); *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

6. NOTE WELL: *Whether a specific factor exists, and whether any number of factors together is sufficient to demonstrate undue influence over a decedent's execution of a will, are material questions of fact.* See *In re James Junior Phillips*, 251 N.C. App. at 112, 795 S.E.2d at 282 (quoting *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360, review denied, 357 N.C. 506, 588 S.E.2d 474 (2003)).

7. *In re Will of Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (stating seven “factors that are relevant on the issue of undue influence”). However, these factors are not exhaustive. *In re Will of Andrews*, 299 N.C. at 54-5 (citation omitted) (“It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.”).

8. *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

9. *In re Frank's Will*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949).

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