

DEEDS--ACTION TO SET ASIDE--UNDUE INFLUENCE.

The (*state number*) issue reads:

"Was the [execution] [delivery] of (*identify deed*) by (*name grantor*) procured by undue influence?"<sup>1</sup>

On this issue the burden of proof is on the plaintiff.<sup>2</sup> This means that the plaintiff must prove, by the greater weight of the evidence, that the [execution] [delivery] of (*identify deed*) by the (*name grantor*) was procured by undue influence.

Undue influence occurs when a grantor's professed act is not his own, but is in fact the act of the person exerting the influence.<sup>3</sup>

Influence is undue when it causes a grantor [to execute a deed he would

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<sup>1</sup>See *Caudill v. Smith*, 117 N.C. App. 64, 66, 450 S.E.2d 8, 10 (1994) (applying undue influence factors to execution of a deed). In *Caudill*, the Court of Appeals noted that the trial court's use of a modified form of N.C.P.I. 505.30 ("Rescission Of Written Instrument--Undue Influence") was acceptable, but the Court also suggested that a charge listing the factors of undue influence the jury may consider would have been better. *Id.*; see also *Stephenson v. Warren*, 136 N.C. App. 768, 525 S.E.2d 809 (2000) (listing the most common factors that bear on consideration of undue influence).

<sup>2</sup>*Caudill*, 117 N.C. App. at 66, 450 S.E.2d at 9. However, in those cases in which a fiduciary relationship is found to exist, the burden of proof shifts to the transferee. *McNeil v. McNeil*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943); *Lee v. Pearce*, 68 N.C. 76, 81 (1873). 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). "Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do [so] constitutes fraud. . . ." *Id.*

<sup>3</sup>*Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983) ("a party must show that something operated upon the mind of the person [that] had a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or other"); see also *In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935).

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not have otherwise executed<sup>4</sup>] [to deliver a deed he would not have otherwise delivered]. The undue influence must act upon the free will of a grantor at the time he [executes] [delivers] the deed.<sup>5</sup>

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

(*name grantor's*)

[age]

[physical condition]

[mental condition]

[dependence upon] [association with] [relationship with] [custody by] (*state name of person exerting influence*)]

[opportunity to [associate] [have a relationship] with persons other than (*state name of person exerting influence*)]

[relationship (by blood) to the grantee(s) of the deed]

[the degree to which (*name grantor*) was influenced to [execute] [deliver] the deed by (*state name of person exerting influence*)]

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

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>Although there is "no test by which the sufficiency of the evidence of undue influence can be measured by mathematical certainty," these factors have been properly used at trial. *Caudill*, 117 N.C. App. at 66, 450 S.E.2d at 9; see also *In re Will of Andres*, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980) ("The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.").

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(Undue influence does not necessarily involve a bad or improper motive).<sup>7</sup>

(Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to [execute] [deliver] a deed in his favor.)<sup>8</sup>

(Influence gained by kindness and affection, without more, is not undue, even if it induces a grantor to [execute] [deliver] a deed which results in an unwise conveyance of his property.)<sup>9</sup>

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the [execution] [delivery] of (*identify deed*) by (*name grantor*) was procured by undue influence, 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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<sup>7</sup>*In re Will of Turnage*, 208 N.C. at 132, 179 S.E. at 333.

<sup>8</sup>*Willettts v. Willettts*, 254 N.C. 136, 118 S.E.2d 548 (1961); *In re Cravens's Will*, 169 N.C. 561, 570, 86 S.E. 587, 592 (1915).

<sup>9</sup>*Willettts*, 254 N.C. at 137, 118 S.E.2d at 549.

