

860.10 WILLS—HOLOGRAPHIC WILLS—REQUIREMENTS.

The (*state number*) issue reads:

"Was the propounder's exhibit (*state number*) executed according to the requirements of law for a valid handwritten will?"

On this issue the burden of proof is on the propounder. This means that the propounder must prove, by the greater weight of the evidence, four things:<sup>1</sup>

First, that every word of the writing necessary to constitute a will is entirely in the handwriting of the deceased.<sup>2</sup> (The fact that there are other words which are not in the deceased's handwriting will not render the writing invalid as a will as long as the words which are in the deceased's handwriting are sufficient to express the deceased's intent<sup>3</sup> to make a will and to dispose of property.<sup>4</sup> The other words are surplusage).

Second, that the deceased signed the writing.<sup>5</sup> (The signature need not appear on any particular part of the writing.<sup>6</sup> It is sufficient if the deceased's name appears somewhere on the writing in the deceased's own hand. No particular form of signature is required as long as the signing was intended as a signature). (It is not necessary that the deceased's signature be witnessed).<sup>7</sup>

Third, that after the deceased's death, the writing was found<sup>8</sup> [among the deceased's valuable papers or effects] [in a safe deposit box or other safe place where it was deposited by the deceased or under [his] [her] authority] [in the possession or custody of some person or firm with whom it was deposited by the deceased or under [his] [her] authority for safekeeping].<sup>9</sup>

("Valuable papers or effects" are such papers or effects as the deceased considered worthy of preservation).<sup>10</sup>

And Fourth, that the deceased intended the writing to be [his] [her] will.<sup>11</sup> The deceased's intent may be determined from [the words which appear in the writing]<sup>12</sup> [the circumstances surrounding the making of the writing].<sup>13</sup>

Finally, as to this issue on which the propounder has the burden of proof, if you find, by the greater weight of the evidence, that the propounder's exhibit (*state number*) was executed according to the requirements of law for a valid handwritten will, then it would be your duty to answer this issue "Yes" in favor of the propounder.

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 caveator.

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1. N.C. Gen. Stat. § 31-3.4. *In re Will of Penley*, 95 N.C. App. 655, 656, 383 S.E.2d 385, 386 (1989). Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the will was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co.*, 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, an additional element would need to be added to this instruction.

2. *Alexander v. Johnston*, 171 N.C. 468, 471, 88 S.E. 785, 786 (1916); see also *In re Will of Lamparter*, 126 N.C. App. 593, 598, 486 S.E.2d 458, 461 (1997), *rev'd on other grounds*, 348 N.C. 45, 497 S.E.2d 692 (1998).

3. See *In the Matter of the Will of Allen*, \_\_\_ N.C. \_\_\_, \_\_\_, 821 S.E.2d 396, 400 (2018) ("Regarding wills and codicils, above all, '[t]he discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary instruction.'") (citation omitted). For an instruction on intent, see N.C.P.I.-Civil 101.46.

4. *Pounds v. Litaker*, 235 N.C. 746, 748, 71 S.E.2d 39, 41 (1952). *But cf.*, *In re Smith's Will*, 218 N.C. 161, 164, 10 S.E.2d 676, 678 (1940) (rejecting a document as a holographic will because typewritten words were essential in determining meaning and intent

of handwritten words). Because codicils by definition are an “addition, explanation or alteration” of a prior will, the Supreme Court of North Carolina emphasized that a valid codicil “need not quote in its entirety any language of the will it intends to alter, and a court should not isolate the handwritten text from the will itself in construing the codicil.” *In re Allen*, \_\_\_ N.C. at \_\_\_, 821 S.E.2d at 401.

5. *Pounds v. Litaker*, 235 N.C. at 748, 71 S.E.2d at 41.

6. N.C. Gen. Stat. § 31-3.4(a)(2); *In re Will of Jarvis*, 334 N.C. 140, 144, 430 S.E.2d 922, 924 (1993).

7. N.C. Gen. Stat. § 31-3.4(b); *In re Will of Gilkey*, 256 N.C. 415, 418, 124 S.E.2d 155, 156 (1962).

8. *In re Will of Jenkins*, 157 N.C. 429, 436, 72 S.E. 1072, 1075 (1911); see also *In re Will of Wilson*, 258 N.C. 310, 313, 128 S.E.2d 601, 603 (1962).

9. N.C. Gen. Stat. § 31-3.4(a)(3); *In re Will of Wilson*, 258 N.C. at 313, 128 S.E.2d at 603.

10. *In re Will of Gilkey*, 256 N.C. at 420, 124 S.E.2d at 159.

11. *In re Johnson's Will*, 181 N.C. 303, 305, 106 S.E. 841, 842 (1921); see also *In re Taylor's Will*, 220 N.C. 524, 525, 17 S.E.2d 654, 655 (1941) (indicating that a present intent to create a will is insufficient intent; instead, the language must indicate that "writer's intent [was] that the paper itself should operate as a disposition to take effect after death").

12. *Id.*

13. *In re Mucci's Will*, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975).

