

N.C.P.I.—Civil 860.20  
WILLS—ISSUE OF UNDUE INFLUENCE.  
GENERAL CIVIL VOLUME  
MAY 2017  
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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?"<sup>1</sup>

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.<sup>2</sup> 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 person'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 person to make a will which *he* would not have otherwise made.<sup>4</sup> The undue influence must act upon the free will of the person at the time *he* executes *his* will.<sup>5</sup>

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

[age]

[physical condition]

[mental condition]

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

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

[relationship (by blood) to the beneficiary(ies) of the will]

[failure to include in the will those persons who would naturally be expected to receive the property of the deceased]

You may also consider the degree to which:

[the writing is different from and purports to revoke a prior will]

[the deceased was influenced to execute the writing by (*state name of person exerting influence*)]

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

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

(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* favor.)<sup>9</sup>

(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 *his* property.)<sup>10</sup>

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.

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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 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 deceased. 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 deceased, 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.

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*, 223 N.C. at 181, 25 S.E.2d at 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) for the proposition that "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*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 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.").

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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 or 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*, \_\_\_ N.C. App. at \_\_\_, 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 Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000) (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."); see *In re James Junior Phillips*, \_\_\_ N.C. App. at \_\_\_, 795 S.E.2d at 282 (citing *In re Will of McNeil*, 230 N.C. App. 241, 245-46, 749 S.E.2d 499, 503 (2013) for the principle that undue influence is generally proved by a number of factors taken collectively, even where each standing alone would be of little weight); see also *In re Will of Andrews*, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980); *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910); *In re Will of Priddy*, 171 N.C. App. 395, 399, 614 S.E.2d 454, 458 (2005).

8 *In re Will of Turnage*, 208 N.C. at 132, 179 S.E. at 333.

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

10 *Id.*