

860.05 WILLS - ATTESTED WRITTEN WILL - REQUIREMENTS.

The (*state number*) issue reads:

"Was the propounder's exhibit (*state number*) executed according to the requirements of law¹ for a valid attested will?"

On this issue, the burden of proof is on the propounder.² This means that the propounder must prove, by the greater weight of the evidence, three things:³

First, that the deceased [signed the propounder's exhibit (*state number*) with the intent⁴ that it be *his* will] [directed another to sign *his* name to the propounder's exhibit (*state number*) in *his* presence and with the intent that it be *his* will].⁵ (The deceased's signature need not appear on any particular part of the writing. It may appear at the end of the writing or be written in or on the body of the writing, so long as it is put there by [the deceased *himself*] [another person in the presence and at the direction of the deceased].)⁶ The law does not require any particular form of signature, and the signing can be in any form so long as it is intended as a signature.

Second, that the deceased must have indicated to at least two witnesses by *his* words or conduct that the signature on the propounder's exhibit (*state number*) was *his* by [signing it in their presence] [by acknowledging to them that the signature on it was *his*].⁷ (The deceased may have signed in front of both witnesses, or have acknowledged *his* signature to both witnesses (together or separately) or have signed in front of one witness and acknowledged to the other.)

And Third, that these same witnesses must have signed the propounder's exhibit (*state number*) in the presence and at the request of the deceased.⁸ (However, the witnesses need not have signed in the presence of each other.) (The witnesses must have been situated so

that the deceased, if *he* chose to, could have seen them sign the writing, whether they were in the same room with *him* or not.)

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 attested 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.

1 According to N.C. Gen. Stat. § 31-46 (2013):

A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator, or if (i) its execution complies with the law of the place where it is executed at the time of execution; (ii) its execution complies with the law of the place where the testator is domiciled at the time of execution or at the time of death; or (iii) it is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or replacement statute.

2 *In re Morrow's Will*, 234 N.C. 365, 369, 67 S.E.2d 279, 282 (1951) (finding that "the propounder has the burden of proving the formal execution of the will and that he must do so by the greater weight of the evidence"). A caveator may challenge whether a will was properly executed, even where self-proving affidavits accompany the notarized and signed will. See *In re James Junior Phillips*, ___ N.C. App. ___, ___, 795 S.E.2d 273, 283 (2016) (citing *In re Will of Priddy*, 171 N.C. App. 395, 400-01, 614 S.E.2d 454, 458-59 (2005)).

3 N.C. Gen. Stat. § 31-3.3. 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.

4 For an instruction on intent, see N.C.P.I.-Civil 101.46.

5 *In re Will of Jarvis*, 334 N.C. 140, 142-144, 430 S.E.2d 922, 923 (1993).

6 *In re Will of Jarvis*, 334 N.C. at 143, 430 S.E.2d at 923.

N.C.P.I.-Civil. 860.05
WILLS - ATTESTED WRITTEN WILL - REQUIREMENTS.
GENERAL CIVIL VOLUME
APRIL 2017

7 *In re Will of Long*, 257 N.C. 598, 600, 126 S.E.2d 313, 314 (1962).

8 *In re Will of Long*, 257 N.C. at 600, 126 S.E.2d at 314 (finding error with jury instructions that required witnesses to sign in each other's presence in order to validly witness the will).