

860.22 WILLS - ISSUE OF DURESS.

The (*state number*) issue reads:

"Was the execution of the propounder's exhibit (*state number*) procured by duress?"¹

You are to answer this issue only if you have answered the (*state number*) issue(s) 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 the propounder's exhibit (*state number*) was procured by duress.

Duress occurs when a wrongful act, threat or coercion is used to force a person to make a will *he* would not have otherwise made. (Duress may exist even though the person purporting to make a will is fully aware of the nature and consequences of *his* act.) The existence of duress is for you to determine from all the facts and circumstances in evidence. You may consider the following:³

the deceased's:

[age]

[physical condition]

[mental condition]

[access to or opportunity to have independent advice]

[the fairness of the dispositions made by propounder's exhibit (*state number*)]

[the relationship between the deceased and (*name person allegedly exerting duress*)]

[the degree to which (*name person allegedly exerting duress*) sought or solicited the deceased to make propounder's exhibit (*state number*)]

[the degree to which the deceased was already susceptible to pressure or coercion by reason of [personal distress] [family emergency]]

[*state other situation supported by the evidence*].

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 duress, 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. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971); *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989).

2. When the caveator contends that a fiduciary relationship was created between the propounder and the deceased, it may be necessary to submit an issue as to the existence of such fiduciary relationship. In those cases in which a fiduciary relationship is found to exist, the burden of proof shifts to the propounder. *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943); *In re Estate of Ferguson*, 135 N.C. App. 102, 518 S.E.2d 796. 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. 258, 264, 316 S.E.2d 272, 275 (1984). See also *McNeill*, *supra*. 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. *Coppley v. Coppley*, 128 N.C. App. 658, 664, 496 S.E.2d 611, 616, *disc. rev. denied*, 384 N.C. 281, 502 S.E.2d 846 (1998); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *disc. rev. denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).

N.C.P.I.-Civil. 860.22
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GENERAL CIVIL VOLUME
MAY 2002
