

815.29 VOIDABLE MARRIAGE (ANNULMENT)¹ - ISSUE OF UNDUE INFLUENCE.²

NOTE WELL: If one of the parties to the marriage has died, submission of N.C.P.I.-Civil 815.30 may also be necessary.³

The (*state number*) issue reads:

Was the consent of the [plaintiff] [deceased]⁴ to marry the defendant procured by the undue influence of the defendant⁵ over the [plaintiff] [deceased]?

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence,⁶ that at the time of the [plaintiff's] [deceased's] marriage to the defendant, the [plaintiff's] [deceased's] consent to marry the defendant was procured by the undue influence of the defendant over the [plaintiff] [deceased].

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.⁷ Undue influence exists where there has been such an influence over the mind and will of another that *his* consent to marry is not freely given, but is in reality the act of the person procuring the marriage.⁸

The undue influence must have existed and must have acted upon the free will of the [plaintiff] [deceased] at the precise time of the marriage ceremony.⁹

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 facts and circumstances in evidence, the [plaintiff's] [deceased's]:

[age]

[physical condition]

[mental condition]

[[dependence upon] [association with] [relationship with] the defendant]

*[state any other relevant factors supported by the evidence].*¹⁰

(Undue influence does not necessarily involve moral turpitude or even a bad or improper motive).¹¹

(Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to consent to marry.)¹² (Influence gained by kindness and affection, without more, is not undue, even if it induces a person to consent to marry.)¹³

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the consent of the [plaintiff] [deceased] to marry the defendant was procured by the undue influence of the defendant over the [plaintiff] [deceased] at the time of the marriage ceremony, 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.

1. In addition to bigamy, N.C. Gen. Stat. § 51-3 (1977) also describes certain other marriages as "void"; in those other instances, "the statute should be read to mean 'voidable.'" Suzanne Reynolds, 1 *Lee's North Carolina Family Law* (§ 3.16(A)) (5th ed. Rev. 1993) (hereinafter "Reynolds"); see also *Sawyer v. Slack*, 196 N.C. 697, 699-700, 146 S.E.

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864, 865 (1929) ("void" in statute (now N.C. Gen. Stat. § 51-3) construed to mean "voidable" as applied to marriage of person under statutory age). A "voidable" marriage is "valid for all civil purposes until annulled" by a court of competent jurisdiction; a "void" marriage is a "nullity and may be impeached at any time." *Geitner ex rel First Nat'l Bank v. Townsend*, 67 N.C. App. 159, 161, 312 S.E. 2d 236, 238 (1984) (quoting *Ivery v. Ivery*, 258 N.C. 721, 726, 129 S.E.2d 457, 461 (1963)).

2. A person whose consent to marry was procured by undue influence is "incapable of contracting from want of will," N.C. Gen. Stat. § 51-3, such that the marriage is voidable pursuant to the statute and "may be annulled on this ground where the facts and circumstances so warrant," *Clark v. Foust-Graham*, 171 N.C. App. 707, 714, 615 S.E.2d 398, 403 (2005). See also N.C. Gen. Stat. § 51-1 ("a valid and sufficient marriage is created by the consent of a male and female person . . . , presently to take each other as husband and wife, freely, seriously and plainly expressed, by each in the presence of the other")

Also note that "ratification," see N.C.P.I. Civil 815.32, MAY be a defense to annulment based upon undue influence. This issue has not yet been addressed by appellate decision or statute. See *Reynolds*, § 3.21 (the "law might . . . find that the incompetent who recovers might have ratified the marriage by long cohabitation"), citing *Watters v. Watters*, 168 N.C. 411, 413, 84 S.E. 703, 704 (1915) (in cases other than where the marriage is void (*i.e.*, bigamy), "the marriage can be ratified by the conduct of the party, who is entitled to make the application for such [action]. The ground for such application can be put forward only by the party who has been imposed on and who has not subsequently ratified the contract and waived the disqualification."); see also *Koonce v. Wallace*, 52 N.C. 194, 196, (1859); *Parks v. Parks*, 218 N.C. 245, 250, 10 S.E.2d 807, 810 (1940); *Sawyer v. Slack*, 196 N.C. 697, 700, 146 S.E. 864, 865 (1929) (ratification applicable in context of marriage of person under statutory age).

3. See N.C. Gen. Stat. § 51-3 providing that "[n]o marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties to the marriage, except for bigamy." If a party to the marriage has died, it may be necessary to submit an issue (N.C.P.I.-815.30) to establish the lack of cohabitation AND birth of issue. See *Clark*, 171 N.C. App. at 711, 615 S.E.2d at 401.

4. Although N.C. Gen. Stat. § 50-4 (1979) provides that an annulment may be sought by "either party to a marriage contracted contrary to the prohibitions [of Chapter 51] entitled Marriage," North Carolina also permits annulments on the grounds of undue influence and of lack of mental capacity to be sought by the person under the disability or his guardian [or after the death of such person and in the absence of cohabitation and birth of issue of the marriage, by a person whose legal rights depend on the validity of the marriage]. *Clark*, 171 N.C. App. at 715-716, 615 S.E.2d at 401; *Ivery*, 258 N.C. at 730, 129 S.E.2d at 463.

5. In *Clark*, *supra* note 2, the sole North Carolina appellate decision dealing with undue influence as grounds for "incapab[ility] of contracting [marriage] from want of will," N.C. Gen. Stat. § 51-3, the influence was alleged to have been imposed by the putative spouse, and the issue and instructions herein track *Clark*. Although North Carolina appears to recognize that "duress" from third persons may be grounds to claim lack of capability to contract marriage, see N.C.P.I. 815.27, note 6, no current authority speaks to "undue influence" coming from third persons. If deemed appropriate, this issue and instruction would have to be modified in such a case.

6. No North Carolina case has directly addressed the burden of proof in annulment proceedings. *Cf. Johnson v. Johnson*, 141 N.C. 91, 93-4, 53 S.E. 623, 624 (1906) (Connor, J., concurring) (action to have a marriage declared void "so far as the procedure is concerned, is an action for divorce . . .") (citing *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889)); N.C.P.I. Civil-815.40 ("greater weight of the evidence" set out as the burden of proof for divorce on grounds of one year's separation; 1 *Reynolds* § 6.28 (in an action for divorce from bed and board under N.C. Gen. Stat. § 50-7 (1985), "the complaining party must establish the elements by the greater weight of the evidence.") However, *cf.* 1 *Reynolds* 3.8 ("Fairly consistently among courts in other states that have analyzed the issue, the opinions have required the party [seeking annulment] to prove the case by clear and convincing evidence. [See N.C.P.I.-101.11.] Although no North Carolina cases treat the weight of the burden, by analogy to other issues on marriage validity, one would expect . . . the law to require more than a preponderance of the evidence.")

7. *In re Thompson's Will*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958).

8. *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974); see also *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998)("[t]here 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").

9. *Geitner*, 67 N.C. App. at 162, 312 S.E.2d at 238 ("the mental capacity of a party at the precise time when the marriage is celebrated controls its validity or invalidity").

10. See *Clark*, 171 N.C. App. at 714, 615 S.E.2d at 403 (evidence that deceased was driven to site of marriage by defendant and that marriage was undertaken suddenly pertinent to the issue of undue influence); see also *In re Will of Coley*, 53 N.C. App. 318, 321, 280 S.E.2d 770, 771 (1981) (citing *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932) ("[i]t 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."))

11. *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

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

13. *Id.*