

WILL CONTESTS

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It is the rare circumstance where a plaintiff files a will contest because he or she received what would otherwise be an intestate share. Children that inherit equally rarely force the high cost or emotional cost of litigation. When a testator signs a will that treats heirs differently, watch out. Although no person deserves to inherit anything, feelings and emotions say otherwise. The reasons for a diminished inheritance might be apparent. But reasons sometimes do not help resolve the family turmoil left behind.

In the years to come will contests should increase for several reasons. The baby boom generation is passing away. Children of the 60's have given society a great many step parents. Which set of kids inherits usually depends on which parent survives the longest. The elderly have the choice of a nursing home or in home care. With kids not handling day to day responsibility, care takers are inheriting more than ever. The ethical standards of fiduciaries also appears on the decline. Witnesses to wills inherit. Powers of attorney control everything. Even attorneys are drafting documents that benefit themselves or members of the attorney's family.

STANDING

To have standing to complain about an estate plan, the petitioner must be an interested person. *I.C. 29-1-1-3*. This includes a family member who would inherit under the laws of intestacy if there was no will, and a beneficiary under a prior or later will. A beneficiary under the probated will and an executor in a will other than the probated one might be able to file a complaint to start the case; but they must in the end have something to gain for the complaint to survive.

OBJECTIONS TO PROBATE

If a beneficiary believes a will exists that should be contested, he or she may file an objection to its probate. *I.C. 29-1-7-16*. Although such an objection to probate is usually filed soon after a death, it can be filed before the testator has passed away. Objections to probate have an interesting history. Prior to 1954, if objections were filed, the probate code placed the burden of proof on the petitioner who wanted to probate the will in the first place. Since 1954 the probate code places the burden of proof on the contestant, whether or not framed as objections to probate, an action to resist probate, or a will contest. *I.C. 29-1-7-20*. One benefit to filing objections to probate verses a will contest is that the court will appoint a special administrator rather than simply rubber stamp the executor nominated in the will. *I.C. 29-1-10-15*. Keep in mind, however, courts still look at the executor nominated in the contested will in appointing a special administrator.

WILL CONTESTS

Governed by statute, plaintiffs have a simple road map in filing a will contest:

1. A complaint must be filed within three months of the court's order probating the will.

2. The complaint must include summons and a filing fee. The Indiana Supreme Court has rendered recent and strong precedent that trial rule 3 has real teeth. *See IC. 29-1-7-18*. Some plaintiffs have filed the complaint under the estate's caption and cause number; better to avoid a motion to dismiss for failing to pay a filing fee. In Marion County, Indiana will contests are filed in the probate court. In other counties, plaintiffs file will contests with an eye toward which judge will ultimately preside; i.e., forcing the defendants to file any motion for change of judge.

3. The complaint must name as defendants the executor and all persons named in the will. The petition to open the estate in the first place should provide all of this information in detail. If the plaintiff files against one defendant, case law has allowed the plaintiff to amend and include any omitted defendants. Case law has also allowed amendments to add plaintiffs.

One tricky situation is the case where a beneficiary has the court probate a will but there is no petition to open an estate. This is more common where a trust owns all of the property and no estate was really contemplated. Three months come and go and any will contest is barred, even though the only way to discover the will's probate is to contact the clerk. To contest such a will, the defendants would include all those named in the will and I suggest you file a petition for the court to appoint a special administrator to defend it – then amend to include the newly named administrator.

4. The text of the complaint should copy the language of Indiana Code Section 29-1-7-17. The most common reason for contesting a will is that the testator was of unsound mind when he or she signed it. Others include undue execution, the will was a product of duress, fraud, undue influence, or an insane delusion, or the existence of a later will. Trial Rule 9 applies, so the complaint should attach a copy of any contested document, and plead fraud with particularity. *E.g., Estate of Parlock, 486 N.E.2d 567 (Ind.App. 1985)*. Obviously fraud and undue influence do not happen in public places. So I suggest simply quoting the statute and in the face of any motion to dismiss for not being more particular, ask the court for more time so that discovery might disclose the particulars. Defendants can also file motions for more definite statements, motions to strike, etc. It seems like all of the trial rules apply except that defendants need not file an answer.

5. The plaintiff should verify the complaint. *I.C. 29-1-20-1*. In fact the probate code requires that petitioners verify almost everything. But such a requirement is often overlooked and when noticed can be cured without a jurisdictional problem.

6. Without dispute, will contests may be tried to a jury if timely requested. *Lamb v. Lamb*, 5 N.E. 171 (Ind. 1886).

SAMPLE COMPLAINT:

[CAPTION]

**VERIFIED WILL CONTEST; and
REQUEST FOR JURY TRIAL**

Comes now _____ and contests the purported Will of the decedent probated by this Court.

1. _____ died on or about _____, domiciled in _____ County, Indiana.

2. _____ filed a petition to admit a document to probate purporting to be the decedent's last Will and Testament dated _____. Although disputed, pursuant to Trial Rule 9.2(A) a copy is attached. Pursuant to Trial Rule 9.2(B) the proper execution of the document is denied under oath and not deemed established.

3. Pursuant to Indiana Code Section 29-1-7-17, the contested Will is not valid for several reasons: the unsoundness of mind of the testator; the undue execution of the Will; that the Will was executed under duress or was obtained by fraud; the decedent was unduly influenced into signing it; or any other valid objection to the Will's validity or the probate of the Will as discovery might disclose.

4. The plaintiff, _____, is [describe family relationship].

5. Under a prior, validly executed Will signed by the decedent, the plaintiff, _____, receives _____ share of the decedent's estate. She is also an intestate heir.

JURY REQUEST

6. The plaintiff requests trial by Jury on all issues in this case.

WHEREFORE the Court and Jury should reject the probate of the decedent's Will, and grant such further relief the Court deems proper, including the award of attorney fees and expenses pursuant to Indiana Code Section 29-1-10-14.

I affirm under the penalty of perjury the foregoing statements are

true and correct, this _____.

CERTIFICATE OF SERVICE

I certify that the foregoing paper was duly served upon the following by United States first class mail postage prepaid this _____:

Respectfully submitted,

REQUEST NOTICE OF ALL PLEADINGS AND PAPERS

[CAPTION]

VERIFIED PETITION FOR
NOTICE OF ALL PLEADINGS AND PAPERS

Comes now _____, by counsel, and pursuant to Indiana Code Section 29-1-7-6 petitions for notice of all pleadings and papers filed with the Court, including any Indiana inheritance tax return, federal estate tax return, closing statement, all inventories and any other papers signed by the personal representative or his or her attorney and mailed to any beneficiary or heir, prior to this petition and in the future.

The Clerk of the Court and all interested persons are advised to notify the undersigned of any and all filings, petitions, hearings, and orders.

I affirm under the penalty of perjury the foregoing statements are true and correct, this _____.

PRELIMINARY AND FINAL INSTRUCTIONS:

Rather than write a quasi law review article on will contests, I thought to provide the same information in a more practical setting. To follow are proposed preliminary instructions and jury instructions that explain the

standards used by the courts in resolving will contests. The article concludes by addressing common evidentiary matters.

[CAPTION]

PROPOSED PRELIMINARY JURY INSTRUCTIONS

Comes now the plaintiff, by counsel, and respectfully requests that the Court instruct the Jury as follows:

Pattern Number	Instruction
1.01	Duty of Jurors - Admonishment
1.03	Issues for Trial – Parties’ Burden (Inclusive of Pattern No. 27.01)
1.06	Clear and Convincing Evidence
27.09	Testamentary Capacity - Definition
1.09	Credibility of Witnesses- Weighing Evidence
1.10	Juror Note –Taking
1.11	Preliminary Instruction – Witness Testimony/Exhibits/Court Rulings
1.12	Juror Questions - Procedure
1.13	Conduct of Trial
1.15	Final Preliminary Instruction
	<u><i>Villanella v. Godbey</i>, 632 N.E.2d 786 (Ind.App. 1994);</u>
	<u><i>In re estate of Wade</i>, 768 N.E.2d 957 (Ind.App. 2002).</u>

CERTIFICATE OF SERVICE

I certify that the foregoing paper was duly served upon the following by U.S. first class mail postage pre-paid this _____:

PLAINTIFF’S PROPOSED PRELIMINARY INSTRUCTION NO. _____

Members of the Jury:

You have been selected as jurors and have taken an oath to well and truly try this case. During the trial there will be times when you will be away from the courtroom for recesses, lunch periods and overnight. When you are in the jury room, you may discuss the evidence with your fellow jurors only when all of you are present, so long as you reserve judgment about the outcome of the case until the deliberations begin.

During the trial you are not to discuss the case with anyone other

than your fellow jurors. When you are not in the jury room, you must not discuss the case among yourselves or with anyone else. From now until the trial is concluded, do not talk to any of the parties, their lawyers, or any of the witnesses. If anyone tries to talk to you about this case, you should report it to the court immediately.

You must focus your attention on this trial and reach a verdict solely upon the evidence and my instructions on the law. Do not listen to discussions among, or receive information from, other people about this trial. Do not read, watch or listen to anything about this trial in newspapers, on radio, on television or on the Internet. During the trial, you must not consume any alcohol or drugs that would affect your ability to hear and understand the evidence.

You should keep an open mind and not reach a judgment in this case until you have heard all of the evidence, the arguments of counsel and the final instructions as to the law.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 1.01

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

The Plaintiff, _____, has brought this claim against the Defendants, _____, to contest the validity and set aside the probate of the Last Will and Testament of _____, deceased.

The Plaintiff claims that the written instrument is not the will of the deceased because it was obtained by the undue influence of _____, and _____ lacked testamentary capacity at the time the instrument was signed.

The Defendants claim that the written instrument is valid, there was no undue influence, and that the decedent had the testamentary capacity at the time the written instrument was signed.

If the Plaintiff proves that _____ had a fiduciary relationship with the decedent, then he has the burden to prove by clear and convincing evidence that he acted in good faith, that he did not take advantage of his position of trust, and that the benefits he and his family received under the Will was fair and equitable.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

MODIFIED Indiana Pattern Jury Instructions, Civil, 1.03, (inclusive of Pattern No. 27.01)

Villanella v. Godbey, 632 N.E.2d 786 (Ind.App. 1994); In re estate of Wade, 768 N.E.2d 957 (Ind.App. 2002).

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

Clear and convincing evidence is an intermediate standard of proof. It is greater than a preponderance of the evidence and less than proof beyond a reasonable doubt. It requires that the existence of a fact be highly probable.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 1.06

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

To make a valid will, a person must have what the law terms "testamentary capacity."

A person has testamentary capacity if at the time of making a will she possess the ability:

- (1) To know the extent and value of her property;
- (2) To know the number and names of those who are the natural objects of her bounty;
- (3) To know what they should receive with reference to their conduct toward her;
- (4) To retain these facts in mind long enough to have a will prepared and executed.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 27.09

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

You are the exclusive judges of the evidence. You should assume that each witness has testified truthfully. If there are conflicts in the evidence, you must reconcile those conflicts, if you can, based on that assumption. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony that you cannot reconcile, you must decide what testimony you believe and what testimony you disbelieve.

In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence.

In deciding what or whom you believe, you should use your own knowledge, experience and common sense gained from day-to-day living.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 1.09

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

You may take notes during the trial if you wish. Do not become so involved in note-taking that you fail to carefully listen to the evidence or observe the witnesses as they testify.

Notes are not evidence in the case and must not take precedence over your independent recollection of the evidence. They are only an aid to recollection and are not entitled to any greater weight than your recollection or impression as to the actual evidence.

Your notes should not be disclosed to anyone other than a fellow juror during deliberations. Do not take your notes outside of the courtroom or jury room. The court will furnish you with paper and pencil.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 1.10

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

You must judge the evidence from your memory of the testimony of the witnesses and any exhibits admitted into evidence. The court will not provide a written transcript of any testimony.

During the trial, the parties may offer certain exhibits as evidence. When the court admits an exhibit as evidence, you should carefully examine it, without discussion, when it is submitted to you.

The admissibility of evidence is strictly controlled by rules of law. The attorneys may ask certain questions or offer certain exhibits that the court may rule are not admissible into evidence. You must not consider an exhibit or testimony that the court orders stricken from the record. Such matter must be treated as though you had never heard of it.

Nothing that I say or do during the trial is intended to suggest what facts or verdict you should find. Each of you, as jurors, must determine the facts and the verdict.

- _____ Given
- _____ Refused

_____ Given as modified
_____ Withdrawn
Indiana Pattern Jury Instructions, Civil, 1.11

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

During the trial, you may have questions you want to ask a witness. Please do not address any questions directly to a witness, the lawyers, or your fellow jurors since there are rules as to what questions may be asked, and the answers that witnesses are allowed to give.

Instead, if you have questions, please raise your hand after the attorneys have asked all of the questions, and before the witness has left the witness stand. You must put your questions in writing. I will review them with the attorneys, and I will determine whether your questions are permitted by law. If a question is permitted, I will ask it of the witness. If it is not permitted, you may not speculate why it was not asked, nor what the answer may have been.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn
Indiana Pattern Jury Instructions, Civil, 1.12

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

The trial of this case will proceed as follows:

First, the attorneys will have an opportunity to make opening statements. These statements are not evidence. They are only previews of what the attorneys anticipate the evidence will be.

Following the opening statements, the attorneys begin presenting the evidence. They may call witnesses to testify under oath. The attorneys may also offer documents and other tangible exhibits as evidence.

When the evidence is completed, the attorneys will make final arguments. These final arguments are not evidence but are given to help you in evaluating the evidence. The attorneys are also permitted to argue, to characterize the evidence, and to attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn
Indiana Pattern Jury Instructions, Civil, 1.13

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. _____

The court has read these preliminary instructions to you prior to the

opening statements of the attorneys and prior to the introduction of the evidence so that you may understand the issues presented and the rules regarding the burden of proof, the credibility of witnesses, and the weighing of evidence.

You will receive further instructions after you have heard all the evidence and final arguments.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 1.15

INSTRUCTIONS TO THE JURY:

[CAPTION]

PROPOSED JURY INSTRUCTIONS AND VERDICT FORMS

Comes now Plaintiff _____, by counsel, and respectfully requests that the Court instruct the Jury according to the attached proposed instructions and tender the two possible verdict forms. The authority for each is as follows:

<u>Pattern Number</u>	<u>Instruction Or Authority</u>
3.01	Credibility of Witnesses – Weighing Evidence– Conflicts on Evidence
3.13	Law to the Court- Fact to the Jury
3.15	Inadmissible Evidence – Court Rulings
3.17	Jury Deliberations
3.19	Jury Management
3.31	Duty of Alternate Juror
4.03	Agreed Facts
27.01	Issues for Trial – Parties’ Burden
9.02	Clear and Convincing Evidence – Definition
27.09	Testamentary Capacity – Definition
37.01	General Instruction for Verdict
37.43	Will Invalid – Probated or Unprobated
	<u>McCartney v. Rex, 145 N.E.2d 400 (Ind.App. 1957)</u>
	<u>Villanella v. Godbey, 632 N.E.2d 786 (Ind.App. 1994)</u>
	<u>In re estate of Rothenberg, 530 N.E.2d 1148 (Ill.App. 1988)</u>
	<u>In re estate of Wade, 768 N.E.2d 957 (Ind.App. 2002)</u>
	<u>Workman v. Workman, 46 N.E.2d 718 (Ind. 1943)</u>
	<u>Cooper v. Cooper, 51 N.E.2d 100 (Ind.App. 1943)</u>
	<u>Fletcher v. DeLoach, 360 So.2d 316 (Ala. 1978)</u>

Dominquez v. Duran, 540 S.W.2d 567 (Tex.App.1976)
Farner v. Farner, 480 N.E.2d 251 (Ind.App. 1985)

CERTIFICATE OF SERVICE

I certify that the foregoing paper was duly served upon the following by U.S. first class mail postage prepaid, this _____:

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

You are the exclusive judges of the evidence. You should assume that each witness has testified truthfully. If there are conflicts in the evidence, you must reconcile those conflicts, if you can, based on that assumption. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony that you cannot reconcile, you must decide what testimony you believe and what testimony you disbelieve.

In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence.

In deciding what or whom you believe, you should use your own knowledge, experience and common sense gained from day-to-day living.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.01

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

You must determine the facts of this case by considering all of the evidence according to the law contained in these instructions.

All the law in the case is not embodied in any single instruction. You must consider these instructions as a whole and construe them in harmony with each other.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.13

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

You are not to consider testimony or exhibits that were not admitted into evidence.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.15

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with the goal of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. Do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are the judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.17

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

A verdict form has been prepared. The bailiff will bring them to you. Before deliberation, you must select a foreperson. The foreperson will preside over your deliberations and must sign and date the verdict upon which you all agree.

You will be under the supervision of the bailiff who will be in attendance but not in the jury room during deliberations. If you leave the jury room during deliberations, you will be in the charge of the bailiff. While out of the jury room or separated from the other jurors, you must not:

- (1) talk about the case among yourselves or with anyone else;
- (2) talk to the attorneys, parties or witnesses;
- (3) express any opinion about the case; and

(4) listen to or read any outside or media accounts of the trial.
If you have a question, put it in writing and give it to the bailiff who will deliver it to the court, the court will respond appropriately.

Do not sign any verdict form for which there is not unanimous agreement. The foreperson must return the verdict form into open court. When you have reached your verdict, please notify the bailiff. The bailiff will return you to court with your verdict where the judge will review and read your verdict. After you all agree to your verdict, you are under no obligation to discuss it with anyone.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.19

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Mr./Ms. _____, you have been selected as an alternate juror. Your duties are the same as those of the regular jurors. You will retire with the jury to the jury room and you should listen attentively to the deliberations of the jury.

You must not participate in any manner in the discussions, deliberations or voting of the jury. You may only participate in the deliberations if the Court directs you to do so.

The foreperson of the jury shall prevent any discussion or voting by an alternate and shall promptly report to the Court any violation of this instruction.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 3.31

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

When the attorneys for the parties stipulate or agree to the existence of a certain fact, you shall accept such stipulation or agreed fact as true.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 4.03

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The Plaintiff, _____, has brought this claim against the Defendants, _____, to contest the validity and set aside the

probate of the Last Will and Testament of _____, deceased.

The Plaintiff claims that the written instrument is not the will of _____, deceased, because she lacked testamentary capacity at the time she signed the instrument, or because _____ obtained it by the undue influence.

The Defendants are those that benefit under the written instrument. They claim that _____ had the testamentary capacity at the time the written instrument was signed, and that no one unduly influenced her to sign it.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

MODIFIED Indiana Pattern Jury Instructions, Civil, 27.01

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The Defendant _____ served as the attorney in fact for _____. Because of this fiduciary relationship, Indiana law presumes that he and his family members obtained a benefit through undue influence or fraud. The Defendant _____ must prove by clear and convincing evidence that he acted in good faith, that he did not take advantage of his position of trust, and that the benefits he and his family received under the Will was fair and equitable. If the Defendant _____ successfully rebuts such a presumption, the burden shifts back to the plaintiff, _____ to show by a preponderance of the evidence that the Will is not valid. The presumption of undue influence and fraud applies in this case regardless of the amount of involvement _____ had leading up to _____ signing the contested will.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Authority: *Villanella v. Godbey*, 632 N.E.2d 786 (Ind. App. 1994); *In re Estate of Wade*, 768 N.E.2d 957 (Ind. App. 2002)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Clear and convincing evidence is an intermediate standard of proof. It is greater than a preponderance of the evidence and less than proof beyond a reasonable doubt. It requires that the existence of a fact be highly probable.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 9.02

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Once a fiduciary relationship has been shown between _____, the law presumes that any transaction between them by which _____ has profited is fraudulent, and the burden shifts to _____ to prove by clear and convincing evidence that the written instrument was not the result of undue influence; if _____ does not meet this burden, the written instrument must be set aside.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Authority: *In re Estate of Rothenberg*, 530 N.E.2d 1148 (Ill.App.1988)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Written instruments entered into during the existence of a fiduciary relationship, such as the relationship between _____, are presumptively invalid as the product of undue influence.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Authority: *In re Estate of Wade*, 768 N.E.2d 957 (Ind. App. 2002)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The law presumes fraud when a person with a fiduciary duty benefits from a questioned transaction, such as the written instrument purported to be _____ will.

_____ Given
_____ Refused
_____ Given as modified
_____ Withdrawn

Authority: *In re Estate of Wade*, 768 N.E.2d 957 (Ind. App. 2002)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

If the plaintiff _____ evidence established: (1) the existence of a fiduciary relationship between _____, and (2) that the written instrument resulted in an advantage to _____ or his family, the law imposes a presumption that the written instrument was the result of undue influence exerted by _____, constructively fraudulent, and thus void; once

these facts are established, the burden shifts to _____ to rebut the presumption by clear and unequivocal proof.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: In re Estate of Wade, 768 N.E.2d 957 (Ind. App. 2002)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Proof of undue influence must depend largely upon circumstantial evidence; someone who exerts undue influence does so in private, not where witnesses can see. Undue influence can best be seen by its results.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: McCartney v. Rex, 145 N.E.2d 400 (Ind.App. 1957)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

If _____ exerted undue influence over _____, the result is that the document she signed may have been hers in outward form, but in reality reflected _____ wishes.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Workman v. Workman, 46N.E.2d 718 (Ind.1943)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

_____’s undue influence over _____ is a question of fact and _____ is entitled to the benefit of any and all inferences of fact which may be deduced reasonably from direct evidence which is necessary only to establish the facts from which undue influence may reasonably be inferred. The question is not whether one single fact proves undue influence; but whether all of the facts taken together may justify your finding the will invalid because of undue influence.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Workman v. Workman, 46N.E.2d 718 (Ind.1943)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

To find that the contested will is not valid because of undue influence, _____ did not need to be present when _____ signed the written instrument. Someone having undue influence over _____ does not need to be actually present at the time and place of preparation and execution of the will in order to make it invalid because of undue influence. It is a question of fact for the jury as to whether influence previously acquired still persisted at the time of the execution of the written instrument. It is also a question of fact for the jury to determine whether or not _____ will would have been different if _____ had not influenced her.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: McCartney v. Rex, 145 N.E.2d 400 (Ind.App. 1957); Cooper v. Cooper, 51 N.E.2d 100(Ind.App. 1943)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

One of the factors that may be considered in setting aside the contested Will is whether the beneficiaries of the contested document are her natural heirs.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Workman v. Workman, 46N.E.2d 718 (Ind.1943)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The character of _____ testamentary scheme, such as the reasonableness of the distributions made by _____ in the written instrument, is relevant because _____ mental capacity is at issue, and thus you may examine the written instrument to see if its provisions are just and reasonable and consonant with the state of _____ family relations, since this would reflect on her capacity to recall natural objects of her bounty.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Fletcher v. DeLoach, 360 So.2d 316 (Ala.1978)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

You are entitled to consider the past relationship between _____ and her family and if _____, without reasonable explanation, made an unnatural disposition of her estate, you may consider that circumstance in weighing the evidence of her testamentary capacity.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *Dominquez v. Duran*, 540 S.W.2d 567 (Tex. App. 1976)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

To sign a valid will, a person must have what the law terms "testamentary capacity."

A person has testamentary capacity if at the time of making a will she possess the ability:

- (1) To know the extent and value of her property;
- (2) To know the number and names of those who are the natural objects of her bounty;
- (3) To know what they should receive with reference to their conduct toward her;
- (4) To retain these facts in mind long enough to have a will prepared and executed.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Civil, 27.09

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

_____ must have possessed all the essentials of testamentary capacity, and if one essential is lacking, incapacitating _____, the written instrument is not valid.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *Lowe v. Talbert*, 177 N.E.2d 339 (Ind. App. 1931)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

If the plaintiffs prove that _____ was of unsound mind at any time, you are entitled to infer that her condition continued unless the defendants prove to the contrary.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *Farner v. Farner*, 480N.E.2d 251 (Ind.1985)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

That there was evidence presented of _____ alertness, good memory, and seeming realization of the consequences of her actions at the time of the execution of the written instrument is not conclusive that _____ had the necessary mental capacity.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *O'Dell v. Youngblood*, 422N.E.2d 381 (Ind.App.1981)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

_____ does not have to prove complete unsoundness of mind to support a finding of undue influence. A weakness of mind can make a person more susceptible to undue influence such that combined with other factors you are entitled to find that _____ was unduly influenced in signing her Will.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *O'Dell v. Youngblood*, 422N.E.2d 381 (Ind.App.1981)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

Mental weakness will invalidate a Will, if accompanied by undue influence, duress, inadequacy of consideration, misrepresentations, concealment, taking advantage of ignorance, inexperience, or want of advice.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: *Yount v. Yount*, 43 N.E.2d 136 (Ind. 1896)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

To have been mentally capable of making her will, _____ must have been capable of comprehending her act and all conditions entering into its rational performance, and must have had capacity to comprehend the extent of her property, nature of those claims excluded, and deliberately forming an intelligent purpose of excluding _____.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Ramseyer v. Dennis, 119 N.E. 716 (Ind. 1917)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

A person may have sufficient mind to know and comprehend that she is making a will and thereby disposing of her property, giving it to some of the natural objects of her bounty to the exclusion of others, and have an object in so doing which she fully comprehends, and yet be prompted to so dispose of her property by some form of unsound mind; and, if the unsoundness of mind affected in any way or entered into the making of the will, such will would be invalid, and should be set aside.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Authority: Swygart v. Willard, 76 N.E. 755 (Ind. 1906); Young v. Miller, 44 N.E. 757 (Ind. 1896)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. _____

The Court is submitting to you forms of possible verdicts.

When you have reached your verdict, the foreperson should complete, sign and date the verdict form. Bring all verdict forms with you when you return to court.

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

MODIFIED Indiana Pattern Jury Instructions, Civil, 37.01

PLAINTIFF'S PROPOSED VERDICT FORM _____

[CAPTION]

VERDICT

We, the Jury, find for the Plaintiff, _____. The contested Will is not valid.

Date

Foreperson

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Verdict Form No. 37.43

PLAINTIFF'S PROPOSED VERDICT FORM _____

[CAPTION]

VERDICT

We, the Jury, find for the Defendants. The decedent, _____, signed the contested Will while she was of sound mind and was not unduly influenced by anyone.

Date

Foreperson

- _____ Given
- _____ Refused
- _____ Given as modified
- _____ Withdrawn

Indiana Pattern Jury Instructions, Verdict Form No. 37.43