CHAPTER 34

WILLS

34:1 WILL CONTEST — STATEMENT OF THE CASE

(I) (The Court) will now instruct you as to the claims of each party to the case and the law governing the case. Please pay close attention to these instructions. You must all agree on your verdict. You must apply the law to the facts.

The parties to the case are:

The proponent, *(name)***, who is the party offering the will for probate, and the contestant,** *(name)***, who is the party objecting to the admission of the will to probate.**

(The proponent claims the offered will was properly signed by *[name of alleged testator]* **as [his] [her] [signed and witnessed] [signed and acknowledged] [self-proved] [or] [holographic] will.)**

(Even though the court has determined that the offered will was not properly signed by *[name of alleged testator]*, **the court has also determined that it should nonetheless be treated as if it had been properly signed as [his] [her] [signed and witnessed] [signed and acknowledged] [or] [holographic] will.)**

The contestant claims that the will should not be admitted to probate because:

(insert the basis of the objection).

These are the issues you are to determine, but are not to be considered by you as evidence in the case.

Notes on Use

1. Use the first unnumbered parenthesized paragraph unless the court has determined as a matter of law under section 15-11-503(1), C.R.S., that the offered document or writing "was not executed in compliance with section 15-11-502." Use the second unnumbered parenthesized paragraph if a valid will exists under section 15-11-503, when the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed as a signed and witnessed will under section 15-11-502(1), C.R.S., or as a holographic will under section 15-11-502(2). Under section 15-11-503, even though "a document, or writing added upon a document, was not executed in compliance with section 15-11-502," the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that "the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse," § 15-11-503(2), and (2) that "the proponent of the document or writing [has established] by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will," § 15-11-503(1). *See* **In re Estate of Wiltfong**, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); **In re**

Estate of Sky Dancer, 13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

2. Use whichever other parenthesized or bracketed portions of the instruction are appropriate to the evidence in the case.

3. If the parties have stipulated pursuant to C.R.C.P. 48 to having the jury's verdict based on some stated majority rather than requiring it to be unanimous, this instruction must be appropriately modified.

4. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications should be made in this instruction.

5. If the will contains an *in terrorem* (no contest) clause, courts generally will not enforce that clause when a beneficiary acts in good faith and has probable cause to challenge the will. **In re Estate of Peppler**, 971 P.2d 694 (Colo. App. 1998). "In the context of wills, probable cause is 'the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful.'" *Id.*at 697; *accord* RESTATEMENT (SECOND) OF PROPERTY § 9.1 cmt. j (1981). Additionally, no-contest clauses in wills are to be strictly construed, and forfeiture is to be avoided if possible. **Sandstead-Corona v. Sandstead**, 2018 CO 26, ¶ 60, 415 P.3d 310. The court must first determine as a matter of law if the *in terrorem* (no contest) clause is enforceable; if it is not, then the case may be submitted to the jury.

Source and Authority

1. This instruction is supported by sections 15-12-407 (contested cases), 15-10-306 (right to jury trial), and 15-11-502 to -504, C.R.S.

2. The requirements of a properly executed, signed, and witnessed or acknowledged will, that is, a will other than a self-proved or holographic will, are set out in Instruction 34:2. The requirements of a properly executed self-proved will are set out in Instruction 34:5, and the requirements for a properly executed holographic will are set out in Instruction 34:6.

34:2 ELEMENTS OF PROOF OF PROPERLY EXECUTED, SIGNED, AND WITNESSED OR ACKNOWLEDGED WILL — ALL WILLS EXCEPT SELF-PROVED AND HOLOGRAPHIC

For the proponent, *(name)***, to have the writing that has been admitted into evidence and identified as** *(insert appropriate description)* **admitted to probate as the will of the testator,** *(insert name of alleged testator)***, you must find the following have been proved by a preponderance of the evidence:**

1. The writing *(insert appropriate description)* **was signed by** *(name of alleged testator)* **(or) (someone for** *[name of alleged testator]***) in (his) (her) conscious presence and at (his) (her) direction; and**

(2. Either before or after the testator's death, the writing was signed by at least two persons, each of whom signed it within a reasonable time after [either]:

[a. Seeing *[name of alleged testator]* **sign the writing] [or]**

[b. Seeing *[name of alleged testator]* **acknowledge the signature on the writing as being (his) (hers)] [or]**

[c. Seeing *[name of alleged testator]* **acknowledge the writing as being (his) (her) will].)**

(3. The writing was acknowledged by the testator before [a notary public] [an individual authorized by law to take acknowledgements].)

If you find that either one of these propositions has not been proved by a preponderance of the evidence, then your verdict must be for the contestant, *(name)***.**

On the other hand, if you find that both propositions have been proved, (then your verdict must be for the proponent) (then you must consider the contestant's claim[s] that *[insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof, e.g., "that (name of alleged testator) was not of sound mind at the time he signed the will"]***).**

If you find that (this claim has) (any one or more of these claims have) been proved by a preponderance of the evidence, then your verdict must be for the contestant.

However, if you find that (this claim has not) (none of these claims have) been proved, then your verdict must be for the proponent.

Notes on Use

1. This instruction should be used in cases in which there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the alleged will was properly executed as a signed and witnessed will under section 15-11-502(1), C.R.S.

2. Use either numbered paragraph 2 or numbered paragraph 3, as appropriate, with numbered paragraph 1.

3. If the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed as a signed and witnessed will or a signed and acknowledged will under section 15-11-502(1), or as a holographic will under section 15-11-502(2), the provisions of section 15-11-503, C.R.S. may nonetheless be applicable. Under that statute, even though "a document, or writing added upon a document, was not executed in compliance with section 15-11-502," the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that "the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse," § 15-11-503(2), and (2) that "the proponent of the document or writing [has established] by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will," § 15-11-503(1). *See* **In re Estate of Wiltfong**, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); **In re Estate of Sky Dancer**, 13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

4. For self-proved wills, see Instruction 34:5.

5. If the writing is one that would, at the most, constitute a holographic will, then Instruction 34:6 should be used rather than this instruction.

6. Instruction 34:3, defining "conscious presence," should be given with this instruction whenever that phrase is given in numbered paragraph 1 of this instruction.

7. Use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case. In particular, omit the second parenthesized clause in the third to the last paragraph and the last two paragraphs if the contestant has made no claim of invalidity based on those matters on which the contestant has the burden of proof (e.g., "lack of testamentary intent or capacity [insufficient age or unsound mind], undue influence, fraud, duress, mistake, or revocation," section 15-12-407, C.R.S.) or there is insufficient evidence to support a jury finding as to any such matters.

8. If the death of the testator is in issue, and the proponent of the will in question has the burden of proving death under section 15-12-407, this instruction must be appropriately modified.

9. This instruction must be appropriately modified if, because the testator's original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. Under section 15-12-402(3), C.R.S., the burden is on the proponent to prove that a lost, destroyed, or otherwise unavailable will was not revoked. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, this instruction must be modified to add as an element of the proponent's claim the requirement that

the proponent prove "the will had not been revoked by *[name of alleged testator]*." *See* Instruction 34:8 and the accompanying Notes on Use. Instructions 34:8 and 34:9 should also be given if appropriate to the case.

10. Section 15-12-402(3) refers to satisfying "the court" that an "unavailable" will has not been revoked. However, section 15-10-306(1), C.R.S., appears to permit the issue to be tried to a jury.

11. If a will has not been destroyed and is, therefore, still "available," but is found burned, torn, canceled, or obliterated, then the burden of proving revocation is with the contestant under section 15-12-407. The issue should be set out as the contestant's claim in the third to the last unnumbered paragraph of this instruction, and Instruction 34:8 and 34:9 should also be given. Also, contrary to prior case law, *see, e.g.*, **Hoff v. Armbruster**, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator's death is found burned, torn, or obliterated (but not "destroyed") no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

12. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

13. Omit any of the numbered paragraphs if the facts are not in dispute, and make such other changes as are necessary in such circumstances. *See* **O'Brien v. Wallace**, 145 Colo. 291, 359 P.2d 1029 (1961) (where proof of due execution has been made, only such issues on which there is contrary evidence should be submitted to the jury).

14. This instruction, appropriately modified as may be necessary, may also be used in cases involving a written foreign will which the proponent claims was executed in compliance "with section 15-11-502 or 15-11-503 or . . . with the law at the time of execution of the place where the will [was] executed, or of the law of the place where, at the time of execution or at the time of death, the testator [was] domiciled, [had] a place of abode, or [was] a national." § 15-11-506, C.R.S.

15. For international wills, see the Uniform International Wills Act, §§ 15-11-1001 to -1011, C.R.S. When the valid execution of a will under that statute requires one or more facts to be determined by a jury, this instruction, appropriately modified, may be used. Other relevant instructions in this chapter, with such modifications as may be necessary, may also be used.

16. As to determining the sufficiency of the evidence relating to the requirements of due execution under this instruction, see section 15-12-406(1):

(1) In a contested case in which the proper execution of a will is at issue, the following rules apply:

(a) If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the

will and the acknowledgement and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgement or affidavit.

(b) If the will is notarized pursuant to section 15-11-502(1)(c)(II), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.

(c) If the will is witnessed pursuant to section 15-11-502(1)(c)(I), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

For submitting rebuttable presumptions to the jury, see Instruction 3:5.

17. When the case involves a "separate writing or memorandum identifying [a] devise of certain types of tangible personal property" permitted under section 15-11-513, C.R.S., this instruction should be appropriately modified, if necessary, to make it clear to the jury that the requirements of this instruction apply only to the will itself and not to the "separate writing."

18. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications must also be made in this instruction.

19. When necessary and appropriate to the evidence in the case, Instruction 34:4 (witness having an interest under the will) should be given with this instruction as a cautionary instruction.

20. "Intent that [a] document constitute[s] the testator's will can be established by extrinsic evidence. . . ." § 15-11-502(3).

21. Where a holographic will was executed in accordance with the requirements of section 15-11-502(2), and the signature of the decedent was affixed to the will itself, an additional signature beside cross-outs intended to work a partial revocation was not necessary pursuant to sections 15-11-503 or 15-11-507, C.R.S. **In re Estate of Schumacher**, 253 P.3d 1280 (Colo. App. 2011).

Source and Authority

This instruction is supported by section 15-11-502(1).

34:3 CONSCIOUS PRESENCE — DEFINED

"Conscious" means that the testator, *(name)***, was aware through one or more of (his) (her) senses of the presence of the person signing the will at (his) (her) direction. "Presence" requires that that person was physically near the testator, though not necessarily in (his) (her) line of sight.**

Notes on Use

This instruction should be given in conjunction with Instruction 34:2 whenever the phrase "conscious presence" is used in numbered paragraph 1 of that Instruction.

Source and Authority

The first sentence of this instruction is supported by the common definition of conscious. The second sentence is supported by section 15-11-502(4), C.R.S.

34:4 WITNESS HAVING AN INTEREST UNDER THE WILL

A will or any provision in it may be valid even if a person who signed the will as a witness is also a beneficiary under the will.

Notes on Use

When, in light of the evidence and arguments being made in the case, it would be appropriate to give this instruction as a cautionary instruction, it may be given with Instruction 34:2, 34:5, or 34:6.

Source and Authority

This instruction is supported by section 15-11-505(1), C.R.S., which provides that anyone who is "generally competent to be a witness may act as a witness to a will." Under subsection (2) of that statute, the "signing of a will by an interested witness does not invalidate the will or any provision of it."

34:5 ELEMENTS OF PROOF OF PROPERLY EXECUTED WILL — SELF-PROVED WILL

Exhibit *(insert appropriate identification)* **is what is known as a "self-proved" will. It has been offered by the proponent,** *(name)***, as the will of** *(name of alleged testator)***.**

If you find that the contestant has proven (the claim of) (any one or more of the claims of) *(insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof and of which there is sufficient evidence, e.g., "the will was not properly executed because [name of alleged testator] did not sign it himself, nor was it signed by another at his direction," "[name of alleged testator] was not of sound mind at the time he signed the will," etc.)***, by a preponderance of the evidence, your verdict must be for the contestant,** *(name)***.**

On the other hand, if you find that the contestant has not proven (the claim of) (any one or more of the claims of) *(insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof and of which there is sufficient evidence, e.g., "the will was not properly executed because [name of alleged testator] did not sign it himself, nor was it signed by another at his direction," "[name of alleged testator] was not of sound mind at the time he signed the will," etc.)***, your verdict must be for the proponent.**

Notes on Use

1. If the court determines as a preliminary evidentiary matter that the offered will does not meet the requirements of a self-proved will under section 15-11-504, C.R.S., the will may nonetheless be entitled to probate as a regularly executed or foreign will, in which case Instruction 34:2 should be used rather than this instruction. Similarly, should it appear "the material provisions" or that "material portions" of the offered will were handwritten by the testator, the will may be entitled to probate as a holographic will. § 15-11-502(2), C.R.S.; *see* Instruction 34:6.

2. As with other wills, a self-proved will may be invalid because of "lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation," but the burden of proving such matters is on the contestant. § 15-12-407, C.R.S.

3. Under section 15-11-504(3), relating to the making of a self-proved will, "[a] signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution."

4. In all cases involving a self-proved will, section 15-12-406(1)(a), C.R.S., provides:

> If the will is self-proved pursuant to section 15-11-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgement and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgement or affidavit.

5. The conclusive presumption of due execution of a self-proved will created by the acknowledgment of the testator and affidavits of witnesses to "an attested will" does not apply if there "is evidence of fraud or forgery affecting the acknowledgment or affidavit." Section 15-12-406(1)(a). Although section 15-12-406(1)(a) is not explicit, it is assumed the burden of proving such fraud or forgery is on the contestant. C.R.C.P. 8(c). If there is sufficient evidence of such fraud or forgery, this instruction must be appropriately modified.

6. Also, while the acknowledgment of the testator or the affidavits of the witnesses may be invalid because of fraud or forgery, the "attested will" may itself have been validly executed, for example, at an earlier time. Likewise, it is possible that, at an earlier time, the will had been validly executed as a holographic will. If there is sufficient evidence supporting such conflicting claims, the basic provisions of this instruction should be combined in an appropriate manner with the basic provisions of either Instruction 34:2 or Instruction 34:6.

7. For cases that do not involve evidence of fraud or forgery, the statutory presumption is conclusive. Consequently, neither CRE 301 nor Instruction 3:5 applies to this instruction. When there is sufficient rebutting evidence of a ground that would invalidate the execution of the will, that ground should be appropriately described in the second paragraph of the instruction.

8. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

9. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications should be made in this instruction.

10. Such other instructions in this chapter which are appropriate to the particular case should be given with this instruction.

11. This instruction may not be used for a lost will, even though the lost will would otherwise have qualified as a self-proved will. The presumption of valid execution requires filing of the will and the acknowledgment and affidavits annexed or affixed to it.

Source and Authority

This instruction is supported by sections 15-11-504, 15-12-406(1)(a), and 15-12-407.

34:6 ELEMENTS OF PROOF OF PROPERLY EXECUTED WILL — HOLOGRAPHIC WILL

For the proponent, *(name)***, to have the writing that has been admitted into evidence and identified as** *(insert appropriate description)* **admitted to probate as the holographic will of the testator,** *(insert name of alleged testator)***, you must find the following have been proved by a preponderance of the evidence:**

1. The writing *(insert appropriate description)***, whether witnessed or not, was signed by the testator,** *(name)***, in (his) (her) own handwriting; and**

2. Material portions of the writing were handwritten by the testator.

If you find that either proposition 1 or 2 has not been proved by a preponderance of the evidence, then your verdict must be for the contestant, *(name)***.**

On the other hand, if you find that both propositions 1 and 2 have been proved, (then your verdict must be for the proponent) (then you must consider the contestant's claim[s] that *[insert an appropriate description of any of the contestant's claims on which the contestant has the burden of proof, e.g., "that (name of alleged testator) was not of sound mind at the time he signed the will"]***).**

If you find that (this claim has) (any one or more of these claims have) been proved by a preponderance of the evidence, then your verdict must be for the contestant.

However, if you find that (this claim has not) (none of these claims have) been proved, then your verdict must be for the proponent.

Notes on Use

1. This instruction should be used in cases in which there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the alleged will was properly executed as a holographic will under section 15-11-502(2), C.R.S.

2. The provisions of section 15-11-503, C.R.S., may apply if the evidence is not sufficient for a reasonable jury to find by a preponderance of the evidence that the will was properly executed either as a signed and witnessed will under section 15-11-502(1)(c)(I), or as a holographic will under section 15-11-502(2). Under section 15-11-503, even though "a document, or writing added upon a document, was not executed in compliance with section 15-11-502," the document or writing may still be treated as if it had been so executed if the court (not a jury) determines (1) that "the document [was] signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse," § 15-11-503(2), and (2) that "the proponent of the document or writing [has established] by clear and convincing evidence that the decedent intended the document or writing to constitute: (a) The decedent's will; (b) A partial or completed revocation of the will; (c) An addition to or an alteration of the will; or (d) A partial or complete revival of the decedent's formerly revoked will or a formerly

revoked portion of the will," § 15-11-503(1). *See also* **In re Estate of Wiltfong**, 148 P.3d 465 (Colo. App. 2006) (a document acknowledged but not signed may be recognized as a will under this statute); **In re Estate of Sky Dancer**, 13 P.3d 1231 (Colo. App. 2000) (inadequate basis to find a will under this statute).

3. Use whichever parenthesized words are appropriate to the evidence in the case. In particular, omit the second parenthesized clause in the third to the last paragraph and the last two paragraphs if the contestant has made no claim of invalidity based on those matters on which the contestant has the burden of proof (for example, "lack of testamentary intent or capacity [insufficient age or unsound mind], undue influence, fraud, duress, mistake, or revocation," § 15-12-407, C.R.S.), or there is insufficient evidence to support a jury finding as to any such matters.

4. If the death of the testator is in issue, and the proponent of the will in question has the burden of proving death under section 15-12-407, this instruction must be appropriately modified.

5. This instruction must be appropriately modified if, because the testator's original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. For additional modifications that may also need to be made in this instruction when the will has been lost, destroyed, or is otherwise unavailable, see the discussion following in these Notes on Use.

6. This instruction should not be used when it is claimed only a part, as opposed to the entire will, is invalid because of fraud, etc.

7. Omit either numbered paragraph 1 or 2 if the facts are not in dispute, and make such other changes as are necessary in such circumstances. *See* **O'Brien v. Wallace**, 145 Colo. 291, 359 P.2d 1029 (1961) (where proof of due execution has been made, only such issues on which there is contrary evidence should be submitted to the jury).

8. This instruction may be used, when appropriately modified, in cases involving a written foreign holographic will which the proponent claims was executed in compliance "with section 15-11-502 or 15-11-503 or . . . the law at the time of execution of the place where the will [was] executed, or of the law of the place where, at the time of execution or at the time of death, the testator [was] domiciled, [had] a place of abode, or [was] a national." § 15-11-506, C.R.S.

9. When the case involves a separate writing identifying a devise of certain types of tangible personal property permitted under section 15-11-513, C.R.S., this instruction should be appropriately modified, if necessary, to make it clear to the jury that the requirements of this instruction apply only to the will itself and not to the "separate writing."

10. If the contest relates only to a codicil or to a will with one or more codicils, appropriate modifications must also be made in this instruction.

11. When necessary and appropriate to the evidence in the case, Instruction 34:4 (witness having an interest under the will) should be given with this instruction as a cautionary instruction.

12. This instruction must be appropriately modified if, because the testator's original will, if any, has been lost, destroyed, or is otherwise unavailable, no writing has been admitted, or the writing referred to in this instruction is a copy. Under section 15-12-402(3), C.R.S., the burden of proving that a lost, destroyed, or otherwise unavailable will was not revoked is on the proponent. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, this instruction must be modified to add as an element of the proponent's claim the requirement that the proponent prove "the will had not been revoked by [name of alleged testator]." See Instruction 34:8 and the accompanying Notes on Use. Instructions 34:8 and 34:9 should also be given if appropriate to the case.

13. Section 15-12-402(3), refers to satisfying "the court" that an "unavailable" will has not been revoked. However, section 15-10-306(1), C.R.S., appears to permit the issue to be tried to a jury.

14. If a will has not been destroyed and is, therefore, still "available," but is found burned, torn, canceled, or obliterated, then the burden of proving revocation is with the contestant under section 15-12-407. The issue should be set out as the contestant's claim in the third to the last unnumbered paragraph of this instruction, and Instruction 34:8 and 34:9 should also be given. Also, contrary to prior case law, *see, e.g.*, **Hoff v. Armbruster**, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator's death is found burned, torn, or obliterated (but not "destroyed") no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

15. There need be no witnesses to holographic wills. § 15-11-502(2).

16. A holographic will may be valid even though immaterial parts such as date or introductory wording are printed or stamped. The fact that immaterial portions of a holographic will (for example, date of execution) may be illegible or difficult to read does not justify denying the admission of an otherwise admissible holographic will to probate. Moreover, as to material portions which may be difficult to read, "it is the court's duty to ascertain and give effect to the testator's intent." **Nunez v. Jersin**, 635 P.2d 231, 233 (Colo. App. 1981).

17. For a writing to constitute a holographic will, the "instrument must have been executed . . . with testamentary intent, [that is, t]he writing, together with such extrinsic evidence as may be admissible, must establish that the decedent intended the writing itself to make a testamentary disposition of decedent's property." **In re Estate of Olschansky**, 735 P.2d 927, 929 (Colo. App. 1987).

18. "[T]he intent of the testator and not the location of his [signed] name is the crucial factor in determining whether a holographic will has been signed within the meaning of" the statute. **In re Estate of Fegley**, 42 Colo. App. 47, 48, 589 P.2d 80, 81 (1978).

19. The "[i]ntent that [a] document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting." § 15-11-502(3).

20. Under a previous version of the Probate Code, "the material provisions" of the offered will must have been in the handwriting of the testator. *See* Ch. 451, sec. 1, § 153-2-503, 1973 Colo. Sess. Laws 1555-56. Under the present version, § 15-11-502(2), the word "provisions" was changed to "portions" and the "the" before "provisions" was deleted. *See* Ch. 178, sec. 3, § 15-11-502(2), 1994 Colo. Sess. Laws 997. The relevant language now, therefore, is "and material portions of the document are in the testator's handwriting." § 15-11-502(2). The omission of the "the" before "portions" suggests that a holographic will is sufficient as long as some material portions are in the handwriting of the testator. The use of the word "the" before "provisions" in the original language suggested that all material "provisions" had to be in the testator's handwriting. Also, the change in language from "provisions" to "portions" suggests that some change in meaning, however slight, was intended. However, none of the comments prepared by the Joint Editorial Board of the ABA and the National Conference of Commissioners on Uniform State Laws for the Uniform Probate Code indicate what changes in legal effect, if any, these changes in language were intended to make. *See* UNIF. PROBATE CODE § 2-502(b) cmt. (amended 2010).

Source and Authority

1. The two numbered paragraphs of this instruction are supported by section 15-11-502(2).

2. This instruction is also based on section 15-12-407, which provides that "[p]roponents of a will have the burden of establishing prima facie proof of due execution in all cases. . . ." Under section 13-25-127(1), C.R.S., the weight of the proponent's burden of proof as to the issues covered by numbered paragraphs 1 and 2 is by a preponderance of the evidence.

34:7 TESTAMENTARY INTENT — DEFINED

Testamentary intent means the intent to direct how some or all of one's property is to be disposed of after one's death. A person need not express that intent by stating that a writing is his or her will. The intent may be shown by other words or acts.

Notes on Use

1. Because the burden of proving lack of testamentary intent is on the contestant, section 15-12-407, C.R.S., this instruction should only be used in conjunction with Instruction 34:2, 34:5, or 34:6, when the contestant has raised lack of testamentary intent as an affirmative defense. *See* **In re Estate of Grobman**, 635 P.2d 231 (Colo. App. 1981) (burden of proving lack of testamentary intent on the contestant of holographic will).

2. Modification in the language of this instruction may be required or advisable in cases involving (1) powers of appointment and other similar interests (2) codicils (3) related testamentary documents or instruments, for example, a separate writing identifying a bequest of tangible property permitted under section 15-11-513, C.R.S. *See, e.g.*, **In re Estate of Harrington**, 850 P.2d 158 (Colo. App. 1993) (although decedent had necessary testamentary intent, she intended that her "writings" operate as tangible personal property memoranda under section 15-11-513, rather than as a codicil to her will).

Source and Authority

1. This instruction is supported by sections 15-12-407, and 15-11-502(3), C.R.S.

2. It is also based on the following cases, which, though they were decided prior to the statutory change shifting the burden of proving the lack of testamentary intent to the contestant, would appear to be applicable: **In re Estate of Maikka**, 110 Colo. 433, 134 P.2d 723 (1942) (testator's clear indication that instrument is the testator's last will and testament is sufficient, and testator may authorize or ratify another's request that witnesses act as such); and **Aquilini v. Chamblin**, 94 Colo. 367, 30 P.2d 325 (1934) (A testator need not use exact words of statute in publishing a will; words, signs, motions, or conduct clearly indicating the instrument is his last will and testament are sufficient).

3. "The term testamentary intent can only mean that the testator's frame of mind or intent is that the instrument or disposition of property which he makes shall pass no interest in the property until his death and that the act or instrument shall take effect only upon his death." 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 5.6, at 178 (rev. ed. 2003).

34:8 REVOCATION BY BURNING, TEARING, CANCELLING, OBLITERATING, OR DESTROYING — DEFINED

A person who has made a will may revoke (that will) (or) (any part of that will) by performing an act of revocation on the will with the intent to revoke (it) (or) (part of it). A person may also revoke a will by directing another person to perform an act of revocation if that other person performs the act of revocation in the conscious presence of the one who made the will.

An act of revocation on (a will) (or) (any part of a will) includes burning, tearing, canceling, obliterating, or destroying the (will) (or) (part of the will). For a burning, tearing, or canceling to be an act of revocation on the will, it is not necessary that the burn, tear, or cancellation have touched any of the words on the will.

("Conscious" means that the one who made the will was aware through one or more of [his] [her] senses that the act of revocation was being performed by the other person. "Presence" requires that the other person was physically near the one who made the will, though not necessarily within [his] [her] line of sight.)

Notes on Use

1. This instruction should be given when appropriate to the evidence in the case.

2. Omit any portions of this instruction, whether parenthesized or not, which are not relevant to, or supported by, the evidence in the case.

3. When appropriate to the evidence, Instruction 34:9 (presumption of revocation) should also be given with this instruction.

4. There are two ways to revoke a will or any part thereof: (1) executing a subsequent will that revokes the previous will or part expressly or by inconsistency, or (2) by performing a revocatory act on the will. § 15-11-507(1), C.R.S.; **In re Estate of Schumacher**, 253 P.3d 1280, 1282 (Colo. App. 2011) ("A will can be revoked only in the manner provided by statute, and the statutory provisions for revocation of wills must be strictly construed."). Under section 15-11-507(1)(b), a "revocatory act on the will" includes "burning, tearing, canceling, obliterating, or destroying the will or any part of it." Prior to the 1979 amendment to section 15-12-402(3), C.R.S., the burden of proving revocation was on the contestant in all cases. *See* Ch. 152, sec. 8, § 15-12-402, 1979 Colo. Sess. Laws 649. However, under the 1979 amendment to section 15-12-402(3), the burden of proving that a lost, destroyed, or otherwise unavailable will was not revoked is on the proponent. Consequently, where the will has been lost, destroyed, or for any other reason is unavailable, Instruction 34:2 (for all but self-proved and holographic wills) or 34:6 (for holographic wills) must be modified to add as an element of the proponent's claim the requirement that the proponent prove "the will had not been revoked by *[name of alleged testator]*." The effect of this modification will be to place the burden of proving no revocation on the proponent, as required by the 1979 amendment.

5. On the other hand, if the will has not been destroyed and is, therefore, still "available," but is found burned, torn, canceled or obliterated, then the burden of proving revocation remains on the contestant, and that question of fact should be set out as a contestant's claim in the third to the last unnumbered paragraph of Instruction 34:2 or 34:6, whichever is appropriate. Also, contrary to prior case law, *see, e.g.*, **Hoff v. Armbruster**, 122 Colo. 563, 226 P.2d 312 (1950), the fact that the will at the time of the testator's death is found burned, torn or obliterated (but not "destroyed") no longer creates a presumption of an intent to revoke that shifts the burden of proving the contrary to the proponent. That fact, however, still creates a presumption that shifts the burden of going forward with the evidence. *See* Instruction 34:9.

6. If other rules relating to revocation would be relevant in light of the evidence in the case and would require the resolution of one or more disputed facts by the jury, an appropriate instruction must be given. *See, e.g.*, § 15-11-507(1)(a) (revocation by execution of subsequent will); § 15-11-508, C.R.S. (revocation by change of circumstances); § 15-11-509, C.R.S. (revival of revoked will).

7. "Although a will does not become operable until the testator's death . . . the effectiveness of [acts causing a] revocation is dependent on the law in force," governing such acts at the time of the acts. **In re Estate of Ralston**, 674 P.2d 1001, 1003 (Colo. App. 1983).

8. Direct evidence that the decedent himself made the cross-outs in a will is not always required. **In re Estate of Schumacher**, 253 P.3d at 1283-84 (lawyer's testimony that decedent showed him a will with the cross-outs and explained the reason for the cross-outs adequate to support conclusion decedent himself made the cross-outs).

9. Doctrines such as the presumptive revocation of a will when a trust is revoked, equity, and mistake do not supersede statutory authority regarding will revocation. **In re Estate of Sandstead**, 2016 COA 49, ¶ 71, 412 P.3d 799, *rev'd on other grounds sub nom.* **Sandstead-Corona v. Sandstead**, 2018 CO 26, 415 P.3d 310; s*ee* **In re Estate of Schumacher**, 253 P.3d at 1282; **In re Estate of Haurin**, 43 Colo. App. 296, 605 P.2d 65 (1979).

Source and Authority

1. The first and second paragraphs of this instruction are supported by the provisions of section 15-11-507(1)(b).

2. For the third paragraph, see the Source and Authority to Instruction 34:3 (defining conscious presence).

34:9 PRESUMPTION OF REVOCATION OF LOST WILL OR OF WILL OR PART(S) OF WILL FOUND BURNED, TORN, CANCELLED, OBLITERATED, OR DESTROYED

"Presumptions" are rules based upon experience or public policy and established in the law to help the jury decide the case.

If you find by a preponderance of the evidence that the will of *(name of alleged testator)* **was last in (his) (her) possession, and after (his) (her) death (the will could not be found) ([the will] [or] [any one or more parts of the will] was found burned, torn, canceled, obliterated, or destroyed), then the law presumes (, and you must find,) that** *(name of alleged testator)* **revoked (the will) (one or more parts of the will).**

(You must consider this presumption together with all the other evidence in the case to determine whether *[name of alleged testator]* **revoked [the will] [or] [one or more parts of the will]).**

(If you find this presumption applies, you must determine, from all the evidence, whether *[name of alleged testator]* **intended to revoke the entire will or only one or more parts of the will.)**

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case. Also, omit the parenthesized last paragraph if, based on the evidence in the case, a reasonable jury could only find that the will had been lost, or could only find (a) that the entire will had been revoked by burning, etc. or (b) that a part or parts of it had been so revoked.

2. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could reasonably find the basic facts of the presumption, for example, possession by the testator, etc., to be proved.

3. See the Notes on Use to Instruction 3:5 (permissible inference arising from rebuttable presumption). As explained there, if there is evidence to support the basic facts of the presumption, but there is no or insufficient evidence rebutting the presumed fact, then the parenthesized clause, "and you must find," in the second paragraph must be given and the parenthesized third paragraph must be omitted. On the other hand, if there is sufficient rebutting evidence (and assuming the presumption covered by this instruction is one that stays in the case as "some evidence," even when rebutted, see the Notes on Use to Instruction 3:5), the parenthesized clause, "and you must find," should be omitted, and the parenthesized third paragraph must be given.

4. Under both CRE 301, and section 15-12-407, C.R.S., the presumption set out in this instruction does not shift the burden of disproving the presumed fact to the opponent of the presumption. For a discussion of CRE 301, see Notes 1-7 of the Notes on Use to Instruction 3:5.

Under section 15-12-407, a party has "the ultimate burden of persuasion as to matters with respect to which [that party has] the initial burden of proof."

5. A decedent does not need to have had exclusive possession of the torn or canceled will for this presumption to apply. **In re Estate of Schumacher**, 253 P.3d 1280 (Colo. App. 2011) (will was in decedent's possession when it was found in a box of personal records decedent sent to his secretary to store in her garage six months before his death).

6. "[A] testator's cancellation of a duplicate original or fully executed carbon copy of a will which is in the testator's possession at his death raises a presumption that the testator intended to cancel the other duplicate original or the original will in the possession of another. . . . [Such] presumption, as other evidentiary presumptions, may be rebutted by evidence." **In re Estate of Tong**, 619 P.2d 91, 92 (Colo. App. 1980). When the evidence is sufficient to support the application of this rule, this instruction must be appropriately modified.

Source and Authority

This instruction is supported by section 15-11-507(1)(b), C.R.S.; **Hoff v. Armbruster**, 122 Colo. 563, 568, 226 P.2d 312, 314 (1950) ("'Where a will which cannot be found following the death of the testator is shown to have been in his possession when last seen, the presumption is, in the absence of other evidence, that he destroyed it *animo revocandi*.'" (quoting 57 Am. Jur. *Wills* § 549)); and 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 29.139 (presumption where will is missing) and § 29.140 (presumption where will is torn, canceled) (rev. ed. 2004). *See also* **In re Estate of Perry**, 33 P.3d 1235 (Colo. App. 2001).

34:10 BURDEN OF PROOF ON ISSUES OF SOUND MIND AND MEMORY (TESTAMENTARY CAPACITY) AND UNDUE INFLUENCE

No separate instruction to be given.

Note

Instructions 34:11 and 34:14, when applicable, and the last paragraphs of Instructions 34:2, 34:5, and 34:6, when applicable, adequately inform the jury of the burden of proof with regard to the affirmative defenses of lack of testamentary capacity or the existence of undue influence.

34:11 TESTAMENTARY CAPACITY AND SOUND MIND — DEFINED

A will that was signed when the person making the will did not have testamentary capacity is not valid and may not be admitted to probate. (*Name of alleged testator)* **did not have testamentary capacity if (he) (she) (was not eighteen years of age or older) (or) (was not of sound mind) when the will was signed.**

(A person is not of sound mind if, when signing a will, [(he) (she) was suffering from an insane delusion that affected or influenced (his) (her) decisions regarding property included in the will] [or] [the person does not understand all of the following:

1. That (he) (she) is making a will;

2. The nature and extent of the property (he) (she) owns;

3. How that property will be distributed under the will;

4. That the will distributes the property as (he) (she) wishes; and

5. Those persons who would normally receive (his) (her) property.])

Notes on Use

1. When the issue of lack of testamentary capacity has been properly put in issue, this instruction should be given in conjunction with Instruction 34:2, 34:5, or 34:6.

2. Use whichever parenthesized and bracketed portions of the instruction are appropriate in light of the evidence in the case.

3. For the definition of "insane delusion," see Instruction 34:12. *See also* **In re Estate of Gallavan**, 89 P.3d 521 (Colo. App. 2004).

4. An objector to a will may challenge a testator's capacity based on either or both tests for "sound mind" set out in this instruction and in Instruction 34:12. **In re Estate of Breeden**, 992 P.2d 1167 (Colo. 2000) (discussing both tests).

5. For a discussion as to the specific knowledge a testator must have to be deemed to know the "nature and extent" of his or her property, see **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005).

Source and Authority

1. This instruction is supported by section 15-11-501, C.R.S. (to have testamentary capacity the testator must have been of sound mind and eighteen years of age or more).

2. The definition of "sound mind" is based on **Cunningham v. Stender**, 127 Colo. 293, 255 P.2d 977 (1953), and reaffirmed in **In re Estate of Breeden**, 992 P.2d at 1170; **In re Estate**

of Romero, 126 P.3d at 230-31; and **In re Estate of Scott**, 119 P.3d 511 (Colo. App. 2004), *aff'd on other grounds sub nom.* **Scott v. Scott**, 136 P.3d 892 (Colo. 2006). *See also* **In re Estate of Gallavan**, 89 P.3d 521 (Colo. App. 2004).

3. The burden of proving lack of testamentary capacity is on the contestant. § 15-12-407, C.R.S.

34:12 INSANE DELUSION — DEFINED

An insane delusion is a persistent belief, resulting from illness or disorder, in the existence or non-existence of something that is contrary to all evidence.

Notes on Use

1. When appropriate to the evidence, this instruction should be used in conjunction with Instruction 34:11.

2. A will is not invalid even though the testator suffered from insane delusions at the time of executing the will if these insane delusions did not materially affect or influence the disposition of property set forth in the will. **In re Estate of Breeden**, 992 P.2d 1167 (Colo. 2000).

Source and Authority

This instruction is supported by **In re Estate of Breeden**, 992 P.2d 1170-71; and **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005). *See also* **In re Estate of McCrone**, 106 Colo. 69, 101 P.2d 25 (1940) (an adjudication of mental incompetency is evidence of lack of a sound mind and memory but is not conclusive evidence of incapacity); **In re Estate of Cole**, 75 Colo. 264, 226 P. 143 (1924).

34:13 EFFECT OF ATTESTATION OF WILL BY WITNESSES

No separate instruction to be given.

Note

In most if not all instances, an instruction on this subject would be an improper comment on the evidence.

34:14 UNDUE INFLUENCE — DEFINED

Undue influence means words or conduct, or both, which, at the time of the making of a will:

1. Deprived the person making the will of (his) (her) free choice; and

2. Caused the person making the will to make it or part of it differently than (he) (she) otherwise would have.

Notes on Use

1. Use whichever parenthesized words are most appropriate.

2. This instruction should be given in conjunction with Instruction 34:2, 34:5, or 34:6, whenever it is claimed (and there is sufficient supporting evidence) that the entire will or codicil is invalid because it was executed in its entirety while the testator was under undue influence. This instruction may also be used when only a part of the will is claimed to be invalid because of undue influence.

3. When this instruction is given, Instruction 34:15 (factors to be considered in determining undue influence) must also be given, and either Instruction 34:16 (presumption of undue influence when beneficiary in a confidential or fiduciary relationship) or Instruction 34:17 (inference of undue influence, when presumption of undue influence is rebutted) may be appropriate.

4. The burden of proof on the issue of undue influence is on the contestant. § 15-12-407, C.R.S.

Source and Authority

This instruction is supported by T. ATKINSON, WILLS § 55 (2d ed. 1953). *See also* **Scott v. Leonard**, 117 Colo. 54, 184 P.2d 138 (1947) (no undue influence found); **Snodgrass v. Smith**, 42 Colo. 60, 94 P. 312 (1908) (possible to have partially valid will); **In re Estate of Shell**, 28 Colo. 167, 63 P. 413 (1900) (no undue influence found).

34:15 FACTORS TO BE CONSIDERED IN DETERMINING UNDUE INFLUENCE

Undue influence cannot be inferred solely because one or more persons may have had a motive or an opportunity to influence *(name of alleged testator)* **in the making of (his) (her) will.**

Influence gained by reason of love, affection or kindness, or by appeals to such feelings, is not undue influence.

You may consider the provisions in the will in determining whether or not *(name of alleged testator)* **was acting under undue influence at the time (he) (she) made the (claimed) will. However, in considering any particular provisions in the (claimed) will, you must consider them along with all the other provisions in the will and along with all other evidence relating to the making of the will.**

A person (18 years or older and) (of sound mind and) not acting under undue influence may will his or her property to whomever he or she desires. The fact that a will may contain provisions that differ from your idea of what would be proper is not enough to invalidate the will for undue influence.

Notes on Use

1. This cautionary instruction should be given with Instruction 34:14 when undue influence is in issue. Either Instruction 34:16 (presumption of undue influence when beneficiary in a confidential or fiduciary relationship) or Instruction 34:17 (inference of undue influence, when presumption of undue influence is rebutted) may also be appropriate.

2. The second paragraph should be omitted if there is no evidence in the case relating to the matters covered by it.

3. Omit the parenthesized word "claimed" if the only dispute going to the validity of the will is undue influence.

4. Because the burden of proving lack of testamentary capacity is on the contestant, § 15-12-407, C.R.S., the parenthetical references to testamentary capacity (age and sound mind) in the last paragraph should not be given unless either or both these matters have, in addition to undue influence, been properly put in issue by the contestant. Their inclusion otherwise in this instruction might improperly confuse the jury by suggesting the proponent has the burden of proving those elements of testamentary capacity.

Source and Authority

This instruction is supported by **Scott v. Leonard**, 117 Colo. 54, 184 P.2d 138 (1947) (states the rule set out in the first paragraph); **In re Estate of Rentfro**, 102 Colo. 400, 79 P.2d 1042 (1938) (mere kindness of treatment, or reasonable solicitation, entreaty or persuasion not sufficient to invalidate a will); **Lamborn v. Kirkpatrick**, 97 Colo. 421, 50 P.2d 542 (1935) (if proponent and testator were living in unlawful cohabitation, proponent must show such

relationship was not used to influence the will); **Aquilini v. Chamblin**, 94 Colo. 367, 30 P.2d 325 (1934) (supports the second and fourth paragraphs); **Piggott v. Schachet**, 76 Colo. 434, 232 P. 1112 (1925) (states the rule set out in the first paragraph); **Davis v. Davis**, 64 Colo. 62, 170 P. 208 (1917) (supports the fourth paragraph); **Lehman v. Lindenmeyer**, 48 Colo. 305, 109 P. 956 (1909) (same); **Snodgrass v. Smith**, 42 Colo. 60, 94 P. 312 (1908) (the burden of showing undue influence is on the one who asserts it, and an opportunity to exert undue influence in itself creates no presumption of undue influence); **In re Estate of Shell**, 28 Colo. 167, 63 P. 413 (1900) (states the rules set out in the first and fourth paragraphs); and **Blackman v. Edsall**, 17 Colo. App. 429, 68 P. 790 (1902) (supports the second paragraph and lists other matters for jury to consider).

34:16 UNDUE INFLUENCE — PRESUMPTION WHEN BENEFICIARY IN A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

[Deleted.]

Note

1. This former instruction is incorrect under **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009), and should not be given. In **Krueger**, the Supreme Court held that the rebuttable presumption of undue influence due to a confidential or fiduciary relationship "shifts only the burden of going forward with evidence, and does not shift the entire burden of proof." *Id.* at 1154. The former instruction's notes on use stated that the instruction was to be "given only if there is no or insufficient evidence rebutting the presumed fact of undue influence." **Krueger** states, however, that "[a]fter a rebuttable presumption is raised and the burden of going forward is shifted, if the opponent does not meet her burden, the presumption establishes the presumed facts as a matter of law." *Id*. at 1156.

2. In that event, the proper procedure would be either to direct a verdict in whole or in part or to instruct the jury that the fact of undue influence has been established as a matter of law. *See* Instruction 2:5 (directed verdict). No jury issue as to the presumed fact would remain. *See also* Notes on Use to Instruction 3:5 (permissible inference arising from rebuttable presumption).

3. **Krueger** is consistent with CRE 301 (discussed in the Notes on Use to Instruction 3:5) and the provisions of the Probate Code, which now clearly establish that the presumption shifts to the proponent only the burden of coming forward with rebutting evidence. The presumption does not shift to the proponent the "ultimate" burden of disproving undue influence. § 15-12-407, C.R.S. "Contestants . . . have the burden of establishing . . . undue influence. . . . Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." *Id.*; *see also* §§ 15-17-101(1), (2)(b), C.R.S. (applicability of Probate Code to events occurring prior to its adoption); **In re Estate of Schlagel**, 89 P.3d 419 (Colo. App. 2003) (any presumption of undue influence arising out of confidential relationship did not shift burden of proof to proponent of will, but only burden of coming forward with evidence rebutting claim of undue influence, and ultimate burden of proof remained with contestants of will).

4. The opponent of the presumption may meet the burden of rebutting the presumption by producing evidence of the circumstances of the relationship and the transaction, such as evidence of love and trust between the parties, evidence the transaction was not unreasonable, and evidence of opportunity for independent action by the testator. *See* **In re Estate of Schlagel**, 89 P.3d at 422 (evidence of trust between parties to transaction and that beneficiary never made demands for property); **Arnold v. Abernathy**, 134 Colo. 573, 307 P.2d 1106 (1957) (evidence transaction was fair and reasonable), *overruled by* **Krueger**, 205 P.3d at 1155; **In re Estate of Romero**, 126 P.3d 228 (Colo. App. 2005) (testator living independent of beneficiary and with access to others at time will executed).

5. "[W]hether the opponent's evidence meets the burden is a question of legal sufficiency for the trial court, not a question of fact for the jury." **Krueger**, 205 P.3d at 1154. If the opponent

of the presumption meets the burden, "the presumption does not continue in the case." *Id*. at 1156. Nonetheless, a permissible inference of the presumed fact of undue influence remains. *Id*. "Whether the trial court instructs a jury on the permissible inference is within its discretion." *Id*. at 1158. If the trial court decides to instruct on the permissible inference, use instruction 34:17. Note, however, that the Supreme Court "disfavor[s] instructions emphasizing specific evidence." *Id*. at 1157. **Krueger** sets forth a detailed framework for a trial court to use in deciding whether to instruct on the permissible inference. *Id*. at 1157-58.

34:17 UNDUE INFLUENCE — PERMISSIBLE INFERENCE WHEN PRESUMPTION OF UNDUE INFLUENCE IS REBUTTED

You may, but are not required to, draw an inference that the will was signed under undue influence if you find by a preponderance of the evidence that *(name of beneficiary claimed to have been in a confidential or fiduciary relationship)*

1. Was a beneficiary under the will, and

2. Was in a (confidential) (and) (or) (fiduciary) relationship with *(name of testator)* **at the time of the preparation or execution of the will, and**

3. Was in some way actively involved with the preparation or signing of the will.

If you draw this inference, you may consider it together with all other evidence in the case in determining whether or not *[name of testator]* **signed the will under undue influence.**

You should not draw an inference, however, that a person exercised undue influence over another person solely because they were in a (confidential) (and) (or) (fiduciary) relationship.

Notes on Use

1. This instruction may be used only when the trial court rules that the opponent of the presumption of undue influence has produced legally sufficient evidence to rebut the presumption. *See* **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009); Notes on Use to Instruction 34:16. In that event, the presumption does not continue in the case. **Krueger**, 205 P.3d at 1156. If the jury finds all of the facts in paragraphs 1 through 3 of the instruction, however, the jury still may draw an inference of undue influence. *Id*. The trial court has discretion whether to instruct on this permissible inference. *Id*. at 1156-57.

2. For a definition of "inference," see Instruction 3:8.

3. Though instructions emphasizing specific evidence are disfavored, policy considerations may permit the trial court in its discretion to instruct the jury on an inference of undue influence and unfairness in transactions between persons in fiduciary or confidential relationships. **Krueger**, 205 P.3d at 1157; *see* Notes on Use to Instructions 3:8 and 34:16. When the case involves an elderly person making a significant conveyance to a caretaker, there are strong reasons for using this instruction. **Krueger**, 205 P.3d at 1157-58. Nonetheless, the Supreme Court in **Krueger** upheld the trial court's decision not to instruct. *Id*. at 1158.

Source and Authority

This instruction is supported by **Krueger**, 205 P.3d at 1156. *See also* Notes on Use to Instructions 3:8 and 34:16.

34:18 CONFIDENTIAL RELATIONSHIP — DEFINED

A confidential relationship exists whenever one person gains the trust and confidence of the other person by acting or pretending to act for the benefit of or in the interest of the other (and, as a result, is put in a position to exercise influence and control over the other).

Notes on Use

1. When appropriate, this instruction should be used with Instructions 34:16 and 34:17 and such other instructions, as for example, Instruction 19:5 (duty to disclose), when a definition of "confidential relationship" is required. When this instruction is used with Instructions 34:16 and 34:17, the parenthesized last clause should be included. When it is used with other instructions, such as Instruction 19:5, the parenthesized last clause should be omitted.

2. When instructing a jury on a claim for breach of a fiduciary duty arising out of a confidential relationship, Instructions 26:3 and 26:4 should be used, rather than this instruction.

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959). *See also* **Page v. Clark**, 197 Colo. 306, 592 P.2d 792 (1979); **Arnold v. Abernethy**, 134 Colo. 573, 307 P.2d 1106 (1957), *overruled on other grounds by* **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009); **Hilliard v. Shellabarger**, 120 Colo. 441, 210 P.2d 441 (1949), *overruled on other grounds by* **Krueger**, 205 P.3d at 1155; **Dittbrenner v. Myerson**, 114 Colo. 448, 167 P.2d 15 (1946); **Nicholson v. Ash**, 800 P.2d 1352 (Colo. App. 1990); **First Nat'l Bank of Meeker v. Theos**, 794 P.2d 1055 (Colo. App. 1990); **Rubenstein v. South Denver Nat'l Bank**, 762 P.2d 755 (Colo. App. 1988); **Alexander Co. v. Packard**, 754 P.2d 780 (Colo. App. 1988); **Meyer v. Schwartz**, 638 P.2d 821 (Colo. App. 1981).

2. A confidential relationship may arise when one person occupies a position of superiority over another with the opportunity to use that superiority to the other's disadvantage. **United Fire & Cas. Co. v. Nissan Motor Corp.**, 164 Colo. 42, 433 P.2d 769 (1967). Further, a confidential relationship may arise if: (1) one party has taken steps to induce another to believe that he or she can safely rely on the first party's judgment or advice; (2) one person has gained the confidence of the other and purports to act or advise with the other's interest in mind; or (3) the parties' relationship is such that one is induced to relax the care and vigilance that one would ordinarily exercise in dealing with a stranger. **Theos**, 794 P.2d at 1061; *accord* **In re Marriage of Page**, 70 P.3d 579 (Colo. App. 2003). Generally, to establish the existence of a confidential relationship, plaintiff must show that he or she reposed a special trust or confidence in the defendant, that reposing such trust in the defendant was justified, and that the defendant either invited or ostensibly accepted the plaintiff's trust. **Steiger v. Burroughs**, 878 P.2d 131 (Colo. App. 1994).

3. If a confidential relationship is shown to exist, the person in whom the special trust is placed must act in good faith and with due regard for the interests of the one reposing the confidence. **Nicholson**, 800 P.2d at 1355.

4. There is no separate and distinct cause of action for a breach of a confidential relationship per se. **Bock v. Brody**, 870 P.2d 530 (Colo. App. 1993), *aff'd in part, rev'd in part on other grounds*, 897 P.2d 769 (Colo. 1995); **Todd Holding Co. v. Super Valu Stores, Inc.**, 874 P.2d 402 (Colo. App. 1993). Rather, the existence of a confidential relationship is simply one of the elements to be considered in determining whether there is fraud, undue influence, overreaching, or other improper conduct. **Theos**, 794 P.2d at 1061; *see also* **Jarnagin v. Busby, Inc.**, 867 P.2d 63 (Colo. App. 1993).

34:19 FIDUCIARY RELATIONSHIP — DEFINED

See Instructions 26:2 and 26:3.

34:20 VERDICT FORM FOR PROPONENT

IN THE _____ COURT IN AND FOR THE
COUNTY OF _____, STATE OF COLORADO

Action No. _____

IN THE MATTER OF	**)**	
THE ESTATE OF	**)**	
	)	**VERDICT**
_____,	**)**	
Deceased.	**)**	

We, the jury, find in favor of the proponent, *(name)***.**

_____ _____

Foreperson

_____ _____

_____ _____

Notes on Use

1. See Notes 4 and 5 of the Notes on Use to Instruction 4:4.

2. This instruction uses the statutory language of the Probate Code. *See, e.g.*, § 15-12-407, C.R.S. In appropriate cases, for example, when more than one instrument is in controversy, a special verdict form may be used or special interrogatories may be submitted to the jury with this instruction pursuant to C.R.C.P. 49.

Source and Authority

This instruction is supported by section 15-12-407. *See also* **Irwin v. Robinson**, 143 Colo. 336, 355 P.2d 108 (1960), noting that the caption on this form is the proper caption to be used in a case involving a contest over the probate of a will.

34:21 VERDICT FORM FOR CONTESTANT

IN THE _____ COURT IN AND FOR THE COUNTY OF _____, STATE OF COLORADO

Action No. _____

IN THE MATTER OF THE ESTATE OF	**)**	
	)	**VERDICT**
_____,	**)**	
Deceased.	**)**	

We, the jury, find in favor of the contestant, *(name)***.**

_____ _____

Foreperson

_____ _____

_____ _____

Notes on Use

See the Notes on Use to Instruction 34:20.

Source and Authority

See the Source and Authority to Instruction 34:20.