**WILL CONTESTS (NH LAW)**

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# **Will Proof Proceedings**

## **Requirements of A Valid Will**

 The validity of a will is governed by the law of the state or country of execution. RSA 551:5. The requirements for a will executed in New Hampshire are:

### The testator must be married or at least 18 years old, RSA 551:1;

### The testator must be of "sane mind," RSA 551:1;

### The will must in writing, RSA 551:2, II;

### The will must be signed by the testator or by some person at his or her express direction in his or her presence, RSA 551: 2, III; and

### The will must be signed by 2 or more “credible” witnesses at the request of and in the presence of the testator attesting to the testator's signature, RSA 551:2, IV.

If these requirements of “due execution” are “proved,” the Court “allows” the will, making it effective to dispose of estate property. In order of formality, a will can be proved by: filing a self-proving will, RSA 551:2-a; presenting the testimony of one of the attesting witnesses to the Court without notice to interested parties (proving the will in common form), RSA 552:6; or a trial with notice to the surviving spouse, heirs, and legatees (proving a will in solemn form), RSA 552:7. While an executor on occasion might initiate a solemn proof proceeding in order to prevent a then incapacitated person from later contesting the will, the vast majority of solemn proof proceedings are initiated by will contestants.

## **Initiation of a Will Contest**

 RSA 552:7 provides:

**Proof, Solemn Form; Issues to Court.** – Any party interested may have the probate of a will which has been proved without notice re-examined, and the will proved in solemn form before the court of probate at any time within 6 months of such probate. Any issue related to the execution of a will, testamentary capacity, or fraud, duress, or undue influence shall be tried to the court of probate, and any party interested may request the same within 6 months of such probate.

 A party is “interested” and has standing to initiate a will contest if the “‘aggrieved person … is one who has a direct pecuniary interest in the estate of the … testator which will be impaired if the instrument in question is held to be a valid will.’ Furthermore, the ‘interest which [the] person must possess … is such that if he prevails in the contest he will be entitled to a distributive share in the testator’s estate.’ In other words, a will contestant must generally have some direct legal or equitable interest in the decedent’s estate.” *In re Estate of Kelly*, 130 N.H. 773, 777 – 78 (1988) (quoting, W. Treat, 3 New Hampshire Practice, Probate Law 1037 at 62 (1968)); *see Rogers v. Whitney Estate*, 105 N.H. 95 (1963) (trust beneficiary whose rights under a trust would be vacated by allowance of will had standing to contest will); *Swan v. Bailey*, 84 N.H. 73, 74 (1929) (presumptive heir of incompetent legatee did not have because he had no direct rights in the testator’s estate whether or not the will was upheld).

 For capacitated persons within the state, the statute imposes a six-month statute of limitations running from the allowance of the will. *See In re Estate of Lund*, 118 N.H. 180, 185 (1978) (“any appellant wishing to contest the probate and allowance of the will had six months thereafter … to demand reexamination of the will and probate in solemn form”). If an interested party is “ [a] minor, insane person or person out of the United States,” the statute of limitations does not run until “one year after the removal of the disability.” RSA 552:9. If a solemn proof proceeding is commenced, the Court must appoint guardians for minors and other incapacitated persons and agents for persons who reside out of state or are unknown. RSA 552:11. Thus, an executor by formally proving the will can eliminate the risk of a later challenge by a person who is incapacitated or residing out of state or at an unknown location: they will be bound by the guardians and agents appointed by the court to represent them in the solemn proof proceeding.

 A will contest is initiated by the filing with the Probate Court a Motion to Re-Examine Will. Appendix A. In the motion, the contestant must check one or both of the following as the grounds for seeking re-examination:

 [ ]  Examination of the witnesses to the will only.

 [ ]  Examination based on the allegations set forth in the attached
 statement.

See Appendix A. The first box refers to the procedural requirements of due execution, *see* section \_ above. The second box refers to other grounds for invalidation, which per RSA 552:7 may include “testamentary capacity, … fraud, duress, or undue influence.” In most cases, the asserted grounds will be incapacity and undue influence.

 As a precondition for filing a claim, the contestant must surrender to the executor any legacy received. *Holt v. Rice*, 54 N.H. 398, 402 - 03 (1874). Since legacies are ordinarily not paid until after expiration of the six-month creditor demand exhibition period, RSA 556:3, which coincides with the six-month statute of limitations for contesting a will, most contestants will not have received a legacy by the time the contest is filed. If the will is upheld, the legacy shall be repaid, unless forfeiture is required under an *in terrorem* provision in the will. *See* below.

## **Grounds for Will Invalidation**

### **Witness Attestation**

 To be valid, a will must be “signed by 2 or more *credible* witnesses, who shall at the request of the testator and in the testator’s presence, attest to the testator’s signature.” RSA 551:2, IV. “The term ‘credible’ … means, simply, that the witness must be competent, or not disqualified at the time of the attestation to be sworn and to testify in a court of justice.” *Lord v. Lord*, 58 N.H. 7 (1876). Testimonial capacity requires an ability “to observe, remember and narrate as well as understand the duty to tell the truth.” N.H. Rules of Evid., Rule 601(b). In *Ross v. Carlino*, 120 N.H. 489, 490 (1980), the court affirmed disallowance of the will on grounds that one of the witnesses (a hospital patient) “lacked the requisite mental capacity to attest that the deceased executed the will [and] that she neither had knowledge of its contents nor possessed the mental capacity to sign.”

 If one of the witnesses (or his or her spouse) is a legatee or recipient of a “beneficial device,” such as a trust, under a will, the testamentary provision “shall be void unless there be 2 other subscribing witnesses, and such subscribing witnesses shall be competent witness thereto.” RSA 551:3. “[T]he interest, to be disqualifying, must be a present, certain, and vested interest.” *Lord v. Lord*, 58 N.H. 7, 9 (1876) (brother and heir-at-law of executor was a competent witness); *see In re Amore Estate*, 99 N.H. 417, 420 (1955) (“attesting witnesses are considered competent even though they may receive some indirect benefit under the will”); *Stewart v. Harriman*, 56 N.H. 25 (1875) (nominated executor and his wife held competent witnesses).

 *In re Estate of Fischer*, 152 N.H. 669, 671 (2005), described the requirement that the witnesses sign in the presence of the testator as follows:

 In *Healey v. Bartlett*, 73 N.H. 110, 111, 59 A. 617 (1904), we explained that witnesses are in the testator’s presence ‘whenever they are so near him that he is conscious of where they are and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed.’ The testator need not ‘actually see the witnesses for them to be in his presence.’ *Healey*, 73 N.H. at 111, 59 A. 617. It is sufficient that ‘he has knowledge of their presence, and can, if he is so disposed, readily see them write their names, . . . even if he does not see them do it and could not without some slight physical exertion.’ *Id*.

 ‘The test to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them to it.’ *Id*. at 112. When a testator does not have all of his faculties solely because of physical infirmities, ‘the test to determine whether his will is attested to in his presence is to inquire whether he was conscious of the presence of the witnesses and understood what they were doing when they wrote their names, and could also, if it had not been for his physical infirmities, readily have seen and heard what they were doing, if he had been so disposed.’ *Id*.

In *Fischer*, the Court held that the executor failed to prove that the witnesses signed in the presence of the testator where the testator signed in the living room and the witnesses signed on the porch and there was no evidence concerning the distance or whether there were barriers between the locations. *In re Estate of Fischer*, 152 N.H. 669, 672 - 73 (2005).

### **Testamentary Capacity**

 In most cases, whether the testator was of “sane mind” is the most important disputed issue. Fundamentally, legal capacity in this context, as for other legally significant acts, requires one to understand the nature of the act and its implications. *See, e.g., Young v. Stevens*, 48 N.H. 133 (1868) (contractual capacity); *Concord v. Rumney*, 45 N.H. 423 (1864) (marriage capacity); *Hilco Property Svcs., Inc. v. U.S.*, 929 F. Supp. 526 (D.N.H.) (donative capacity). The focus of the inquiry is the testator’s mental state at the time of execution. “The will of a person, who has been or is ordinarily insane, will be valid, so far as this question is concerned, if made at a lucid interval.” *Boardman v. Woodman*, 47 N.H. 120, 122 (1866). As the Court stated in *Boardman v. Woodman*, 47 N.H. 120, 122 (1866), the standard for capacity is as follows:

 [I]n order to have sufficient mental capacity to make the will, [the testatrix], at the time of making it, must have been able to understand the nature of the act she was doing, to recollect the property she wished to dispose of and understand its general nature, to bear in mind those who were then her nearest relatives as such, and to make an election upon whom and how she would bestow the property by her will; that she must have had the ability, the mental power or capacity to do this; that if she had, the law regarded her as of sufficient mental capacity to make the will; that if she had not this capacity at the time, &c., the jury would find her not of sane mind; but if at the time, &c., she had this capacity, the jury would inquire further, for in this capacity, the jury would inquire further, for in this case it was claimed that she was laboring under what is called active insanity, of which the test is delusion; . . . the mere fact of the possession of a delusion may not be sufficient to render a person utterly incapable of making a valid will; that a person of sufficient mental capacity, though under a delusion, may make a valid will; if the will is in no way the offspring of the delusion, it is unaffected by it; but that if the will is the offspring of the delusion, if the delusion causes it to be made as it is made, or if its provisions in any way result from or are affected by the delusion, it is not a valid will….

*See also In re Estate of Washburn*, 141 N.H. 658, 661 (1997). To be capacitated, a testator must:

(1) Understand the act of making a will;

(2) Understand the property to be disposed of and its general nature;

(3) Understand his or her natural objects of affection, usually the testator's nearest relatives;

(4) Understand and intend to carry out the will’s dispositional scheme; and

(5) If capacity is present, the will must not be the offspring of a delusion.

*Boardman v. Woodman*, 47 N.H. 120, 122 (1866); *see also Lord v. Lord*, 58 N.H. 7, 11 (1876) ("a total failure of memory, extending to and involving the testator's immediate family or property is sufficient to invalidate a will; but mere weakness of understanding is not"); *In re Washburn*, 141 N.H. 658 (1997) (will invalidated where testator suffered subsequently diagnosed Alzheimer's disease and signed will benefiting caregiver); *In re Estate of Lunderville*, 119 N.H. 308 (1979) (will upheld where testator suffered inoperable brain tumor).

 The probate court must inquire whether the will is the product of delusion only if capacity is first found to be present.

 Our reading of *Boardman* reveals two distinct inquiries: 1) whether the testatrix possessed testamentary capacity to execute a will; and 2) if the testatrix had such capacity, whether the will is the offspring of a delusion or was executed during a lucid interval. *Id*. The probate court was required to proceed to the second inquiry only if the testatrix possessed testamentary capacity.

*Washburn*, 141 N.H. 658, 668 (1997).

### **Undue Influence**

 Procurement by undue influence is the second most frequent ground for contesting a will and constitutes:

 the use of such appliances and influences as take away the free will of the testator, and substitute another's will for his, so that in fact the instrument is not the expression of the wishes of the testator in the disposition of the property, but of the wishes of another . . . To vitiate or render void a will by reason of undue influence, the influence must amount to force and coercion, destroying free agency, and not merely the influence of affection, or merely the desire of gratifying another; but it must appear that the will was obtained by this coercion, - by importunity that could not be resisted; that it was made merely for the sake of peace, so that the motive was equivalent to force and fear.

*Albee v. Osgood*, 79 N.H. 89, 92 (quoting *Whitman v. Morey*, 63 N.H. 448, 453 (1885)). Undue influence "exists only when the willpower of the testator is destroyed and his own will is worn down. His freedom of will must be so destroyed as to substitute the will of another for his own." *Bartis v. Bartis*, 107 N.H. 34 (1965) (affirmed disallowance of will on grounds of undue influence where son arranged for retention of counsel and drafting of three wills and provided instructions to counsel for provisions of wills for his housebound 84 year old mother who suffered confusion and memory difficulties).

 Because an unimpaired person, absent true duress, generally has the capacity to exercise independent judgment, a successful claim on this basis ordinarily requires diminished capacity if not incapacity. The more intimidating the influence, the less capacity becomes an issue. *Gaffney v. Coffey*, 81 N.H. 300 (1924), is illustrative and involved a challenge by a daughter (Mamie) to the will of her mother on grounds that her brother (Fred) had procured the will through undue influence as a result of his violent objections to Mamie’s accepting the romantic attentions of Arthur Pappachristo. *Id.*, p. \_\_. The probate court disallowed the will even though testamentary capacity was conceded and there was no evidence that the Fred “had knowledge of the will or its execution until after the death of the testatrix.” *Id.*, pp. 301, 304. In its affirmance, the Court cited the extensive evidence of intimidation:

 The appellant's evidence tended to show that, beginning in the latter part of 1919, Fred, in the presence of his mother, gave expression to his opposition to Mamie in language and manner calculated to prejudice and to intimidate the mother in respect to the disposition of her property if his sister should persist in her attachment for Pappachristo. On this phase of the case the evidence of the appellant and her witnesses was in substance as follows: that in August or September, 1919, Fred said to Mamie in the presence of her mother, ‘If you ever have anything to do with that damn Greek you will never get a cent of my father's money for that damn Greek to spend;’ that at the same time he said to the mother, "Now, if she is going to keep company with this Greek, you must do something and do it quick, because he is never going to have a cent of my father's money;" that in December, 1919, during an altercation with Mamie as to whether she was making the Greek a Christmas present, he slapped his sister in the face, blackening her eye, called her by a vile name and pursued her to the kitchen, causing the mother to fall on the stove; that on January 1, 1920, while partially under the influence of liquor, he told them that if Mamie didn't stop keeping company with the Greek they would both have to get out, that he wasn't going to stand it any longer; that he said to his mother, "You are hiding up this girl, and she is going out with this damn Greek all the time, and it has got to be stopped or else I won't keep you in this house; and if you don't act as I want you to act you will have to get out of this house"; that he threatened to kill Mamie and the Greek if he should ever meet them together, and accompanied such threats by conduct tending to terrify the mother; that nearly every morning following January, 1920, he inquired of his mother before leaving for his office, “Well, have you done anything about changing that will yet?” and, upon an evasive reply from the mother, he would say, “Well, I want you to change it and change it damn quick, too”; that like threats were repeated nearly every day until May 30 following; that with the apparent purpose of intimidating the mother, he claim to be suffering from the nervous strain occasioned by Mamie’s conduct and threatened to go to a sanatorium; that on May 30 upon the return of the mother and sister from mass he met them upon their entrance at the home and said, "Now, you stand just where you are. . . . Now, one of you is just as bad as the other one. You are shielding her and hiding her up long enough, and she is keeping company with this damn Greek, and the two of you must get right out"; that when Mamie, following his direction, left the house, he followed her to the door and calling her by a vile name said, "Now you go, . . . and don't you ever come back to this house again"; that the next forenoon, May 31, the mother called on her brother-in-law to come over to console Fred, saying that she was afraid he would commit suicide, and that he had threatened her; that the brother-in-law found Fred walking the corridor with his hands at his head, saying, "Oh, dear, what shall I do? Mother, Mamie will never come into this house again. Mother, if you die in the morning, Mamie can't come in here and look at you." The will was made the forenoon of the following day. That such conduct and threats were of a character calculated to produce the change made in the will is apparent.

*Id.*, pp. 302 -03. In most cases, the influence at issue is much more subtle than that described above. In those cases, capacity, in addition to undue influence, will likely need to be at issue for a credible challenge to be made.

### **Fraud**

 “Fraud in procuring the execution of a will is recognized in this jurisdiction as a distinct cause.” *Knox v. Perkins*, 86 N.H. 66, 68 (1932). “‘Fraud may consist in the intentional concealment of a material fact as well as in a false statement of a fact.’” *Id.*, p. 69 (quoting *Benoit v. Perkins*, 79 N.H. 11, 15 (1918). “Obviously in will cases, the deception must be such as to induce the testator to make some disposition of his property that he would not otherwise have made.” *Id*. In *Knox*, the court affirmed allowance of a will by which the testator left his estate to his widow, finding that the testator “either knew of [her] former marriages, or if he did not know, would have made the same disposal of his property after learning the facts.” *Id.*

### ***Revocation***

 Upon discovery of a subsequently executed will, which expressly or impliedly revokes an allowed will, the party offering the new will should seek re-examination of the prior one. *In re Estate of Lund*, 118 N.H. 180, 185 (1978). If the six-month statute of limitations of RSA 552:7 bars re-examination, the equitable power of the court might be invoked. “For a court to set aside its approval of a will [on equitable grounds] there must exist ‘some substantial ground, such as fraud, accident, or mistake, which renders it against conscience to execute the decree they attack, and of which they were prevented from availing themselves by fraud, accident, or mistake, unmixed with any fraud or negligence on their part.’” *Id.*, p. 185 (*quoting Knight v. Hollings*, 73 N.H. 495, 502 (1906)).

### **Mistake**

 “[A]ccording to the prevailing view, if the testator knew and approved the contents of his will, it is immaterial that he mistook the legal effect of the language used or that he acted upon the mistaken advice of counsel, provided that advice ‘was given in an honest belief that it was sound.’” *Leonard v. Stanton*, 93 N.H. 113, 115 (1944) (*quoting Elam v. Phariss*, 289 Mo. 209, 217 (1921)). In other words, mistake is not a ground unless so substantial as to be tantamount to a failure of capacity, such as a mistaken belief that the document is other than a will.

## **Strategy Considerations for the Prospective Contestant**

 Counsel representing a prospective will contestant must make a number of strategic judgments, the first being to guide the client relative to the risks and merits of a claim. This requires counsel to determine whether contesting the will may cause the contestant and/or his or her family members to forfeit their inheritances if the claim is unsuccessful. Through an *in terrorem* clause, a will or trust can provide that, if a beneficiary takes a specified act contrary to the administration of the estate and/or trust, including contesting an instrument’s validity, he or she forfeits all inheritance rights. *See Shelton v. Tamposi*, 164 N.H. 490, 500 (2013). An *in terrorem* clause can be drafted to disinherit, not only an estate plan contestant, but others in his or her family.

 Counsel must also evaluate what a successful will challenge might gain the client. If a will contest is successful, the Court will disallow the will, resulting in the revival of a prior will that was revoked expressly or by implication by the execution of the contested will. If no such prior will exists, then the estate will pass by intestate succession under RSA 561:1. Thus, counsel advising a prospective contestant must evaluate whether a prior will exists and whether its revival would materially benefit the client. If the prior will is likely valid and treats the client favorably, then proceeding with a will contest may be merited. If the prior will is likely valid and treats the client unfavorably, proceeding may make little sense. If the prior will is vulnerable to challenge and treats the client preferentially, success in contesting the current will could lead to a new round of litigation contesting the prior will. If the prior will is subject to challenge and treats the client unfavorably, counsel could contest the wills seriatim with separate trials or simply invoke the Court’s equity authority to seek a declaratory judgment that the not-as-yet proved and allowed will is as invalid as the current one.

 If the client has determined to contest the will, counsel must advise the client whether companion cases should be brought. In a typical case, the contestant claims that that principal legatee exploited diminished capacity of the testator to procure the will. Often, the principal legatee was the beneficiary of *inter vivos* transactions suggestive of favoritism (legatee’s position) or exploitation (contestant’s position). Relevant transactions might include: re-titling of bank and investment accounts; changes to account or insurance beneficiary designations; real estate transfers; credit and ATM card use; and the exercise by the legatee of powers as attorney-in-fact or trustee. Appropriate companion claims might include:

1. Contest of the validity of a trust on grounds of incapacity and/or undue influence, RSA 564-B: 4-402;

2. Claims seeking to impose a constructive trust on transfers and benefits received by the legatee on grounds of unjust enrichment, see *Archer v. Dow*, 126 N.H. 24, 28 (1985);

3. Accounting of acts as attorney-in-fact, RSA 506:7;

4. Claims for breaches of a trustees duties of care and loyalty, RSA 564-B:8-802, 804.

All of these claims may be brought before the Probate Court with jurisdiction over the administration of the estate, but should be filed as an equity proceeding with a docket number independent of the estate administration. Once filed, counsel would ordinarily seek consolidation of the equity case with the will contest for discovery and/or trial given their common parties, facts, and law. Probate Court Rule 113.

## **Discovery**

 Procedurally, discovery in a will contest is handled the same as any other contested probate case with deadlines customarily set at the structuring conference for interrogatories, depositions, expert disclosures, exchanges of witness and exhibit lists, and trial. Substantively, discovery often focuses on the following:

### **The Relationship Between the Testator and Counsel**

 According to Rule 502 of the New Hampshire Rules of Evidence, there is no attorney-client privilege “[a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.” *See also Stevens v. Thurston*, 112 N.H. 118, 119 (1972). Consequently, counsel who prepared a contested will is often (and always in capacity / undue influence cases) a critical witness. Aspects of the attorney-client relationship of frequent concern include:

1. The longevity of the attorney-client relationship

2. The role played by the principal legatee in introducing counsel and/or facilitating communications between the testator and counsel;

3. The number and duration of the meetings between counsel and testator;

4. Counsel’s notes, file memoranda, correspondence, and drafts ; and

5. Communications by counsel with others, such as accountants and caregivers.

### **The Medical Condition of the Testator**

 Incapacity / undue influence cases almost always require discovery of medical records and often depositions of physicians and other caregivers. The elderly in supervised settings such as nursing homes, assisted living facilities, and hospitals often are subject to periodic mental status checks, including so-called “mini mental status exams” and evaluations of the extent to which they are alert and oriented to person, place, and time. Medical records and the testimony of caregivers can be highly persuasive evidence and can further serve as the basis for the opinions of engaged experts, including psychiatrists, neurologists, and/or psychologists.

### **The Testator’s Independence of Mind**

 “On the question of undue influence, the quality of Matilda’s mind was a material fact. It was competent for the parties to show that she was firm and decided, or irresolute and easily persuaded to conform to the wishes of others. Witnesses found by the court to be competent to form valuable opinions on the subject, and to have had opportunities to form them, could give their opinions.” *Patten v. Villey*, 67 N.H. 520, 528 (1893). Family and friends commonly are called at trial to express observations concerning the testator’s independence of mind.

### **The Variance Between the Current Will and Prior Ones**

 Absent some reasonable justification, the greater the departure of the dispositional scheme of the current will with that of prior ones, the more scrutiny the will’s validity will likely receive. This is particularly so if the evidence of diminished capacity and undue influence are compelling.

### **The Relationship Between the Testator and the Principal Legatee**

 In an undue influence case, the contestant, usually a child of the testator, typically claims that the principal legatee, usually another child, a second or third spouse, or a caregiver of the testator, exploited the diminished capacity of the testator to procure the contested will. Discovery often addresses, not only the general history and circumstances of the relationship between the legatee and the testator, but also whether there were other transfers or transactions benefiting the legatee. As discussed above, these transactions are often the subject of companion equity claims.

### **The Relationship Between the Testator and the Contestant**

 The closeness of the relationship between the testator and the contestant at the time of execution can be highly important to the Court in its evaluation of whether the will reflects the true wishes of the testator or those of the principal legatee. *See, e.g., Patten v. Villey*, 67 N.H. 520, 528 (1893) (“It was competent for the parties to show why the testatrix did not give property to [the contestant]. It appeared that she was displeased with his conduct….”). Whether the relationship was close and loving or estranged can be highly important.

## **The Trial**

 As the proponent of the will, the executor must prove its validity by a preponderance of the evidence. *Daley v. Judge of Probate*, 90 N.H. 381, 382 (1939). As the party with the burden of proof, the executor presents his or her evidence first and is required at a minimum to call the attesting witnesses to the will. Opening a “trial by calling to the stand or accounting for the absence of the three persons whose names appeared as witnesses to the document… is in accordance with the approved practice in this state.” *Id*. Once the attesting witnesses have testified in support of due execution of the will, presumptions of validity, including that the testator was capacitated and free from undue influence arise and the executor need not present any further evidence until after the case of the contestant. “A will proponent need not introduce any evidence upon the issue of the testatrix’s capacity until a will contestant first rebuts the presumption by offering evidence of incapacity.” *In re Estate of Washburn*, 141 N.H. 658, 663 (1997); *Perkins v. Perkins*, 39 N.H. 163, 170 (1859) (“the party propounding a will for probate is under no general duty to offer any evidence of the testator’s sanity, but may safely rely upon the presumption of the law that all men are sane until some evidence to the contrary is offered”). Upon close of the contestant’s case, the executor may re-open his or her case to present evidence beyond the testimony of the attesting witnesses to respond to any issues raised, including capacity and undue influence. *Pattee v. Whitcomb*, 72 N.H. 249, 250 (1903), described this procedure as follows:

Upon the issue whether the testator was unduly influenced by his wife to execute the will in question, evidence of the quality of his mind, with respect to its susceptibility or non-susceptibility to the influence of others, was competent. *Patten v. Cilley*, 67 N.H. 520, 528. A fortiori, evidence of the susceptibility of his mind to the influence of his wife, in particular, was competent. If the witness offered by the appellant to prove the latter fact was qualified, by personal acquaintance with their relations, to give an opinion upon the subject, it was competent for him to do so.

“The proponent, therefore, although aided by a host of presumptions, retains the burden of persuasion throughout the probate proceeding.” *Ross v. Carlino*, 119 N.H. 126, 130 (1979). This includes the burden of proving, if contested, that the testator was capacitated and the will was “the free and voluntary act of the testatrix.” *Gaffney v. Coffey*, 81 N.H. 300, 307 (1924).

If a witness to the will is unable to testify in court, the executor must prove that the witness is “unavailable.” RSA 552:12. “[I]f a witness is found to be unavailable at the time of probate, the proponent is excused from his obligation of producing that witness. Nonetheless, there must be a hearing on and a finding of unavailability, and the propounding party is obliged to prove it to the satisfaction of the court. That obligation is implicit in both the statute and common law.” *Ross v. Carlino*, 119 N.H. 126, 131 (1979). In *Ross*, the probate court committed error in finding a witness unavailable on the basis of a doctor’s letter “that stated that the witness was too ill to testify either in court or at home” where the “contestant moved for a continuance for the purpose of summonsing the doctor to determine if the witness was indeed ‘unavailable’ and to inquire into the witness’ competency at the time of execution.” *Id.*, p. 128 - 129. Thus, the contestant may require the executor to prove with testimony the unavailability of a subscribing witness.

 As in any bench trial, the judge has wide discretion in the admission of evidence. Generally, witnesses will be permitted to testify to observations concerning the testator’s capacity and susceptibility to influence. *Hardy v. Merrill*, 56 N.H. 227 (1875) (non-subscribing lay witnesses may testify to observations regarding competency of testator); *Patten v. Cilley*, 67 N.H. 520 (1893) (witnesses may testify to testator’s susceptibility to influence). Under Rule 804(b)(5) of the New Hampshire Rules of Evidence, a hearsay statement by the testator shall be admissible so long as the court finds that the “statement was made by [testator], and that it was made in good faith and on [testator’s] personal knowledge.” Customarily, both sides call witnesses who recount many testator statements.