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Henry Weihofen

MENTAL INCOMPETENCY TO MAKE A WILL*

HENRY WEIHOFEN†

Disposition of property by will is a privilege granted by statute, on terms fixed by the state. Anglo-American law during recent centuries has adopted a policy of allowing wide latitude in designating how one's property should pass after death. One restriction universally laid down is that a person making a will be mentally competent to do so.

Not every form of mental disorder implies testamentary incapacity;[1] nor does every degree of mental weakness or retardation. Average intelligence is not required. It has been said that the level of mental capacity required for a person to execute a will is low.[2]

In New Mexico and most other jurisdictions, the statutes merely provide that a testator must have a "sound mind" or "sound and disposing memory."[3] But these broad terms lay down no precise criteria. For all practical purposes they leave it to the courts to spell out a more workable test.

Although the wording in the cases varies, the courts are in substantial agreement that a testator is mentally competent to make a will if he has "(1) an understanding of the nature of the transaction, that is, making a will; (2) a general comprehension of the nature and extent of one's estate; and (3) a recollection of the natural objects of one's bounty."[4]

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† Professor of Law, University of New Mexico, Albuquerque.

1. *In re* Russell's Estate, 189 Cal. 759, 210 Pac. 249 (1922).

2. *In re* Delaney's Estate, 131 N.J. Eq. 454, 25 A.2d 901 (Prerog. Ct. 1942); *In re* Lucas' Will, 124 N.J. Eq. 347, 1 A.2d 929 (Prerog. Ct. 1938).

3. N.M. Stat. Ann. § 30-1-1 (1953). For citations to statutes in other jurisdictions, see Lindman & McIntyre, The Mentally Disabled and the Law 282-84 (1961); 1 Page, Wills § 12.15 (Bowe-Parker Rev. 1960) [hereinafter cited as Page].

4. *In re* Armijo's Will, 57 N.M. 649, 654, 261 P.2d 833, 837 (1953). To the same effect are: McElhenney v. Kelly, 67 N.M. 399, 356 P.2d 113 (1960); Calloway v. Miller, 58 N.M. 124, 129, 266 P.2d 365, 368 (1954); and many cases from other states: *In re* Fritchi's Estate, 60 Cal. 2d 357, 384 P.2d 656, 33 Cal. Rtpr. 264 (1963); Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953); Giardina v. Wanner, 228 Md. 116, 179 A.2d 357 (1962); Tarricone v. Cummings, 340 Mass. 758, 166 N.E.2d 737 (1960); *In re* Leffert's Will, 29 Misc. 2d 594, 218 N.Y.S.2d 845 (Surr. Ct. 1961), *aff'd*, 16 App. Div. 2d 939, 230 N.Y.S.2d 673 (1961); *In re* Pridgen's Will, 249 N.C. 509, 107 S.E.2d 160 (1959); Farmer v. Dodson, 326 S.W.2d 57 (Tex. Civ. App. 1959); and cases cited in 1 Page § 12.21.

An eminent psychiatrist, Dr. Henry Davidson, has explained these three elements of the test as follows:[5]

(1) Knowledge of the nature of the act means that he must know that it is his will that he is signing. Evidence that at the time he was confused and talking incoherently or unable to talk at all, that he did not seem to recognize the people present, that his hand had to be guided in signing, and that he died soon afterward, would probably lead a doctor to conclude that he did not know he was executing a will.

(2) Knowledge of the nature and extent of his property calls for a reasonably accurate comprehension of what he owns.

A bequest of 100,000 dollars to his sister Kate and the remainder to his wife, when his whole estate is not and never has been worth that much, would indicate that because of psychotic delusions of grandeur or other reasons he did not know the extent of his holdings. A specific devise of the old family homestead, which in fact he had sold ten years before, may lead one to conclude that senility has so far impaired his memory as to deprive him of capacity to know the nature and extent of his property.

(3) Knowing his relations to the persons who are the natural objects of his bounty requires that he know who they are and what their legal or moral claims on him may be. If he insists that his children are all dead, or that the daughter who has been caring for him is not his daughter but an imposter, he is presumably incompetent under this third criterion.[6]

Interviews with lawyers, judges, psychiatrists, and psychologists in the course of a recent study[7] showed little objection to this test, even by those who offered suggestions for improving the criteria of competency to perform other legal acts, such as suing or defending a lawsuit, marrying, or voting.

When legal incompetency is proved, the question of whether it renders a jural act void or only voidable, which has given the courts so much difficulty in contracts cases, is not a problem in wills. Mental incompetency in the testator can only render a will void.[8]

Many court opinions contain statements comparing the legal

5. Davidson, Forensic Psychiatry 99 (1952).

6. For a case discussing the effect of an insane delusion that the daughter had tried to have the testator committed as insane, upon capacity to recognize, weigh, and appreciate obligation to the natural object of her bounty, her only daughter, see Hardy v. Barbour, 304 S.W.2d 21, 36 (Mo. 1957).

7. The Mental Competency Study, conducted by the National Law Center of The George Washington University (1962-1963).

8. 1 Page § 12.46.

standard for executing a will with that for making contracts or engaging in business. Some have said that testamentary and contractual capacity both require the same degree of mental power.[9] Others have said that it requires less mental faculty to execute a will than to make a contract.[10] Indeed, a recent New York case has held that less mental faculty is required to execute a will than any other legal instrument.[11] Thus, under this view, if a person has capacity to transact ordinary business, he is able to make a will.[12] But the fact that he is incapable of disposing of property by contract or managing his estate is not conclusive that he lacks testamentary capacity.[13] By the same reasoning, a person incompetent to execute a will is necessarily incompetent to execute a contract.[14] The criterion for making a will, it has been said, is the same as for making a gift.[15]

The sounder view, and the one that now represents the weight of authority, is that the two functions are different and cannot be quantitatively compared.[16] "Testamentary capacity and contractual capacity are so different in their nature that it is impossible to use one as the test for measuring the other, or to say that the existence of one either proves or disproves the other's existence conclusively."[17]

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9. Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946); Gillikin v. Norcom, 197 N.C. 8, 147 S.E. 433 (1929); Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928). In Maryland and the District of Columbia, the statutes provide that to be competent to make a will, a person must be capable of making a valid deed or contract. D.C. Code Ann. § 18-102 (Supp. 1966); Md. Ann. Code Art. 93, § 349 (1957).

10. *In re* Arnold's Estate, 16 Cal. 2d 573, 107 P.2d 25 (1940); *In re* Lingenfelter's Estate, 234 P.2d 125 (Cal. Ct. App. 1951), *rev'd*, 38 Cal. 2d 571, 241 P.2d 900 (1952); DeMarco v. McGill, 402 Ill. 46, 83 N.E.2d 313 (1949); *In re* Coddington, 281 App. Div. 143, 118 N.Y.S.2d 525 (1952), *aff'd*, 307 N.Y. 181, 120 N.E.2d 777 (1954); Grassel v. Bailey, 363 Pa. 614, 70 A.2d 298 (1950); Smith v. Welch, 285 S.W.2d 823 (Tex. Civ. App. 1955); *In re* Good's Estate, 274 S.W.2d 900 (Tex. Civ. App. 1955).

11. *In re* Safer's Will, 19 App. Div. 2d 725, 242 N.Y.S.2d 445 (1963).

12. *In re* Finkler, 3 Cal. 2d 584, 46 P.2d 149 (1935); Shevlin v. Jackson, 5 Ill. 2d 43, 124 N.E.2d 895 (1955).

13. *In re* Chongas' Estate, 115 Utah 95, 202 P.2d 711 (1949); *In re* Bottger, 14 Wash. 2d 676, 129 P.2d 518 (1942); Note, 34 N.C.L. Rev. 155 (1955). But capacity to transact business may be indicative of the degree of mental capacity or incapacity. Duckwell v. Lawson, 197 Okla. 472, 172 P.2d 415 (1946).

14. James v. James, 85 Colo. 154, 274 Pac. 816 (1929).

15. Charlson v. Brunsvold, 249 Iowa 775, 89 N.W.2d 344 (1958); Scheller v. Schindel, 153 Md. 547, 138 Atl. 415 (1927).

16. *In re* Hall's Estate, 165 Kan. 465, 195 P.2d 612 (1948); Duckwall v. Lawson, 197 Okla. 472, 172 P.2d 415 (1946).

17. 1 Page § 12.20. It is perhaps significant that even in the District of Columbia and Maryland, where the statues require that one making a will have capacity to make a valid deed or contract, the courts tend to ignore this requirement and apply the same

The complexity of the particular transaction is significant. Even if it be assumed that conducting arm's length bargaining with an adverse party generally requires greater mental capacity than disposing of property by will, nevertheless, a simple business deal, such as purchasing an ordinary inexpensive article with a fixed price, may call for less mental ability than to dispose of extensive holdings by will.[18] And the importuning and appeals of relatives may present "pressures" not unlike those of arm's length contract negotiation.

I

EVIDENCE OF INCOMPETENCY OR COMPETENCY

A. Prior Adjudication of Incompetency

Unlike competency to enter into a contract or to convey property, about which a respectable minority of states holds that a person adjudicated incompetent and placed under guardianship is incompetent as a matter of law,[19] testamentary incapacity is not conclusively established by proof of such adjudication and guardianship. This seems to be true in all states,[20] including New Mexico, which has applied it even where the will was drawn only a few minutes after the adjudication.[21] A guardian is appointed to manage the incompetent's property during his lifetime, not to control disposition after death.[22] The guardian has no power to make a will for his ward. Execution of a will by the ward therefore does not interfere with the guardian's performance of his function. The test or criterion of mental competency to execute a will is not the same as that for ap-

criteria as do other states. See Lewis v. American Security & Trust Co., 289 Fed. 916 (D.C. Cir. 1923); Giardina v. Wanner, 228 Md. 116, 179 A.2d 357 (1962); Sellers v. Qualls, 206 Md. 58, 110 A.2d 73 (1954).

18. Venner v. Layton, 244 S.W.2d 852 (Tex. Civ. App. 1952); Note, 34 N.C.L. Rev. 155(1955).

19. Weihofen, *Mental Incompetency To Contract or Convey*, 39 So. Cal. L. Rev. 211 (1966).

20. Estate of Goddard, 164 Cal. App. 2d 152, 330 P.2d 399 (Dist. Ct. App. 1958); *In re* McCrone's Estate, 106 Colo. 69, 101 P.2d 25 (1940); *In re* Hall, 165 Kan. 465, 195 P.2d 612 (1948); Lusis v. Kaminski, 329 Mass. 766, 108 N.E.2d 567 (1952); *In re* Jerrell's Will, 63 N.Y.S.2d 499 (Surr. Ct. 1946); Sutton v. Sutton, 222 N.C. 274, 22 S.E.2d 553 (1942); Clement v. Rainey, 50 S.W.2d 359 (Tex. Civ. App. 1932); Hermann v. Crossen, 81 Ohio L. Abs. 322, 160 N.E.2d 404 (Ohio App. 1959); *In re* Bottger's Estate, 14 Wash. 2d 676, 129 P.2d 518 (1942); and cases collected in Annot., 89 A.L.R.2d 1120; Note, 16 So. Cal. L. Rev. 355 (1943). In the District of Columbia, however, where to be competent to make a will a person must be capable of making a valid contract, D.C. Code Ann. § 19-101 (1961), a contract made by a person under conservatorship is void. D.C. Code Ann. § 21-507 (1961).

21. *In re* Armijo's Will, 57 N.M. 649, 261 P.2d 833 (1953).

22. Minnehan v. Minnehan, 336 Mass. 668, 147 N.E.2d 533 (1958).

pointment of a guardian. At the hearing to determine whether a guardian should be appointed, the question of testamentary capacity is not in issue and persons who may be interested in upholding or setting aside a will previously made (and a fortiori, a will that the person may make in the future) may not be represented.[23]

The fact that the testator was under guardianship at the time he made the will is, however, relevant and admissible on the issue of his mental condition, and in most states this fact has been said to raise a rebuttable presumption of incapacity.[24] Similarly, guardianship creates a rebuttable presumption of incompetency to revoke a will executed before the incompetency arose.[25]

In California,[26] Massachusetts,[27] and Ohio,[28] on the other hand, the fact that the decedent was under conservatorship or guardianship at the time of making the will, although admissible in evidence as a factor proper for the jury to consider in determining the question of testamentary capacity, does not create a legal presumption and is not prima facie evidence of testamentary incapacity.

Similarly, discharge from guardianship is not conclusive proof of testamentary capacity.[29]

B. Subsequent Adjudication of Incompetency

An adjudication of incompetency shortly after execution of the will is ordinarily admissible in evidence.[30] How much weight it will

23. The distinction between the issues relevant to an adjudication of incompetency and those relevant on probate of a will are well stated in the dissenting opinion of *In re* White's Will, 2 N.Y.2d 309, 141 N.E.2d 416, 419 (1957).

24. *In re* Armijo's Will, 57 N.M. 649, 655, 261 P.2d 833, 837 (1953) ("and it is said that very clear evidence is required to rebut the presumption"). *Accord:* McCone's Estate, 106 Colo. 69, 101 P.2d 24 (1940); Doyle v. Rody, 180 Md. 475, 25 A.2d 457 (1942); *In re* Rice's Estate, 173 Misc. 1038, 19 N.Y.S.2d 602 (Surr. Ct. 1940); *In re* Jerrell's Will, 63 N.Y.S.2d 499 (Surr. Ct. 1946); Bogel v. White, 168 S.W.2d 309 (Tex. Civ. App. 1943).

25. Sutton v. Sutton, 222 N.C. 274, 22 S.E.2d 553 (1942).

26. *In re* Watson's Estate, 195 Cal. App. 2d 740, 16 Cal. Rptr. 125 (Dist. Ct. App. 1961); *In re* Fossa's Estate, 210 Cal. App. 2d 464, 26 Cal. Rptr. 687 (Dist. Ct. App. 1962) (adjudication thirty minutes before will was signed held not determinative, but is evidence justifying an inference of lack of testamentary capacity).

27. Lusis v. Kaminski, 329 Mass. 766, 108 N.E.2d 567 (1952).

28. Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928). But this case also said that adjudication creates a presumption sufficient to shift to the proponent of the will the burden of going forward with evidence, though not the ultimate burden, which remains on the contestant to show lack of testamentary capacity and never shifts.

29. *In re* Baker's Estate, 176 Cal. 430, 168 Pac. 881 (1917). A judgment of restoration is not conclusive of testamentary capacity even on the same day. *In re* Price's Estate, 375 S.W.2d 900 (Tex. 1964).

30. *In re* Loveland's Estate, 162 Cal. 595, 123 Pac. 801 (1912); *In re* White's Will,

be given depends on the length of time intervening and the type and seriousness of the mental condition proved. A California case held that an adjudication one month after signing the will does not establish testamentary incapacity but does constitute substantial evidence on which a finding of such incapacity might rest, especially when there is evidence that the decedent's mental condition has not changed materially in the interim.[31] And an adjudication two months after execution of the will was said to have prima facie effect; but the court refused to deem it conclusive, even though the decree found not only that the person was then incapable of governing herself and her property, but also that "she has been in the same state of lunacy for the space of two years past and upwards."[32]

In a 1965 New Mexico case, there was evidence that a petition for a declaration of incompetency and appointment of a guardian had been filed on the same day that the decedent executed the will, and granted a week later, the trial court finding her then incompetent and that she had been incompetent to handle her property at the time the suit was filed (and the will executed). The New Mexico Supreme Court's opinion does not discuss the legal effect of this adjudication, but it obviously did not consider it conclusive or even persuasive of testamentary incapacity, for it upheld the trial court's finding that the decedent had such capacity.[33]

C. Hospitalization

A judicial order of commitment to a mental institution generally has even less effect than an adjudication of incompetency. At most, the commitment is prima facie evidence of testamentary incapacity, which can be overcome.[34] It is, however, in all but one or two states admissible in evidence on the issue.[35] Even when a statute or departmental regulation requires a patient in a mental hospital to obtain a

2 N.Y.2d 309, 141 N.E.2d 416 (1957). But excluding proof of an adjudication the day before the testatrix died and when she was *in extremis*, eleven months after making the will, was held in North Carolina not to be an abuse of the trial court's discretion and not prejudicial error. *In re* Knight's Will, 250 N.C. 634, 109 S.E.2d 470 (1959).

31. Estate of Wolf, 174 Cal. App. 2d 144, 344 P.2d 37 (Dist. Ct. App. 1959).

32. American Nat'l Red Cross v. Lester, 129 N.J. Eq. 28, 18 A.2d 295 (Ct. Err. & App. 1941).

33. Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

34. *In re* Alexieff's Will, 94 N.Y.S.2d 32 (Surr. Ct. 1949), *aff'd*, 277 App. Div. 790, 97 N.Y.S.2d 532 (1950), *appeal denied*, 277 App. Div. 901, 98 N.Y.S.2d 582 (1950).

35. Wigmore, Evidence § 1671 (3d ed. 1940). The statement to the contrary in 3 Page § 29.72 is incorrect.

court order to be allowed to make a will (as in the District of Columbia for retarded patients and in New York for those committed as mentally ill), failure to obtain such an order has been held not to vitiate an otherwise valid will.[36]

D. Psychiatric Examination and Testimony

When reason exists for thinking that a will may be contested—as when the testator is elderly or when his conduct seems irrational or forgetful, and especially when he makes dispositions that will disappoint relatives who have expected a devise or bequest—the prudent lawyer drawing the will should have his client examined by a psychiatrist at the time of execution, and file a copy of the psychiatric report with the will.[37] Because mental illness still carries a stigma, a client may resent the suggestion that he submit to such an examination, but if told that it may prevent litigation, he is likely to cooperate. It has been suggested that the lawyer have the examining psychiatrist sign as an attesting witness.[38] Some courts have held that a lawyer drawing a will has a duty to satisfy himself of his client's testamentary capacity.[39] Both legal and medical writers have urged lawyers to take more care than many of them apparently do in interrogating clients who want wills drawn.[40]

The lawyer who arranges for a psychiatrist to examine a client should first make sure that the doctor understands what the legal criterion for testamentary capacity is, and should instruct him to focus his questioning of the client on his thinking processes relevant to that capacity.[41] He may, for example, suggest that the doctor check whether the client is able to state the members of his family

36. *In re* Alexieff's Will, 94 N.Y.S.2d 32 (Surr. Ct. 1949), *aff'd*, 277 App. Div. 790, 97 N.Y.S.2d 532 (1950). See D.C. Code Ann. § 21-1122 (Supp. 1966).

37. Davidson, Forensic Psychiatry 104 (1952).

38. Stephens, *Probate Psychiatry—Examination of Testamentary Capacity by a Psychiatrist as a Subscribing Witness*, 25 Ill. L. Rev. 276 (1931).

39. Gilmer v. Brown, 186 Va. 630, 44 S.E.2d 16 (1947). Refusal of the testator's lawyer to draw a will for him has been taken as strong evidence of incapacity in a contest on a will subsequently drawn by another lawyer. *In re* Halbert's Estate, 80 Cal. App. 666, 182 P.2d 266 (Dist. Ct. App. 1947).

40. Stephens, *supra* note 38; Hulbert, *Probate Psychiatry—A Neuro-Psychiatric Examination of Testator From the Psychiatric Viewpoint*, 25 Ill. L. Rev. 288 (1931); Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 Law & Contemp. Prob. 448 (1935); Note, 66 Harv. L. Rev. 1116 (1953).

41. "The examination should . . . be complete as to everything of importance, both physical and mental. . . . However, . . . the essence of the examination is the eliciting and recording of objective data as to the testator's mind and memory . . . ." Stephens, *supra* note 38, at 284-85.

and their relationship to him; also that they talk about each of these relatives to see if discussing any of them produces an undue emotional reaction. The psychiatrist should take careful notes and prepare a report, perhaps quoting verbatim some of the patient's remarks, and other specific data sufficient to support his conclusion concerning the patient's mental condition.

Because undue influence is often urged in conjunction with mental incompetency as ground for contesting a will, the psychiatric examination should address itself to that possibility too. An examination made partly in the presence of others and partly alone with the testator should enable the psychiatrist to observe his mood reactions, fears, and suggestibility. Such observations and conclusions drawn therefrom should all be included as part of the report. To avoid any later objection that the report or testimony based thereon is inadmissible in evidence because it was a privileged communication, it may be well to have the testator file with the report his written permission for the examining psychiatrist to communicate to the court his findings and conclusions.

By the time a will is offered for probate, the testator is dead and unavailable for examination. Proposals for antemortem probate have not won acceptance.[42] Not being based on personal examination, the experts' opinion in most states will have to be introduced by way of hypothetical questions.

II

FORMS OF MENTAL DISORDER AFFECTING COMPETENCY

Unless it meets the legal criterion, no particular form of mental disorder in and of itself spells testamentary incompetency. This is true whether the illness is arteriosclerosis, congential brain anomaly, epilepsy, dementia paralytica, chronic encephalitis, or any other form of disorder.[43] The issue is never whether the testator had any particular mental illness, but is always whether the illness, if any, was of such a nature or degree as to come within the legal test of incompetency. Inability to reason logically does not necessarily negate testamentary capacity;[44] a person may be capable of executing

42. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. Chi. L. Rev. 440 (1934); Kutscher, *Living Probate*, 21 A.B.A.J. 427 (1935).

43. Estate of Gecht, 165 Cal. App. 2d 431, 331 P.2d 1019 (Dist. Ct. App. 1958) (arteriosclerosis, coronary artery disease, and diabetes mellitus); *In re* Coddington's Will, 281 App. Div. 143, 118 N.Y.S.2d 525 (1952) (arteriosclerosis); *In re* Livingston's Will, 5 N.J. 65, 73 A.2d 916 (1950) (failing memory).

44. *In re* Smith's Estate, 53 Ariz. 505, 91 P.2d 254 (1939); *In re* Lingenfelter's Estate, 38 Cal. 2d 571, 241 P.2d 990 (1952).

a will even though highly nervous and excitable and prone to violent outbursts of temper.[45] Mere feebleness of mind or weakness of memory, if not so severe as to meet the legal test, will not invalidate a will.[46] But an adult with the intelligence of a five-year-old child has been held to lack testamentary capacity.[47] Intelligence testing may therefore be an important procedure when the testator is somewhat retarded. Mere eccentricity has also been held insufficient to invalidate a will. Wills of some highly eccentric testators have been upheld.[48]

A. Old Age: Senile Psychoses

The diseases of old age make up the largest group involved in contests over testamentary capacity. As the life span is prolonged by science, this group can be expected to constitute an even greater proportion of the total. The aging process inevitably takes its toll in both physical and mental ability. Any line between such normal deterioration and pathology is necessarily arbitrary. Not all aging persons will sooner or later have to be diagnosed as having a senile psychosis. "Most physicians appreciate that senility is not a chronological fact. It varies with the individual's physiological status, with the personality, with environmental factors, and with superimposed emotional illness."[49] People have attained the age of ninety or even one hundred without exhibiting mental symptoms in any marked degree.[50] Courts have held that even extreme old age does not in itself deprive a person of the power to make a will;[51] wills made by persons of very advanced years have been upheld.[52]

If the line between normal aging and pathology is difficult to

45. *In re* Lingenfelter's Estate, *supra* note 44.

46. Giardina v. Wanner, 228 Md. 116, 179 A.2d 357 (1962); *In re* Craven's Will, 169 N.C. 561, 86 S.E. 587 (1915).

47. *In re* Estate of Glesenkamp, 378 Pa. 635, 107 A.2d 731 (1954).

48. *In re* Teed's Estate, 112 Cal. App. 2d 638, 247 P.2d 54 (Dist. Ct. App. 1952); Sellers v. Qualls, 206 Md. 58, 110 A.2d 73 (1954); Flynn v. Prindeville, 327 Mass. 266, 98 N.E.2d 267 (1951); *In re* Swan's Estate, 4 Utah 2d 277, 293 P.2d 682 (1956).

49. Usdin, *The Physician and Testamentary Capacity*, 114 Am. J. of Psychiatry 249, 251 (1957). See also Davidson, *op. cit. supra* note 37, at 101.

50. Busse, *The Senile Psychoses*, 5 Encyclopedia of Mental Health 1829, 1835 (1963); Stern, *The Aging and the Aged, id.* at 153.

51. *In re* White's Estate, 128 Cal. App. 2d 659, 276 P.2d 11 (Dist. Ct. App. 1954); Gilbert v. Gaybrick, 195 Md. 297, 73 A.2d 482 (1950); Sellers v. Qualls, 206 Md. 58, 110 A.2d 73 (1954); *In re* Hermann's Estate, 124 N.J. Eq. 541, 3 A.2d 148 (Prerog. Ct. 1938); *In re* Livingston's Will, 5 N.J. 65, 73 A.2d 916 (1950) (failing memory).

52. *In re* Buckman's Will, 80 N.J. Eq. 556, 85 Atl. 246 (Ct. Err. & App. 1912) (over 90 years old); Manogue v. Herrell, 13 App. D.C. 455 (1898) (over 80); *In re* Snelling's Will, 136 N.Y. 515, 32 N.E. 1006 (1893) (over 80).

trace, so is the line between pathology that is not so serious as to meet the test of testamentary incompetency, and that which is. The two major forms of senile psychosis—senile brain disease (dementia) and cerebral arteriosclerosis—are both characterized by demonstrable impairment of orientation, memory (especially for recent events), judgment, and the higher intellectual functions. These facilities may be so far impaired as to fall below the legal requisite for testamentary competency. Thus, the afflicted person may be disoriented as to time, place, and person. He may forget his own name and address and how many children he has. This is a result of confusion, which goes with loss of memory. This severe memory loss cannot be considered part of the normal aging process. It may be caused by the chronic brain deterioration of senile dementia, or by shortage of oxygen reaching the brain due to arteriosclerosis, or by acute infection or toxicity or metabolic disturbance because of malnutrition or disease. One's psychological or emotional state may also contribute to this condition, so that incapacity may be temporary or intermittent.

An aged person may turn against the very ones who are giving him the most care and affection. These reactions are often rooted in insecurity, loneliness, and fear. Suspiciousness may become exaggerated, especially in an aging person who has always been inclined to be suspicious. It is typical that long standing personality characteristics become grossly exaggerated. As the late Arthur P. Noyes, one-time president of the American Psychiatric Association, said, "The older a man grows, the more like himself he becomes."[53] Thus, the person suspicious by nature, seeing his social and financial situation deteriorate with advancing age, may not accept this fact realistically, but may blame the younger people around him: they are jealous of his superior endowments and are spitefully preventing his using them. The loving care he gets may be seen as an unjust attempt to keep him down, and tenderness may be misinterpreted as a cover-up for evil designs.[54]

B. Delusions

In testamentary as in contract cases, the courts have sometimes supplemented the "understanding" test with an insane delusion test. The reasoning is that if the testator's normal instincts and affections were irrationally displaced by insane suspicion or aversion so as to

53. Quoted in Stern, *supra* note 50, at 167.
54. *Id.* at 171-72.

lead to a disposition other than what he presumably would have made had he been sane, the will should not stand. Of course the mere fact that the testator held beliefs that other people might regard as groundless does not mean that the beliefs were the result of an insane delusion, nor does the fact that he makes an unfair or peculiar disposition of his property mean that he is mentally incompetent. That a man's suspicions about certain relatives were wrong does not mean that they were the product of a delusion or that he was suffering from mental illness. A person is not required to be fair or just or reasonable in disposing of his property. If there was no mental disorder to negate testamentary capacity, and no undue influence or fraud, the law will give effect to the will, even though its provisions are unreasonable and unjust.[55]

The courts therefore try to distinguish, for example, between belief in a wife's unfaithfulness induced by external circumstances and a belief based on psychotic delusion. The distinction is not always easy, as illustrated by a New York case[56] in which the testator cut off his wife of forty years with little more than her minimum statutory share because he believed that she was unfaithful to him. He first began to express this belief after a series of surgical operations, when he was about seventy. He seemed otherwise normal, but this suspicion became an obsession. A year before his death, he went to Europe without telling his wife, and while there consulted a doctor. He had said he was "sick in the head." On his return he made the will in question. He never again rejoined his wife in the marital home.

To offset this evidence, the proponents of the will undertook to show that reasonable grounds existed for his belief. The man he suspected, an old friend, had sent a printed anniversary greeting card; because it was addressed to the wife alone and was not received on the anniversary date, and because its message was sweetly sentimental, the decedent took it to confirm his suspicion. He found further support in the fact that whenever the telephone rang his wife answered it. One incident he considered significant occurred one day when he was leaving the house; his wife asked him when

55. Estate of Gecht, 165 Cal. App. 2d 431, 331 P.2d 1019 (Dist. Ct. App. 1958); *In re* Chongas' Estate, 115 Utah 95, 202 P.2d 711 (1949); *In re* Honigman's Will, 8 N.Y.2d 244, 168 N.E.2d 676, 679 (1960) (dissenting opinion). But the reasonableness and justice of the disposition rather clearly do carry weight in the courts' determinations of mental capacity. See *In re* Arnold's Estate, 16 Cal. 2d 573, 107 P.2d 25 (1940). *Cf. In re* Armijo, 57 N.M. 649, 261 P.2d 833 (1953).

56. *In re* Honigman's Will, *supra* note 55.

she might expect him to return. His suspicion aroused, he secreted himself in a nearby park and saw the suspect enter his home. When he charged his wife with this, she allegedly asked him for a divorce. The wife flatly denied this story. There was also evidence that he had given his attorney other reasons for the disposition made: his wife's independent fortune and the financial need of his residual legatees.

The jury found that the testator was not of sound and disposing mind and memory at the time he executed the will. The appellate division reversed, finding that there were sound reasons for the testator's disposition, and this decision was in turn reversed by the court of appeals. The court of appeals found that a preponderance of the evidence clearly established that the belief of infidelity was an obsession with the testator, and a question of fact was therefore presented as to whether his obsession affected the will.

To distinguish false but not disordered beliefs from delusions, the product of a disordered mind, courts sometimes say that an insane delusion is a belief in something that has "no foundation in evidence" and is so extravagant that no reasonable man would believe it, but which one persists in believing "against all evidence."[57] In short, they assume that there can be no such thing as a delusion founded on fact. One California court has said, "One cannot be said to act under a monomania if his condition results from a belief or inference, however irrational or unfounded, which is drawn from facts which are shown to exist."[58] But it is psychiatrically unsound to say that delusion is not present if some factual basis, however slight, exists for the belief. "Actually, it is only in the most dilapidated psychotic that the delusion is not based to some extent on actual events. Indeed the paranoid's delusions are characterized by a false misinterpretation of an actual event or series of events."[59] Acting on this too narrow conception of delusion, courts have in

57. *In re* Watson's Estate, 195 Cal. App. 2d 740, 16 Cal. Rptr. 125 (Dist. Ct. App. 1961); Hardy v. Barbour, 304 S.W.2d 21 (Mo. 1957); *In re* Honigman's Will, 8 N.Y.2d 244, 168 N.E.2d 676 (1960); *In re* Sommerville, 406 Pa. 207, 177 A.2d 496 (1962); and cases cited in Page §§ 12.30, 12.33.

58. *In re* Hart's Estate, 107 Cal. App. 2d 60, 236 P.2d 884 (Dist. Ct. App. 1951).

59. Overholser, *Major Principles of Forensic Psychiatry*, 2 American Handbook of Psychiatry, 1887, 1890 (1959). See also Murphy, Personality, a Bisocial Approach to Origins and Structure 402 (1947); Comment, 1960 Wis. L. Rev. 54. This view is apparently accepted in *Re* Riemer, 2 Wis. 2d 16, 85 N.W.2d 804 (1957), holding that the proper test for insane delusion is not whether there is any evidence on which the conclusion could rest, but whether a sane person might draw such a conclusion from the evidence.

some cases upheld wills made by persons whom psychiatrists would consider seriously ill, deluded, and notably out of contact with reality.[60]

Delusion may affect testamentary capacity when it (1) goes to the instrument, as where the testator believes he is forced to sign it; or (2) goes to the property to be disposed of, as for example, a delusion that he is much wealthier or much poorer than he actually is; or (3) concerns his relatives or others having legal or moral claims on him, as where he has paranoid delusions that some of them are trying to poison him; or (4) concerns the disposition, as where he leaves his property for a peculiar purpose or makes an odd choice of beneficiary.[61] Sometimes the delusion is a combination of two or more of these types.

Delusions concerning supernatural directions for disposing of one's property are frequently found. Wills disinheriting persons who are the natural objects of the testator's bounty in favor of a church or religious order have been set aside when the disposition was dictated by spirit voices or visions.[62] But courts are reluctant to reject as delusions any particular form of religious belief, even those that seem bizarre. A belief in spiritualism will not of itself invalidate a will; old people may find solace talking with a spouse or friends long dead. To affect the will, proof is required that the spirits of the dead dictated the disposition. Even when the belief can be termed a delusion, it will not affect the will unless it entered into and controlled or motivated the disposition.[63]

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60. Overholser, *supra* note 59, at 1890.

61. Guttmacher & Weihofen, Psychiatry and the Law 347-48 (1952).

62. *In re* Sandman's Estate, 121 Cal. App. 9, 13, 8 P.2d 499, 500 (Dist. Ct. App. 1932). But the testator's belief that he had communication from departed spirits was held not sufficient to prove incapacity in Donovan v. Sullivan, 296 Mass. 55, 4 N.E.2d 1004 (1936). See also *In re* Elston's Estate, 262 P.2d 148 (Okla. 1953), upholding a will almost wholly disinheriting four of testator's eight children, because he believed members of his religious sect should terminate all association with those who had strayed from its teaching; his belief was based on a Bible verse and therefore arrived at through reasoning. See Comment, 4 N.Y.U.L. Rev. 58 (1927).

63. *In re* Arnold's Estate, 16 Cal. 2d 573, 585-86, 107 P.2d 25, 32 (1940); *In re* Fritschi, 60 Cal. 2d 367, 384 P.2d 656, 33 Cal. Rptr. 264 (1963); Giardina v. Wannen, 228 Md. 116, 179 A.2d 357 (1962); Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942); *In re* Rice's Estate, 173 Misc. 1038, 19 N.Y.S.2d 602 (Surr. Ct. 1940). A delusion that does not affect the disposition of the estate does not invalidate. Estate of Reiss, 50 Cal. App. 2d 398, 123 P.2d 68 (Dist. Ct. App. 1942). The decisions are not always consistent in their holdings on what delusions will or will not affect the provisions of the will. See cases cited in Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 Temple L. Q. 231 (1962). Hallucinations also do not destroy testamentary capacity unless they affect the disposition. *In re* Morgan's Estate, 225 Cal. App. 2d 156, 37 Cal. Rptr. 160 (Dist. Ct. App. 1964).

Delusions of grandeur or of poverty may also invalidate a will, in that they may affect the testator's ability to appreciate the nature and extent of his property. Delusions of marital infidelity are fairly frequent in certain mental illnesses, especially the involutional psychoses and senile psychosis. An innocent (and perhaps old and feeble) spouse may be fancied guilty of flagrant misconduct. Delusions of persecution also are frequent in senile psychosis, and in the schizophrenic form of general paralysis resulting from syphilis. Such delusions may invoke intense hatred, often against some member of the family.[64]

Suppose the delusion affects memory and understanding of the testator concerning some of his property or certain persons, but not others. Can the will be upheld as to the gifts not affected by the delusion, or must the will be treated as an entirety and held totally invalid? Little authority has been found on the question. The better view would seem to be that the will may be valid as to gifts not affected by the delusion. But if the parts of the will tainted by the delusion are so related to the remainder that allowing the latter to stand would probably do violence to the testator's intention, the whole will would probably be held invalid.[65]

A delusional state is typically not static; the degree of delusion may fluctuate materially. A patient who at one time tells of a gigantic and ramified plot against his life may at another time talk about how people in general are after him, and at still another time merely express the feeling that people are untrustworthy. In most if not all jurisdictions, the law recognizes the possibility that persons suffering from certain forms of mental illness, serious enough to render them incompetent, may have intervals during which mental capacity is significanlty higher than at other times. During such a "lucid interval," a patient may be sufficiently free from the effects of the illness to be competent to execute a will or perhaps to perform other legal acts. This is more likely to occur in certain types of illness than in others. For example, such remissions are more

64. *In re* Huston's Estate, 163 Cal. 166, 124 Pac. 852 (unnatural and unfounded distrust of testator's daughter, resulting in her virtual disinheritance, held product of an insane delusion). *Cf. In re* Sommerville, 406 Pa. 207, 177 A.2d 496 (1962). But incapacity is not proved merely by evidence of dislike of certain persons who were natural objects of the testator's bounty. Estate of Gecht, 165 Cal. App. 2d 431, 331 P.2d 1019 (Dist. Ct. App. 1958); *In re* Haywood's Estate, 109 Cal. App. 2d 388, 240 P.2d 1028 (Dist. Ct. App. 1952). See Ferraro, *Senile Psychoses*, 2 American Handbook of Psychiatry 1025-26 (1959); Mack, *Forensic Psychiatry and the Witness—A Survey*, 7 Clev.-Mar. L. Rev. 302, 314 (1958); Comment, 31 Marq. L. Rev. 238 (1947).

65. 1 Page § 12.47. On the similar effect of fraud or undue influence on the part of certain beneficiaries, see Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

likely to occur in cerebral arteriosclerosis than in senile dementia.[66] Whether the will was made during such a lucid interval is of course a question of fact to be determined from the evidence. But if it was,[67] it is valid, even though the testator was incompetent before and after.

A psychiatrist might advise the attorney when "more lucid" intervals can be expected for a particular testator; for example, the phenomenon of mental fatigue in senile persons probably makes it advisable to execute the will early in the day. Or the psychiatrist may advise postponing execution of the will until another day when the testator may be more lucid.

III

BURDEN OF PROOF

The orthodox view has been that the burden of persuasion is on the proponent of the will, and this is still the rule in a number of states.[68] But an increasing number of jurisdictions now put the burden on the contestant, or at least give the proponent the benefit of a presumption of sanity, shifting to the contestant at least the burden of going forward with evidence.[69] Where the burden is on the contestant, wills have been upheld in the face of strong evidence of incompetency.[70]

In New Mexico the proponent upon original offer for probate has the burden of establishing the testator's testamentary capacity when such capacity is challenged by evidence. The same is true on appeal taken from probate.[71] But after a will has been admitted to probate, and a person contests it for the first time by asking that the will be set aside because of mental incompetence, undue influence, or

66. Usdin, *supra* note 49 at 252.

67. *In re* Jamison's Estate, 249 P.2d 859 (Cal. App. 1952), *aff'd*, 41 Cal. 2d 1, 256 P.2d 984 (1953); Note, 16 Notre Dame Law. 234 (1941).

68. *In re* Chinsky's Will, 151 Misc. 129, 270 N.Y. Supp. 822 (Surr. Ct. 1934); Hassell v. Pruner, 286 S.W.2d 266 (Tex. Civ. App. 1956); Atkinson, Wills 545 (2d ed. 1953).

69. *In re* Arnold's Estate, 16 Cal. 2d 573, 107 P.2d 25 (1940); *In re* Jamison's Estate, 249 P.2d 859 (Cal. App. 1952), *aff'd* on this issue, 41 Cal. 2d 1, 256 P.2d 984 (1953); Shevlin v. Jackson, 5 Ill. 2d 43, 124 N.E.2d 895 (1955); Arbogast v. MacMillan, 221 Md. 516, 158 A.2d 97 (1960); Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928); *In re* Bottger's Estate, 14 Wash. 2d 676, 129 P.2d 518 (1942). See Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 Texas L. Rev. 1, 23-25 (1957).

70. Estate of Gecht, 165 Cal. App. 2d 431, 331 P.2d 1019 (Dist. Ct. App. 1958); *In re* Jamison's Estate, *supra* note 69; Arbogast v. MacMillan, 221 Md. 516, 158 A.2d 97 (1960). See also *In re* Davis' Will, 29 Misc. 2d 60, 217 N.Y.S.2d 749 (Surr. Ct. 1961).

71. McElhinney v. Kelly, 67 N.M. 399, 356 P.2d 113 (1960).

fraud, the contesting party becomes the plaintiff in a new action and has the burden of proof.[72]

The time at issue is, of course, the very time of executing the will. But to prove mental condition at that time, condition before and after is relevant and admissible.[73]

IV
UNDUE INFLUENCE

A will may be held invalid if obtained by a domineering relative or friend who took advantage of a weak-willed person by deception, threat, or suggestion. Many aged persons, particularly if they have throughout their lives been rather dependent by nature, develop a childish dependence as they grow senile, and fall easy prey to flattery and suggestion. Others may acquiesce because they are ill, weak, and lonely, and no longer have the physical and emotional stamina to cope with the importuning of those around them.

The issue of undue influence is raised along with that of mental incompetency in a large percentage of the cases, and the two are often closely interwoven in the trial.[74] Juries seem to be quick to upset wills in such cases on either or both of these grounds.[75]

CONCLUSION

The difficulty of applying the broad criteria of competency has led to inconsistent results. Such factors as eccentricities and idiosyncracies, old age, and physical disabilities have been given varying weight by the courts.[76]

Flexibility in applying the criteria is perhaps desirable, but it has

72. *In re* Owens' Estate, 63 N.M. 263, 316 P.2d 1077 (1957).

73. *In re* Fosselman's Estate, 48 Cal. 2d 179, 308 P.2d 336 (1957); *In re* Lingenfelter's Estate, 38 Cal. 2d 571, 241 P.2d 990 (1952); Greene v. Watts, 332 S.W.2d 419 (Tex. Civ. App. 1960); Smith v. Welch, 285 S.W.2d 823 (Tex. Civ. App. 1955).

74. See, *e.g.*, *In re* Jamison's Estate, 249 P.2d 859 (Cal. App. 1952), *rev'd*, 41 Cal. 2d 1, 256 P.2d 984 (1953); *In re* Lingenfelter's Estate, 234 P.2d 125 (Cal. App. 1951), *rev'd*, 38 Cal. 2d 571, 241 P.2d 990 (1952); Arbogast v. McMillan, 221 Md. 516, 158 A.2d 97 (1960); Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965); McElhinney v. Kelly, 67 N.M. 399, 356 P.2d 113 (1960); *In re* Owens' Estate, 63 N.M. 263, 316 P.2d 1077 (1957); Calloway v. Miller, 58 N.M. 124, 266 P.2d 365 (1954).

75. A California study concluded that juries found for the contestants in more than seventy-five per cent of such cases. "Indeed, the tendency of juries in this respect is so pronounced that it has been said to be a proper subject of judicial notice." Note, 6 Stan. L. Rev. 91, 92 (1953). Thus the Illinois court has taken judicial notice of the tendency of juries to look for an excuse to hold invalid a will making unequal division among the testator's children. DeMarco v. McGill, 402 Ill. 46, 83 N.E.2d 313 (1949).

76. Epstein, *supra* note 63, at 239.

been suggested that courts have used the concept of incompetency as a cloak for substituting their own ideas of fairness or unfairness for the wishes of testators.[77] To avoid this, it has been suggested that states enact "family maintenance" legislation, as exists in Australia, New Zealand, England, and some Canadian provinces, allowing disappointed heirs to contest the fairness of the disposition overtly, instead of having to contend that the testator was mentally incompetent. The court is allowed to exercise its discretion in providing for certain classes of persons for whose maintenance the will makes either no provision or inadequate provision. Such legislation would perhaps reduce the temptation to use "incompetency" as a device to set aside wills that are "shocking to the judicial subconscious."[78]

77. Szasz, Law, Liberty and Psychiatry 72 (1963).
78. Epstein, *supra* note 63, at 249-58.