

Volume 39 | Issue 2

---

1989

# Contractual and Donative Capacity

Alexander M. Meiklejohn

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 Case W. Res. L. Rev. 307 (1988-1989)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol39/iss2/3>

This Featured is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CONTRACTUAL AND DONATIVE  
CAPACITY

*Alexander M. Meiklejohn\**

*Under American law, only those who are mentally competent can make valid contractual and donative choices. This Article analyzes the theoretical implications of the capacity doctrine, examining both the views of the earlier commentators and the recent cases. The author concludes that, for the most part, courts have appropriately resolved the fundamental issues that the commentators have identified.*

THE CAPACITY DOCTRINE is a cornerstone of the law of contracts and inter vivos gifts.<sup>1</sup> The doctrine — like those of fraud, duress, and mistake — permits courts to regulate economic behavior. All of these doctrines raise important theoretical issues.<sup>2</sup>

---

\* Associate Professor of Law, University of Bridgeport School of Law; A.B., Amherst College (1966); J.D., University of Chicago Law School (1971).

The author wishes to thank Donald Meiklejohn, John Morgan, Robert Power, Toni Robinson, Margaret Sachs, and Elyn Saks for their helpful comments on earlier drafts of this Article. John Lauterbach, Elizabeth Rogers, Roberta Schwartz, Donna Thomas, and Karen Torre provided valuable research assistance.

1. For purposes of this Article, a gift is inter vivos if, during the life of the donor, it deprives her of either the right of revocation or the use and enjoyment of the property, or both. The execution of a will, or of what Professor Langbein terms a "pure will substitute," deprives the testatrix of neither the right of revocation nor the use and enjoyment of the property. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1110-15 (1984).

2. All defenses shed light on the underlying reasons for liability. In a review of Professor Knapp's contracts casebook, Professor Klare emphasizes the moral and political implications of incapacity and related doctrines:

Knapp begins with a close inquiry into the lack-of-capacity defenses and other

Unlike other policing mechanisms,<sup>3</sup> however, the capacity doctrine requires courts to identify the abilities that are necessary for the exercise of contractual and donative choices.<sup>4</sup> In resolving capacity disputes, therefore, judges and juries focus directly on the nature of those choices in a complex society.<sup>5</sup>

With the doctrine's critical role has come controversy. As the cases continue to arise,<sup>6</sup> commentators remain divided over four

forms of defective entry into contract liability, thereby casting into bold relief the moral and political premises of contract law. Knapp's often poignant cases vividly reveal some of the ethical and social dilemmas courts confront in deciding whether to give legal effect to the apparent assent of the parties, or to upset the litigants' private arrangements.

Klare, Book Review, 54 N.Y.U. L. REV. 876, 888 (1979)(footnote omitted)(reviewing C. KNAPP, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (1976)).

3. See, e.g., A. FARNSWORTH, *CONTRACTS* §§ 4.6-.8, at 225-32 (1982)(discussing the capacity doctrine in a chapter devoted to policing mechanisms).

4. The extent to which contract liability is determined by free choice is a matter of considerable controversy. For differing accounts of the current variety of contract theories, see Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986), and Feinman, *Contract After the Fall* (Book Review), 39 STAN. L. REV. 1537, 1538-41 (1987)(reviewing H. COLLINS, *THE LAW OF CONTRACT* (1986)). For an argument that contract law derives its moral authority from consent, see Barnett, *supra*, at 296-300. For a very different theory of contract that nevertheless accords an important role to choice, see I. MACNEIL, *THE NEW SOCIAL CONTRACT* 3, 47-50 (1980).

5. This Article addresses only those choices that affect the property of alleged incompetents. It excludes, for example, medical treatment decisions and choices made in the course of criminal proceedings.

6. Medicine's ability to prolong life in the face of serious illness raises the probability that each of us will eventually suffer an impairment of capacity. Cf. Redmond, *Testamentary Capacity*, 15 BULL. AM. ACAD. PSYCHIATRY & LAW 247, 247 (1987)("As the population lives longer, people are more apt to have the kind of medical condition that might impair testamentary capacity or render them vulnerable to undue influence."). In 1979, Moses and Pope reported that there is a high probability that any individual will eventually suffer a disability that creates asset management problems:

At age twenty, 789 persons out of 1000 can expect to suffer a disability of ninety days or more at some time during their lives. At age forty, 635 persons out of 1000 can expect to suffer such a disability, and at age sixty, 221 persons out of 1000 can expect to suffer a disability lasting ninety days or longer.

Moses & Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C.L. REV. 511, 513 (1979)(footnote omitted).

Lawyers have developed a variety of planning devices designed to minimize the legal consequences of disability. For discussion of some of the currently available planning mechanisms, see *infra* notes 336-76 and accompanying text. Yet few people have both the foresight and the resources to plan perfectly, and protective arrangements inevitably restrict liberty. E.g., Friedman & Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 276 (1988)("The consequences of conservatorship are profound. For the ward, it is a passage into a degraded status. A ward is not fully competent at law."). The least restrictive device is probably the durable power of attorney. See *infra* notes 339-40 and accompanying text. Even that device, however, involves the exercise of control by the holder of the power over some or all of the property of the incompetent.

fundamental problems. The first concerns psychiatric opinion evidence of mental illness. The Restatement (Second) of Contracts invites psychiatric testimony by providing that mental illness can be a basis for avoidance of contract liability.<sup>7</sup> Yet presumably the standard must be legal rather than medical;<sup>8</sup> judges and juries must not delegate to psychiatrists the task of assessing capacity.

The second problem involves the role of substantive fairness.<sup>9</sup> The fairness of a transaction is arguably relevant to, or even dispositive of, the issue of capacity. Under the Restatement, for example, entry into a fair transaction may indicate capacity, whereas entry into an unfair transaction may indicate incapacity.<sup>10</sup> Yet admitting evidence of fairness on the issue of capacity invites judges and juries to substitute their values for those of the alleged incompetent.<sup>11</sup> An alternative view, therefore, is that sub-

Capacity cases will, therefore, continue to arise. Transactions involving AIDS patients, for example, will undoubtedly contribute to the volume of future litigation. Cf. Dintzer, *The Effect of Acquired Immune Deficiency Syndrome (AIDS) on Testamentary Capacity*, 8 PROB. L.J. 157, 157-59 (1988)(citing Johnson, *AIDS Victims' Wills Under Attack*, N.Y. Times, Feb. 19, 1987, at B1, col. 2).

7. RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1979). The Restatement view is discussed *infra* text accompanying notes 187-202.

8. Cf. H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 37-52 (1972). Professor Fingarette cites, as an example of a legal as opposed to a medical standard, the standard of adequate vision for driving purposes:

Given [a variety] of grounds for defining inadequate vision in one way or another, the authority to establish the definition for, let us say, the purposes of the motor vehicle bureau is in effect the authority to resolve a policy question, not merely the ability to discover a matter of medical fact. The policy decision calls for an evaluation and synthesis, or at least a compromise, involving medical, legal, occupational, and other issues. Neither the oculist nor the traffic engineer alone is competent or authorized to decide the issue, although both can present expert testimony to be used in reaching such a decision. The decision itself must derive from an authoritative interpretation of public policy in the light of the technical information. The definition is in this sense a governmental one, not a medical one.

*Id.* at 39.

9. See Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Professor Leff distinguishes between procedural and substantive fairness. The former is an attribute of the bargaining process and the latter characterizes the resulting agreement. *Id.* at 487. Capacity is, in Leff's terminology, clearly a procedural concept. To say that a party to a transaction is competent is to describe bargaining ability, but not to describe the fairness of any given bargain. On the other hand, to say that a party made a favorable bargain is not necessarily to describe the party's bargaining strength.

For discussion of the distinction between substantive and procedural fairness in connection with Professor Eisenberg's reconceptualization of contract law, see *infra* note 146.

10. See *infra* note 208.

11. The terms "incompetence" and "incapacity" are used interchangeably throughout this Article. Unless otherwise specified, the terms denote only a lack of the requisite

stantive fairness should be irrelevant to capacity.<sup>12</sup> Even under that view, however, fairness may bear on the issue of whether enforcement is appropriate regardless of the alleged incompetent's condition. For example, a court should arguably enforce a transaction against an incompetent if the transaction is fair and the competent party performed without knowledge of the incompetence.<sup>13</sup>

The third problem concerns the role of social context. Traditional contract doctrine is unresponsive to differences among social contexts. As Professor Grant Gilmore put it, "we feel instinctively that commercial law is the heart of [contracts] and that, the need arising, the commercial rules can be applied over, with whatever degree of disingenuity may be required, to fit, for example, the case of King Lear and his unruly daughters."<sup>14</sup> Yet contextual analysis holds the promise of a more sensitive and coherent capacity doctrine.

The fourth problem involves the effect of protective arrangements. Under some statutes, the appointment of a guardian or a conservator renders the ward incompetent as a matter of law. Under other statutes, the appointment merely generates a presumption that the ward is incompetent. An alternative rule is that the appointment has no effect on the ward's capacity.<sup>15</sup>

This Article addresses these problems and reaches the following conclusions: (1) the capacity doctrine is fundamentally sound and does not produce undue deference to psychiatric testimony,

---

ability to enter into particular transactions, rather than the general disability that has traditionally been the basis for guardianship proceedings.

12. Cf. Comment, *A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity*, 2 CONN. L. REV. 616 (1970).

13. See *infra* note 222.

14. G. GILMORE, *THE DEATH OF CONTRACT* 8 (1974). Painting with what he acknowledged to be a broad brush, *id.* at 105 n.1, Gilmore criticized those who advocated too great a role for social context — who urged that legal scholars should "engage in sociological analysis rather than in historical or philosophical synthesis." *Id.* at 3. In the years since the publication of *The Death of Contract*, the proper role of social context in the law of contracts generally has remained the subject of considerable controversy. For a brief argument in favor of an empirical, as opposed to an abstract, approach to contract, see Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465. For an historical "contextualization" of the contract law of Wisconsin, see L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965). Professor Friedman offers observations concerning the relationship between legal scholarship and social science generally in Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

15. See *infra* notes 336-76 and accompanying text.

(2) substantive fairness should be relevant to but not dispositive of the issue of capacity, and may also bear independently on the appropriateness of enforcement, (3) courts must be responsive to social context throughout their analysis, and (4) a judicial declaration of incompetence and the appointment of a guardian or conservator should create at most a presumption of incapacity at any later date.

These conclusions clash in significant respects with those of other commentators. Writers who address the problems directly include Dean Milton Green, Dean George Alexander, and Professor Thomas Szasz.<sup>16</sup> Professor Melvin Eisenberg addresses the problems indirectly by proposing a reconceptualization of contract law that has important implications for the capacity doctrine. Part I of this Article analyzes the contributions of these commentators. Part II demonstrates that the recent cases support the Article's conclusions rather than the commentators' opposing views.<sup>17</sup>

## I. THE COMMENTARY

Although the issue of capacity is largely factual,<sup>18</sup> the commentary is highly abstract. A representative case therefore pro-

---

16. Professors Anthony Kronman and Henry Weihofen also address the doctrine. See Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Weihofen, *Mental Incompetency to Contract or Convey*, 39 S. CAL. L. REV. 211 (1966). Kronman proposes a conception of capacity but focuses on the contracts of minors rather than on adult incapacity. For discussion of his theory, see *infra* notes 87-90 and accompanying text. Weihofen endorses Green's views in most respects but disagrees as to the consequences of guardianship. For discussion of Weihofen's views on guardianship, see *infra* notes 108-10 and accompanying text.

17. The Article focuses on the reported cases decided since 1960. These cases, of course, probably represent only a small fraction of the total volume of recent capacity litigation; a comprehensive study of the doctrine as applied would include both the unreported decisions and the disputes that are settled before trial. Moreover, in some instances reported cases provide so little information about the alleged incompetent that it is not possible to determine what prompted the court's resolution of the issue of capacity, much less to make an independent assessment of the party's condition. The appellate opinions nevertheless provide many examples of stories told by judges to justify their conclusions regarding capacity. Those stories can assist lawyers in predicting the outcomes of capacity disputes, as well as courts in deciding capacity cases.

18. In many appellate cases the question is whether there is sufficient evidence to support the trial court's findings on the issue of capacity. See, e.g., *Gaston v. Bruton*, 358 S.W.2d 207, 212 (Tex. Civ. App. 1962). In *Peterein v. Peterein*, the Missouri Supreme Court emphasized the factual nature of the issue: "We have read the cases cited in the briefs but they are of little value because each case, of necessity, must be decided upon its own facts, and we rarely find two cases where the facts are even substantially the same." *Peterein v. Peterein*, 480 S.W.2d 809, 814 (Mo. 1966).

vides a useful focus for a discussion of the commentators' contributions. In *Simmons First National Bank v. Luzader*,<sup>19</sup> Dewey Luzader and his wife Anna Pearl Luzader entered into a contract with Dewey Luzader's uncle, N. F. Yarbrough. The contract provided that if the Luzaders gave Yarbrough a home for the remainder of his life they would receive \$12,000 upon his death.<sup>20</sup>

Yarbrough was eighty-four years old when the parties entered into the agreement, and his wife had died three days earlier.<sup>21</sup> For many years, he had hoped to live with the Luzaders after his wife's death.<sup>22</sup> He moved in with them three days after his wife's funeral and they began to care for him.<sup>23</sup> Among other things, they bathed and dressed him. After a time, he "lost control of his bodily functions," which caused considerable inconvenience. Mrs. Luzader testified that he was "happy in the home, but embarrassed."<sup>24</sup>

After several weeks, Mr. Luzader petitioned the Probate Court for a determination that Yarbrough was incompetent by reason of senility and old age, requesting that the court appoint a guardian for him.<sup>25</sup> The court appointed Simmons First National Bank as his guardian and also awarded the Luzaders \$150 per month for their services.<sup>26</sup> Yarbrough contributed an additional \$150 per month during part of the time he spent with them.<sup>27</sup>

Yarbrough's niece, Connie Haner, testified that he had trouble remembering some things and did not know how much money he had. Hattie Blaser, an officer of a savings and loan association in which he maintained accounts, saw him the day after his wife died and two days before he signed the agreement. Yarbrough told Blaser that he wanted to transfer his funds to his brother's account. She believed he neither understood the effect of the transfer nor knew the amount of his savings. She also thought that for the past two years he had been incapable of transacting business.<sup>28</sup> Yarbrough died approximately nine months after the

---

19. 246 Ark. 302, 438 S.W.2d 25 (1969).

20. *Id.* at 302, 438 S.W.2d at 26.

21. *Id.*

22. *Id.*

23. *Id.* at 307-08, 438 S.W.2d at 29.

24. *Id.*

25. *Id.* at 304, 438 S.W.2d at 27.

26. *Id.*

27. Yarbrough's pension was the source of the additional \$150. *Id.* at 308, 438 S.W.2d at 29.

28. *Id.* at 307, 438 S.W.2d at 28.

bank's appointment as guardian.<sup>29</sup> After he died, the Probate Court allowed the Luzaders' claim for \$12,000, and the bank, as administrator, appealed.<sup>30</sup>

The Arkansas Supreme Court held that the bank had not demonstrated that Yarbrough was incompetent.<sup>31</sup> The court found unimportant his failure to understand "the result of a joint account," his lack of awareness of the extent of his savings, his unfamiliarity with matters of business, and his difficulty in recalling details.<sup>32</sup> Moreover, the opinion emphasized that none of the evidence of incapacity related specifically to the day the parties executed the contract, and that there was no medical testimony that Yarbrough was incompetent.<sup>33</sup> The court concluded with the observation that Yarbrough had long hoped for the arrangement,<sup>34</sup> and that it was by no means inappropriate in light of his family situation:

Let it be remembered that this is not a case where a man is depriving his wife or children of needed monies — this is not a case where loved ones are cast aside for strangers. To the contrary, all heirs are collateral heirs, none of whom, from the record, had anything to do with helping Yarbrough accumulate his savings. Nor does it appear that the other relatives were anxious to take care of this aged man. Also, the Luzaders are not receiving all of his money; in fact, including the amount allowed by the Probate Court, they will be receiving but little more than one-fourth of the estate.<sup>35</sup>

Thus Yarbrough's relationships with the Luzaders and other members of his family were relevant to, if not dispositive of, the outcome of the case.

The case confronted the court with three of the fundamental problems of capacity: the relevance of medical testimony, the role of substantive fairness, and the importance of social context. Although the court did not refer specifically to psychiatric testimony, the opinion did emphasize the absence of any medical evidence of incompetence. The court's impression that the agreement was fair probably contributed to the finding that Yarbrough had

---

29. *Id.* at 304, 438 S.W.2d at 27.

30. *Id.*

31. *Id.* at 309, 438 S.W.2d at 29.

32. *Id.*

33. *Id.* at 310-11, 438 S.W.2d at 29-30.

34. *Id.* at 311, 438 S.W.2d at 30-31.

35. *Id.* at 312, 438 S.W.2d at 31 (footnote omitted).



capacity; the substance of the contract was evidence of his ability to assess it in a competent fashion. Moreover, the court was obviously influenced by the transaction's social context — by the fact that Yarbrough contracted with members of his family with whom he had a close relationship. Had the Probate Court appointed the bank as his guardian before he entered into the agreement, the case would also have addressed the relevance of the appointment to the court's assessment of his capacity.

### A. Milton Green

Dean Green's theory of capacity has implications for the resolution of each of these problems. During the 1940s, Green published a comprehensive and authoritative series of articles<sup>36</sup> that remains the starting point for any analysis of the subject.<sup>37</sup> This Section first summarizes his argument and then critically examines his solutions to the four problems.

#### 1. Green's Theory

Green's articles constitute a classic legal realist call for explicit discussion of the judicial goals underlying the capacity doctrine. In his view, the cases inevitably present a conflict between two policies. The first is the policy of protecting incompetents and their dependents, and the second is the policy of upholding the security of transactions. The protective policy usually militates in favor of invalidating transactions entered into by incompetents, whereas the policy of upholding the security of transactions favors enforcement.<sup>38</sup> Green observes, however, that courts seldom discuss either policy; the need to protect incompetents remains the

---

36. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940) [hereinafter Green, *Public Policies*]; Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141 (1941) [hereinafter Green, *Judicial Tests*]; Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554 (1943) [hereinafter Green, *The Operative Effect*]; Green, *Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts*, 43 COLUM. L. REV. 176 (1943) [hereinafter Green, *Fraud*]; Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944) [hereinafter Green, *Proof*].

37. Green defined "contract" to include "any consensual transaction; hence, in addition to contracts in the strict sense, it includes gifts and so-called voluntary conveyances." Green, *Judicial Tests*, *supra* note 36, at 141; Green, *Proof*, *supra* note 36, at 273 n.15. Although Green does not address the point, the term presumably refers to donative promises as well.

38. Green, *Public Policies*, *supra* note 36; Green, *The Operative Effect*, *supra* note 36, at 589.

"unexpressed major premise" of the capacity doctrine.<sup>39</sup> The unfortunate result is considerable uncertainty as to the outcome in any given case.

Green maintains that courts avoid reference to policy by adopting a "subjective" standard of capacity. This standard focuses on the mental state, as opposed to the behavior,<sup>40</sup> of the alleged incompetent:

It should be emphasized, and borne in mind, that the inquiry is into the *understanding* and *memory* of the individual whose jural acts are in question; it is an attempt to probe into the inner consciousness of the author of the contract or the will; it is the degree of *his* understanding or memory which is made crucial. In short, the test is purely and wholly subjective.<sup>41</sup>

The subjective standard of capacity is consistent with the subjective theory of contracts: "A contract required the 'meeting of the minds' of two individuals, and an insane person had nothing which the law recognized as a mind. Hence, there could be no 'meeting of the minds.'"<sup>42</sup>

Green argues, however, that a subjective standard works only in cases of obvious capacity or obvious incapacity, and that few cases are obvious. In most cases, neither a court nor a jury can determine the actual state of mind of the alleged incompetent at the time of the transaction.<sup>43</sup> Moreover, he believes that the subjective theory of contracts is obsolete; courts base their decisions in contracts cases on the parties' behavior rather than on their states of mind.<sup>44</sup>

In Green's view, the law of capacity would be almost completely chaotic if the courts actually applied the subjective stan-

---

39. Green, *Proof*, *supra* note 36.

40. Green's use of the terms "subjective" and "objective" is consistent with traditional contract terminology in that both terms refer to the promisor. See, e.g., Barnett, *supra* note 4, at 300-09 (relating the subjective and objective theories of contract to a "consent" theory). Green's usage is inconsistent with traditional tort phraseology, in which "subjective" refers to a particular person and "objective" refers to the population generally. For discussion of the distinction in the tort context, see Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983).

41. Green, *Judicial Tests*, *supra* note 36, at 144 (footnote omitted).

42. *Id.* at 145.

43. Green, *Proof*, *supra* note 36, at 310 ("There are no guide posts marking the boundaries of 'understanding,' no outside limits."). Green buttresses his argument with a demonstration that there is wide variety among judicial formulations of the subjective test, and that many of the formulations are in conflict. Green, *Judicial Tests*, *supra* note 36, at 147-52.

44. Green made this argument in 1941. Green, *Judicial Tests*, *supra* note 36, at 162.

dard in all cases. He contends, however, that in most cases the subjective standard functions only as a rhetorical device. The standard that the courts actually employ is objective or "behavioral."<sup>45</sup> In most cases, the factor that is "of controlling importance"<sup>46</sup> is the substantive fairness, or "normality,"<sup>47</sup> of the transaction.<sup>48</sup> Where the transaction is fair, courts are apt to find capacity; where the transaction is unfair, courts are apt to find incapacity.<sup>49</sup>

Green believes that the objective standard generates greater certainty because the courts respond not to vague, general notions of fairness, but rather to specific and identifiable norms. He argues that the norms fall into two broad categories: those that bear on business agreements and those that relate to wills and inter vivos gifts.<sup>50</sup> Cases involving business transactions are controlled largely by the relatively simple prescription that "one should not try to overreach his neighbors, friends, and business associates."<sup>51</sup> In more technical language, inadequacy of consideration, normally relatively unimportant in contract cases,<sup>52</sup> becomes a potent factor when coupled with an allegation of incapacity.<sup>53</sup> Adequacy of consideration, by the same token, is a powerful counter to a claim of incompetence.<sup>54</sup>

Cases involving inter vivos and testamentary gifts, on the other hand, are influenced by several norms:

The mores of the United States approve of work, condemn idleness, and look askance at unearned gain; they believe that the

---

45. See Green, *Proof*, *supra* note 36.

46. *Id.* at 293.

47. *Id.*

48. Substantive fairness is by no means the only relevant factor. Green's overall scheme groups evidentiary factors under four "rather arbitrary headings." *Id.* at 275. His categories, listed in inverse order of importance, are: "(1) symptomatic conduct of the alleged incompetent; (2) opinion testimony of incompetency; (3) organic condition and habits of the alleged incompetent; (4) moral aspects of the transaction and its consequences." *Id.* The final category consists of six subcategories: "The first five in this group are the presence or absence of independent advice, a confidential or fiduciary relationship, undue influence, fraud, and secrecy. The sixth, the abnormality of the transaction, is of controlling importance." *Id.* at 293.

49. According to Green, a decision to enter an unfair transaction indicates incapacity: "if the transaction in itself is irrational, it is evidence of a disordered mind, as is any other item of irrational behavior." *Id.* at 305.

50. *Id.* at 299.

51. *Id.* at 303 (footnote omitted).

52. *Id.* at 303.

53. *Id.* at 304-05.

54. *Id.* at 303-05.

first duty of the head of a house is to provide for his family, that "charity begins at home." While they approve of voluntary gifts for public purposes where the donor is in a position to make them, improvidence is something to be condemned. Gratitude is one of the virtues, and a reward based upon merit is always commendable.<sup>55</sup>

Green does not rank these norms in order of importance. Each one is presumably of equal potential relevance in any dispute over donative capacity.

In Green's view, the objective standard of capacity is genuinely responsive to the policies of protecting both incompetents and the security of transactions. The concepts of commercial overreaching and donative improvidence, for example, both facilitate protection of incompetents. The objective standard therefore tends to produce fair results.<sup>56</sup>

Green believes, then, that the courts actually apply the proper standard of capacity. Yet he argues that as long as judges continue to employ the phraseology of the subjective test, considerable uncertainty will plague the doctrine.<sup>57</sup> Explicit discussion of relevant norms, on the other hand, will generate greater predictability and fairness.<sup>58</sup>

Green advocates only one exception to this general approach. If an alleged incompetent enters into a transaction while under active guardianship, there is no need for an inquiry into his condition. The existence of the guardianship should mean as a matter of law that the ward's action is of no legal consequence. Thus even a ward who is in fact competent is unable to bind himself contractually without first securing an order terminating the guardianship. The reason is twofold. First, the order establishing the guardianship includes a declaration that the ward is incompetent,

---

55. *Id.* at 299 (footnote omitted).

56. Green emphasizes this point:

An abnormal transaction is an unfair transaction. The standards of unfairness, in each instance, will be furnished by the mores of the community. To be actionable the unfairness must manifest itself in a transaction which is obviously out of line with the institutional pattern of similar transactions. To make such a determination all of the circumstances must be taken into account. The dominant factor in the evidence is whether the court sees the particular transaction in its result as that which a reasonably competent man might have made. This is both rational and reasonable and true to the essence of a case-law system.

*Id.* at 309.

57. *Id.* at 310.

58. *Id.* at 309.

and that order is "binding on the world."<sup>59</sup> Second, the guardian must have control over the ward's estate in order to protect it. If the ward is able to engage in effective inter vivos transactions, the guardian's control may be seriously impaired.<sup>60</sup>

## 2. Green's Solutions to the Problems of Capacity

### a. Mental Illness and Psychiatry

Green's stress on transactional fairness leads him to deemphasize psychiatric opinion evidence of incapacity.<sup>61</sup> His articles reflect the view that advances in medical science can lead courts to a more sophisticated understanding of mental disorders, and that psychiatrists, like judges, employ behavioral standards.<sup>62</sup> Yet he recognizes that the standard of capacity is legal rather than medical.<sup>63</sup> His argument implies that the debate concerning psychiatric evidence is essentially unimportant.<sup>64</sup>

### b. The Role of Substantive Fairness

Green contends that in most cases substantive fairness should be dispositive — not simply relevant — on the issue of capacity. While the fairness of the transaction should indeed be relevant to capacity,<sup>65</sup> Green's contention is vulnerable in two respects. First, it underestimates the intuitive appeal of the subjective standard. The subjective theory of contract has survived, at least in the form

---

59. Green, *The Operative Effect*, *supra* note 36, at 578. The rule does not apply to adjudicated incompetents for whom no guardians have been appointed because "mere adjudication of incompetency for the purpose of commitment to an asylum or hospital, without the appointment of a guardian, should be merely evidence of incompetency." *Id.* at 580.

60. *Id.* at 578-79.

61. Green argues that judges feel free to disregard medical opinion evidence of incapacity when it conflicts with the conclusions they have formed on the basis of transactional fairness. Green, *Proof*, *supra* note 36, at 284-86.

62. *Id.* at 306.

63. Green, *Judicial Tests*, *supra* note 36, at 146.

64. Green's resolution of the first problem thus depends upon the success of his argument with respect to substantive fairness. Because the latter is flawed, see *infra* notes 65-74 and accompanying text, the first problem remains. For further discussion of the role of psychiatric testimony, see *infra* notes 111-18 and accompanying text (analyzing the views of Alexander and Szasz).

65. Cf. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 77 (1978) ("Attaching the will [to a petition for living probate] . . . is essential. The standard of the substantive law is testamentary capacity not in the abstract, but in the context of the particular testamentary disposition."); *but cf.* Comment, *supra* note 12, at 616 (nature of disposition should be inadmissible in litigation over testamentary capacity).

of judicial rhetoric,<sup>66</sup> and references to intention are no more likely to disappear from the capacity cases than from daily life.<sup>67</sup> Indeed, Green himself adopts the subjective theory in one respect by assigning legal consequences to the state of mind of the party who deals with an alleged incompetent.<sup>68</sup>

Second, Green's study is based almost entirely on appellate cases, which, as a group, should represent the most debatable of the capacity disputes. The cases that never come to trial and those that are tried and not appealed probably provide many examples of either obvious capacity or obvious incapacity.<sup>69</sup> And Green acknowledges that the subjective standard functions adequately ex-

66. Professor Corbin argues that the objective theory is "based upon a great illusion — the illusion that words, either singly or in combination, have a 'meaning' that is independent of the persons who use them." The cases, he writes, do not demonstrate the demise of the subjective theory. A. CORBIN, *CORBIN ON CONTRACTS* § 106, at 474 (1963).

For a recent account of the continuing tension between the subjective and objective theories, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1039-66 (1985). Professor Dalton points out that the tension is reflected in the alternately subjective and objective phraseology of the *RESTATEMENT (SECOND) OF CONTRACTS* (1979). *Id.*

Eisenberg emphasizes the role of intentions:

Contract is a social institution before it is a legal institution, and the rules of contract law must respond to the social institution, not to autonomous legal conventions. Because the social institution is designed to facilitate the advancement of individual objectives, contract law must be designed to deal with acts that often cannot even be properly described unless intentions are taken into account.

Eisenberg, *The Responsive Model of Contract Law*, 36 *STAN. L. REV.* 1107, 1109 (1984).

Professor Farnsworth believes, however, that in general the courts now employ an objective approach. A. FARNSWORTH, *supra* note 3, § 3.6, at 113-16.

67. The psychologist Jerome Bruner contends that narrative, one of the two basic modes of human thought, "deals with the vicissitudes of human intentions." J. BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 16 (1986). He elaborates as follows:

[O]ne can make a strong argument for the irreducible nature of the concept of intention (much as Kant did for the concept of causation). That is to say, intention is immediately and intuitively recognizable: it seems to require for its recognition no complex or sophisticated interpretive act on the part of the beholder.

The evidence for such a claim is compelling.

*Id.* at 17.

68. Green endorses the view that the contract of an incompetent who is not under guardianship should, as a general matter, be voidable by the incompetent but not by the other party. Yet he advocates enforcement despite the general rule in cases in which circumstances render avoidance unjust. One circumstance that militates in favor of enforcement is the other party's lack of awareness of the incompetent's condition. Green, *The Operative Effect*, *supra* note 36, at 575-76.

69. Only a study of disputes that do not reach the appellate level could prove this point. Moreover, the cases Green cites may support his view of the role of substantive fairness at the appellate level. In the reported cases decided since 1960, however, fairness is unquestionably relevant but by no means dispositive. See *infra* notes 208-21 and accompanying text.

cept where the issue of capacity is debatable.<sup>70</sup>

Green's willingness to accord fairness a dispositive role on the issue of capacity may reflect a failure to consider other potential bases for decision in the capacity cases. A court that wishes to uphold a fair transaction may be able to do so legitimately even if one party was incompetent, either on the basis of ratification<sup>71</sup> or as a result of a good faith change of position by the other party.<sup>72</sup> Even if the court does not enforce the transaction according to its terms, it may be able to accomplish the same result by holding the incompetent liable for the reasonable value of necessities furnished by the competent party. For example, in *Simmons First National Bank v. Luzader*, the bank may have ratified the contract and the Luzaders almost certainly furnished necessities.<sup>73</sup> Moreover, a court that wishes to invalidate an unfair transaction may be able to do so on the basis of fraud or undue influence<sup>74</sup> even if the evidence does not justify a finding of incapacity.

### c. The Role of Social Context

Although Green assigns an unduly important role to substantive fairness, his articles present a forceful argument in favor of the relevance of social context in capacity cases. Yet his account of the role of context stops short of its logical conclusion in two respects. The first relates to fairness and the second to the concept of capacity itself.

---

70. See *supra* text accompanying note 43.

71. See, e.g., *Sawtelle v. Tatone*, 105 N.H. 398, 403, 201 A.2d 111, 115 (1964)(ratification by incompetent's sister, acting first as guardian and then as administratrix of estate); *Weihofen*, *supra* note 16, at 232-34.

72. See *infra* note 222.

73. If the bank knew of the arrangement, its failure to object while the Luzaders provided services probably constituted ratification. Even in the absence of ratification, the fact that the Luzaders performed would militate in favor of enforcement. Their awareness of Yarbrough's condition, however, constitutes a serious obstacle to a recovery on the agreement. See *infra* note 222.

The Luzaders were undoubtedly entitled to recover in quasi contract for the value of the necessary services they furnished over and above the amount that they received from Yarbrough and from the bank in its capacity as guardian. See, e.g., Green, *The Operative Effect*, *supra* note 36, at 562; *Weihofen*, *supra* note 16, at 238; Comment, *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1020, 1089-91 (1959).

For thoughts relating to ratification and the effect of good faith performance in the context of agency law, see Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 IND. L.J. 115, 134-45 (1986).

74. See, e.g., *Geiger v. Palmer*, 249 Or. 123, 437 P.2d 750 (1968). Undue influence and incapacity are, however, analytically continuous in some respects. See *infra* notes 288-308 and accompanying text.

## i. Fairness

Green's fundamental thrust is that courts should respond to norms of fairness rather than to such formalistic notions as the subjective standard of capacity. Yet he includes a formalistic element in his own structure by relating one set of norms to business agreements and another to gifts.<sup>75</sup> As the agreement between Yarbrough and the Luzaders demonstrates, the distinction is unduly rigid — not every transaction fits into one of those categories. Green's phraseology suggests that the agreement was a business transaction and thus subject to the norm that proscribes overreaching;<sup>76</sup> yet the close relationship between the parties probably helped to persuade the court that the contract was fair. Indeed, an amount in excess of \$12,000 would have been fair if the Luzaders had furnished substantial goods or services to Yarbrough in the past.<sup>77</sup> As Green put it, "[g]ratitude is one of the virtues, and a reward based upon merit is always commendable."<sup>78</sup> Since no contract comes into being in a social vacuum,<sup>79</sup> norms that govern

75. Green, *Proof*, *supra* note 36, at 299-305.

76. The norm applies to transactions between "neighbors, friends, and business associates." Green, *Proof*, *supra* note 36, at 303.

77. Where the transaction is contractual in form, there are, of course, doctrinal obstacles to this approach. The principal source of difficulty is the consideration requirement. At least two aspects of the requirement create potential barriers to judicial sensitivity to relational factors. First, as Professor Shultz observes, courts have traditionally been reluctant to accord to noneconomic factors the status of consideration. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 297-300 (1982). Although she believes that this barrier is crumbling, Shultz does not describe the process of disintegration as complete. *Id.* Thus Yarbrough's affection for and gratitude to the Luzaders might not function as part of the consideration for his promise.

Second, benefits of any kind that are furnished before the parties enter into the transaction may run afoul of the past consideration rule. Professor Patterson advocates enforcement of promises supported by past consideration where the consideration "was part of an agreed exchange at the time when it was conferred," or, in effect, where the transaction was commercial. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 954-55 (1958). He regards enforcement as inappropriate, however, where the promise for past consideration was "gratitude-motivated," or essentially where the transaction was social. *Id.*

Farnsworth indicates that, as of 1982, the past consideration rule was extant, but whether it would govern in any given case was uncertain. A. FARNSWORTH, *supra* note 3, §§ 2.7-.8, at 50-59 (1982).

Despite these obstacles, however, the *Luzader* court clearly considered the relationship between Yarbrough and the Luzaders to be relevant to the outcome of the dispute.

78. Green, *Proof*, *supra* note 36, at 299.

79. See, e.g., I. MACNEIL, *supra* note 4, at 11; see also Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 798 n.11 (1983) ("There appears to be no discussion of the possibility that persons can be totally self-sufficient, except in economic literature and in *Robinson Crusoe*.").



human relationships are likely to bear on the fairness of many transactions that are not cast as donations.

In addition, the proscription of overreaching that Green relates to business agreements may apply to gifts as well. The concept of a gift as a reward based upon merit underscores this point. If the Luzaders had furnished goods and services to Yarbrough for many years and he had then given them \$12,000 out of gratitude, both the motive and the form of the transfer would have been donative in a traditional sense. Yet the transaction would have been part of an ongoing process of economic exchange between the parties.<sup>80</sup> And economic exchange is traditionally cognizable under the rubric of contract rather than gift.<sup>81</sup> This suggests that the norms that prescribe appropriate contractual behavior would have some bearing on the transaction. If \$12,000 greatly exceeded the value of the goods and services, for example, the payment might be unfair. Green's distinction between donative transfers and business agreements for purposes of normative analysis thus represents a surprisingly artificial holdover of the traditional approach.<sup>82</sup>

Green fails, moreover, to make explicit the consequence for fairness analysis of a fiduciary relationship between the parties to the transaction.<sup>83</sup> Transactions between fiduciaries and "entrustors"<sup>84</sup> may be subject to an elevated standard of substantive fairness.<sup>85</sup> If the entrustor seeks to invalidate the transaction on the

---

80. See Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989)(anthropologists, sociologists, and psychologists view gifts as exchanges).

81. See, e.g., A. FARNSWORTH, *supra* note 3, § 2.5, at 46-48 (absence of exchange underlies general rule that gratuitous promises are unenforceable); Shultz, *supra* note 77, at 217 ("The concept of bargain or exchange is the hub of the contract wheel, the transaction type that most clearly justifies a state choice to defer to private ordering while giving access to public enforcement.").

82. The recent cases do fall into categories consisting of business agreements, transactions between parties to close relationships, and dealings between fiduciaries and entrustors. See *infra* notes 227-335 and accompanying text. For a definition of the term "entrustor," see *infra* note 84. The categories, however, are by no means intended to serve as doctrinal compartments. See *infra* text following note 335.

83. Green notes that a fiduciary relationship may be relevant to an assessment of transactional fairness but does not develop the point. See Green, *Proof*, *supra* note 36, at 296-97.

84. An "entrustor," in Professor Tamar Frankel's terminology, is a party to whom a fiduciary obligation runs, whether or not that party participated in the creation of the fiduciary relation. Frankel, *supra* note 79, at 800 n.17.

85. Frankel points out that any fiduciary relation involves the risk that the fiduciary will abuse delegated power. She lays the groundwork for a body of "fiduciary law" whose central purpose is to protect entrustors against breaches of trust. *Id.* at 808-16. An elevated

basis of incapacity, the court should assess substantive fairness by reference to the higher standard.

## ii. Capacity

Green also fails to recognize that social context has important implications for the concept of capacity itself. In a sense, of course, his rejection of the subjective standard implies that there is no such concept. The capacity doctrine consists, in his view, of a collection of cases in which more or less random evidence of incapacity combines with coherent evidence of substantive fairness to produce at least somewhat predictable results. Yet his identification of relevant norms suggests that the evidence of incapacity is not entirely random, since different social contexts call upon different abilities. The traditional standard of contractual capacity is geared to business agreements.<sup>86</sup> A contract that takes place in the context of a close relationship, however, implicates abilities that are foreign to impersonal commercial transactions. Moreover, in a transaction between a fiduciary and an entrustor, a court may appropriately require a high degree of understanding on the entrustor's part. The concept of capacity must, therefore, be responsive to both close relationships and fiduciary relations.

### (A) Close Relationships

A transaction between parties to a close relationship calls upon each party's ability to relate to the other in an appropriate fashion — each party's relational capacity. Although courts have not recognized the concept of relational capacity in an explicit fashion, it is implicit in one feature of the traditional capacity doctrine.

One explanation of the concept of relational capacity begins with substantive fairness: if a relationship affects the fairness of a transaction, then capacity includes the ability to perceive the nature of the relationship. The transaction between Yarbrough and the Luzaders was fair in light of their relationship, and an important component of Yarbrough's capacity was his ability to assess

---

standard of fairness is clearly designed to serve that purpose. *Id.* at 819 n.75. See also Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 748 (1982) ("off-market contracts between a beneficiary and his trustee or between a fiduciary and his corporation are customarily subject to review for objective fairness").

86. The question is whether the alleged incompetent was capable of protecting her own interests. See *infra* notes 228-33 and accompanying text.

the relationship with some degree of sensitivity.

This explanation finds support in a conception of capacity proposed by Professor Anthony Kronman. For Kronman, capacity is the ability to exercise judgment.<sup>87</sup>

Judgment is . . . best thought of as the faculty of moral imagination, the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effect on one's character. A person has good judgment if this faculty is developed and strong, poor judgment if it is not.<sup>88</sup>

To anticipate a transaction's effect on one's character is, at a minimum, to appreciate its relation to the norms that bear on its fairness — to recognize its normality or abnormality.<sup>89</sup> If a transaction takes place in the context of a close relationship, then moral imagination incorporates sensitivity to the relationship. Yarbrough knew he would enjoy living with the Luzaders both for the sake of their company and because he could count on them to take good care of him despite the stress that his declining health was likely to create.<sup>90</sup>

87. Kronman does not discuss the doctrine of adult incapacity in any detail. He argues, however, that the law permits children and adult incompetents to avoid contracts on the basis of impaired judgment. Kronman, *supra* note 16, at 788-89.

88. *Id.* at 790 (footnote omitted).

89. This does not mean, of course, that a promisor or donor must adhere to every norm that bears on a particular transaction. Given Green's account of relevant norms, however, the faculty of judgment is the ability to evaluate a proposed contract or gift in relation to those norms, as well as in light of any conflicting personal values. Kronman explains as follows:

When a person is considering a particular course of action, he may ask a variety of questions regarding its moral acceptability. Is it permitted (is the action consistent with his moral and legal obligations)? Does the action conform with his personal ideals? What effect is it likely to have on his character (will the action change him and if so, in a direction he approves)? To answer these questions, he must construct a mental image of the action and, then, with this image as an aid, attempt to determine the moral effects the action is likely to have.

*Id.* at 791 (footnote omitted).

90. To treat sensitivity to human relationships as a relevant factor is not necessarily to describe a high standard of ability. Read casually, Kronman's account does suggest that capacity consists of a range of abilities and a level of skill that few, if any, possess. Yet that reading is erroneous; Kronman does not address the issue of the degree of impairment of judgment that justifies a finding of adult incapacity.

Nor does Kronman's argument imply that relational faculties are solely affective. He notes with respect to moral imagination generally that "a free imagination is possible only if we have first given it the space it requires by distancing ourselves from our own desires." *Id.* at 793. In order to understand the fairness of the transaction, Yarbrough needed to see the situation from the Luzaders' point of view as well as his own.

A different explanation of relational capacity sees a contract or gift as, under some circumstances, an exercise of relational ability.<sup>91</sup> The transaction may permit the parties to continue a close relationship with a sense of contribution and fair dealing on both sides. Yarbrough was, as the court put it, "quite devoted" to the Luzaders.<sup>92</sup> The agreement probably enabled him to live with them without feeling unduly indebted or burdensome. It thus represented an exercise of his capacity to carry on the relationship.

The two explanations simply reflect different perspectives; Yarbrough needed both to assess the agreement and to carry on the relationship. The transaction represented one element in his ongoing interaction with the Luzaders, and as such it implicated both relational and other<sup>93</sup> faculties.

The feature of the traditional doctrine that implicitly recognizes the concept of relational capacity is the notion of different levels of ability for contracts and wills. As Green observes, some courts state that the standard of contractual capacity is higher than the standard of testamentary capacity.<sup>94</sup> The basis of the distinction is probably a shared intuition that, in general, relationships have more to do with wills than with contracts.

Professor Erik Erikson's theory of the life cycle illuminates this shared intuition. The cycle consists of stages that Erikson defines largely in relational terms:

Personality can be said to develop according to steps predetermined in the human organism's readiness to be driven toward, to be aware of, and to interact with, a widening social radius, beginning with the dim image of a mother and ending with mankind, or at any rate that segment of mankind which 'counts' in the particular individual's life.<sup>95</sup>

The circle widens in childhood to include first parental persons,

---

91. The term "relational ability" might, of course, refer to the capacity to engage in any kind of continuing relation. As used in this Article, however, the term refers only to the ability to carry on personal relationships. For thoughts concerning a wider theory of relational contract, see MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

92. *Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 311, 438 S.W.2d 25, 30 (1969).

93. Yarbrough understood, for example, that the arrangement kept him out of a nursing home. *Id.* at 308, 438 S.W.2d at 29. For discussion of a case in which relational considerations were probably even more important than in *Luzader*, see *infra* notes 247-62 and accompanying text.

94. Green, *Judicial Tests*, *supra* note 36, at 158-59.

95. E. ERIKSON, *IDENTITY AND THE LIFE CYCLE* 54 (1980).

then "basic family," then neighbors, teachers, and other school-children. It later encompasses peer groups, and then expands farther to take in those with whom the young adult cooperates and competes in the world of work.<sup>96</sup> In old age, the circle may contract to complete the cycle; the human interaction may encompass only those who "count" in the individual's life.<sup>97</sup> In Yarbrough's case, for example, the circle presumably narrowed to the point where it included only the Luzaders and a few others. Testamentary capacity is no more than the ability to understand one's property and situation *vis-a-vis* those who are within the narrowed radius. It centers on basic relational abilities that formerly served as the foundation for "higher" business skills.<sup>98</sup>

The notion of a higher level of capacity for contracts than for wills is problematic, both as a matter of common sense<sup>99</sup> and in

96. *Id.* at app., Worksheet, col. B.

97. *Id.* at 54.

98. An image of a narrower radius is, of course, not the same as an image of a "lower" level of capacity; nor is an image of widening the same as one of increasing height. Yet in Erikson's view the process whereby the widening in youth takes place involves "successive stages of increasing capacity." *Id.* at 53. The first stage in an infant's growth, for example, involves the development of a sense of "basic trust." *Id.* at 57-58. That sense is the "cornerstone of a healthy personality" — the foundation on which all other faculties rest. *Id.* at 58.

The court's rhetoric in *Terry v. Buffington* associates social radius with levels of capacity:

This, by way of illustration, we will designate as the morning dawn of reason, or the break of day of the mind, in legal contemplation. It continues to unfold and expand until it culminates to the meridian blaze of noon, when no suspicion is entertained of the competency and freedom to act of the testator. It then begins to go down until its disk disappears beneath the horizon. Still, there is the mellow glow of twilight, by which the testator is enabled to comprehend the contents of his will — the nature of the estate he is conveying to his family connexion — their relative situation to him — the terms upon which he stands with them — his own situation, and the circumstances which surround him. These and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age, or other causes, are still contemplated, not by the flashy, fitful and evanescent glare of the *aurora borealis*; but the steady, though subdued light and illumination of the "glorious king of day," although disrobed of his gorgeous and dazzling beams. The *animus testandi*, the soul of a will, animates the form of the instrument which he has executed.

*Terry v. Buffington*, 11 Ga. 337, 345 (1852).

The testator sees dimly and not very far. He perceives his property and his family and comprehends the relation between the two, but, the court implies, does not see beyond into the world of business. Earlier in his life he could see much farther — he was much more capable — but the vision he retains is enough to enable him to execute a valid will.

99. Many estate plans are highly complex, either because they relate to extensive and varied property holdings or because of tax considerations, or for both reasons. Many contracts, on the other hand, are both easy to comprehend and economically trivial. More-

light of Erikson's theory.<sup>100</sup> Yet the distinction suggests that courts are indeed responsive to a shared perception that transactional capacity at times incorporates relational faculties.

### (B) Fiduciary Relations

The connection between the capacity doctrine and the law of fiduciary relations grows out of the rule that a transaction between a fiduciary and an entrustor is enforceable only if the entrustor consented on the basis of full understanding.<sup>101</sup> Since any impairment of capacity is likely to vitiate complete comprehension, entrustors should be able to establish incapacity with relative ease.<sup>102</sup>

Close personal relationships and fiduciary relations, then, have important implications for both substantive fairness and the

over, parties can and do engage in bargaining over wills as well as over contracts. Thus, neither greater complexity nor the need for strength to engage in bargaining justifies a higher standard of capacity for contracts than for wills.

100. Erikson effectively undercuts the thought, not infrequently expressed by judges, that a person who has contractual capacity must have testamentary capacity:

One of the chief misuses of the schema presented here is the connotation that the sense of trust (and all the other *positive* senses to be postulated) is an *achievement*, secured once and for all at a given stage. In fact, some writers are so intent on making an *achievement scale* out of these stages that they blithely omit all the *negative* senses (basic mistrust, etc.) which are and remain the dynamic counterpart of the positive senses throughout life . . . .

What the child acquires at a given stage is a certain *ratio* between the positive and the negative which, if the balance is toward the positive, will help him to meet later crises with a better chance for unimpaired total development. The idea that at any stage a *goodness* is achieved which is impervious to new conflicts within and changes without is a projection on child development of that success ideology which so dangerously pervades our private and public daydreams and can make us inept in the face of a heightened struggle for a meaningful existence in our time.

Only in light of man's inner division and social antagonism is a belief in his essential resourcefulness and creativity justifiable and productive.

E. ERIKSON, *supra* note 95, at 182 n.4.

101. Frankel, *supra* note 79, at 819 n.75 ("Fiduciary law protects the entrustor by obligating the fiduciary to disclose all material facts, requiring an intelligent, independent consent from the entrustor, a substantively fair arrangement, or both. If the beneficiary is unable to give such informed consent, courts may review the arrangement.")

102. The requirement of full understanding does not necessarily create a high standard of capacity. If a transaction is complex, complete comprehension will in fact demand a high level of intelligence and perhaps education. Yet a fiduciary's duty of disclosure should, in general, require simplification of any unduly complex information. Where the fiduciary complies with that obligation, the entrustor needs no more than the ability to understand the simplified information.

concept of capacity.<sup>103</sup> Although Green recognizes only some of these implications, his argument that context bears on the issue of fairness retains considerable force. Indeed, the argument in favor of contextual analysis is probably stronger today than when his articles appeared. As organizations, particularly large firms, have come to dominate the business arena,<sup>104</sup> individual incapacity has become less relevant to the enforceability of commercial contracts. Organizations that serve as financial intermediaries have probably made a particularly important contribution to this process.<sup>105</sup> At the same time, some commentators argue that contract is gaining value as a tool for structuring family and other close relationships.<sup>106</sup> In future capacity cases, sensitivity to context, and particularly to close relationships, will probably become even more important.

#### d. Guardianship

Green argues that wards should possess neither contractual nor donative capacity.<sup>107</sup> Like his distinction between donations and business agreements, his position regarding guardianships is unduly rigid and likely to produce unfair results. Professor Henry Weihofen argues forcefully that an order establishing a guardianship should do no more than create a rebuttable presumption of incapacity to enter into contracts during the course of the guardianship.<sup>108</sup> Weihofen points out that an adjudication hardly com-

---

103. There is obviously a potential for interaction between personal and fiduciary relations. For discussion of the relation between the presence of a fiduciary and other contextual factors, see *infra* notes 312-35 and accompanying text.

104. See, e.g., Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1220 (1983). Professor Rakoff argues that "[t]he development and use of contracts of adhesion represents one facet of the domination of the modern economy by business organizations," and that "[a] dominant feature in the growth of the modern business firm over the past century and a half has been the replacement of market transactions by managerial coordination." *Id.* (footnote omitted).

105. A firm that invests retirement funds, for example, makes many investments that affect each contributor. The contributor's capacity to engage in the transactions is in most instances irrelevant. Potential capacity problems are relegated to a much smaller number of transactions between the contributor and the firm. Cf. Langbein, *supra* note 65, at 67 (use of financial intermediaries may have the effect of diminishing the volume of litigation over testamentary capacity). Many of the recent capacity cases involve land and arise in rural areas where financial intermediaries probably play a less important role in the process of transmission of wealth from one generation to another.

106. See, e.g., Shultz, *supra* note 77; Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121 (1985).

107. See *supra* notes 59-60 and accompanying text.

108. Weihofen, *supra* note 16, at 211-13.

pels the conclusion that the ward is incompetent at any subsequent time<sup>109</sup> and that the status of our public records fails to justify a rule that those who deal with the ward have constructive notice of the declaration.<sup>110</sup>

### B. George Alexander and Thomas Szasz

In a 1973 article entitled "From Contract to Status via Psychiatry,"<sup>111</sup> Dean Alexander and Professor Szasz argued that mental incompetence should not be a ground for avoiding contracts:<sup>112</sup>

[W]e believe that this policy is most consistent with the traditional moral aims of Anglo-Saxon law, and especially contract

109. Weihofen explains as follows:

The short and summary character of most adjudication hearings gives reason to question whether a determination based on such typically minimal hearings should be conclusive not only of the single issue on which the court has any evidentiary basis for decision, namely the person's competence *at that time*, but also of such person's condition at some later time. As a California opinion notes, "proceedings for the purpose of adjudicating the mental status, although satisfactory to all parties concerned, are frequently uncontested and therefore no more comprehensive or extensive than the particular circumstances require."

*Id.* at 213 (quoting *Estate of Young*, 38 Cal. App. 2d 588, 591, 101 P.2d 770, 771-72 (1940)). A more recent report on one state's experience with conservatorship concluded that a relatively small percentage of petitions for conservatorship are contested. Friedman & Savage, *supra* note 6, at 281. That study also observed that conservatorship is probably imposed unjustifiably in a "small number of instances." *Id.* at 285. Due process issues arising out of summary proceedings are beyond the scope of this Article.

110. Weihofen, *supra* note 16, at 214.

111. Alexander & Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA L. REV. 537 (1973). The title reflects the authors' belief that the capacity doctrine is, in a sense, retrogressive. Sir Henry Maine wrote in 1864 that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." H. MAINE, ANCIENT LAW 165 (1864). The movement had the effect of increasing individual liberty. According to Alexander and Szasz, however, judicial invalidation of contracts on the basis of incapacity has the opposite effect:

Contract is . . . a process by which men shape their own destiny, weaving their self-interest into the fabric of society. Individual decisionmaking . . . brings [the] authority of the state into the contract, and individual decisionmaking can end the contract by mutual agreement. Contract and autonomy are inseparable. When the right to contract is severed from the individual, so is a large portion of his humanity. Yet in contract, as in other areas of the law, the right is taken away with astonishing regularity in the name of mental health.

Alexander & Szasz, *supra*, at 537-38.

112. In their concluding paragraph, Alexander and Szasz advance the alternative suggestion that the law might continue to employ the concept of incapacity if the criteria for avoidance were "operational, not psychiatric, and precise in the extreme." Alexander & Szasz, *supra* note 111, at 559. However, their skepticism about the development of a precise test effectively neutralizes the suggestion. *Id.* at 541.



law — namely, the expansion of the scope of individual self-determination and the protection of personal dignity; and . . . we cherish and support these values and rank them, on our own scale, higher than security or “mental health.”<sup>113</sup>

The authors' dedication to liberty leads them to address the problem of undue dependence on psychiatric testimony as well as the problem of the role of substantive fairness.

### 1. Mental Illness and Psychiatry

Like Green, Alexander and Szasz describe the traditional standard of contractual capacity as essentially cognitive: “Was the person capable of understanding the nature and effect of the transaction in dispute?”<sup>114</sup> They object to recent efforts, including that of the Restatement,<sup>115</sup> to broaden the standard to include volitional and affective disorders.<sup>116</sup> One of the drawbacks of the broader standard is that it accords a greater role to “psychiatric discretion.”<sup>117</sup>

The authors' fear of undue deference to psychiatric testimony is not entirely without foundation.<sup>118</sup> Yet they draw upon very few of the numerous capacity cases, and fail to demonstrate that psychiatric opinion evidence is often dispositive. Their argument with respect to this problem thus constitutes a warning to the courts, rather than a demonstration that the capacity doctrine is generally applied in an inappropriate fashion.

### 2. The Role of Substantive Fairness

Alexander and Szasz object strongly to Green's view that substantive fairness should be dispositive of the issue of capacity. To invalidate transactions on the basis of their abnormality is, they argue, to unduly infringe the liberty of alleged incompe-

---

113. *Id.* at 559.

114. *Id.* at 540 (footnote omitted).

115. RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1979)(discussed *infra* notes 187-202 and accompanying text).

116. Alexander & Szasz, *supra* note 111, at 542-44.

117. *Id.* at 544-46.

118. In addition to the Restatement, Alexander and Szasz cite two well-known New York cases: *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969) (discussed *infra* notes 188-99 and accompanying text) and *Faber v. Sweet Style Mfg.*, 40 Misc. 2d 212, 242 N.Y.S.2d 763 (N.Y. Sup. Ct. 1963)(discussed *infra* note 200).

tents.<sup>119</sup> Individual self-determination has been “swallowed up in the battle between protecting transactions and protecting incompetents.”<sup>120</sup>

The authors concede that a court that abandons the notion of contractual incapacity will enforce some “unfortunate” transactions.<sup>121</sup> They believe, however, that the ill effects will be mitigated by other doctrines. The principles of fraud, duress, and undue influence, and the rules relating to adhesion contracts, for example, entitle courts to protect both competent and “incompetent” parties from the consequences of unfair transactions.<sup>122</sup> Like the capacity doctrine, of course, these principles limit freedom of contract.<sup>123</sup> Alexander and Szasz thus object more to special treatment for incompetents than to restrictions that apply to all those who make contracts. A fear of discrimination against eccentricity, carried out under cover of psychiatry, pervades their analysis.

Alexander and Szasz’s argument regarding substantive fairness is vulnerable to two criticisms. First, it is based upon the assumption that a dispute over capacity inevitably poses a conflict between the personal values of the alleged incompetent and socially imposed norms. Yet there may be no such conflict, either because the alleged incompetent adheres to the general norms or because the court assesses the transaction by reference to the alleged incompetent’s own idiosyncratic moral code.<sup>124</sup> One factor in

119. Alexander & Szasz, *supra* note 111, at 540-41 (“The practical effect of applying this theoretical standard is to deprive the alleged incompetent of his right to contract because his transaction is eccentric or does not meet the normative standards of the courts. This is punishment for deviancy, not protection against helplessness.”).

120. *Id.* at 547.

121. *Id.* at 558-59.

122. *Id.* at 558.

123. In his defense of the objective standard, Green makes this point more generally: While it is true that an external standard is being imposed in such a way as to restrict individual freedom, this is no innovation in law. . . . The indirect sanction of illegality which courts apply in refusing to enforce certain contracts obviously restricts individual freedom. So does the disability of infancy.

Green, *Proof, supra* note 36, at 305.

124. Green acknowledges that the capacity doctrine restricts liberty, but argues in effect that contextual analysis minimizes the restriction: “the abnormality of the transaction is viewed in the light of the social environment of the party making the contract or the will.” *Id.* at 305-06.

Professor Baron argues that courts assess testamentary capacity largely by reference to testators’ personal values:

Indeed, the most striking aspect of opinions on the subject of testamentary capacity is the similarity of their structure. Virtually all such opinions, after

the *Luzader* court's analysis was its impression that Yarbrough's contract was consonant with his affection for the Luzaders and his desire to avoid living in a nursing home. Had he made the agreement with an institution rather than the Luzaders, the court would have been right to suspect that he lacked capacity. Entry into a transaction that is at odds with one's own moral code may reflect freedom from restraint, but it does not represent the exercise of effective control over one's own life.<sup>125</sup>

Second, the authors base their fears regarding substantive fairness on Green's research in the 1940's.<sup>126</sup> They fail to consider the numerous capacity cases decided thereafter.<sup>127</sup> Moreover, they advance no proof of any connection between findings of contractual incapacity and more drastic deprivations of liberty such as involuntary civil commitment. If the recent cases demonstrate that substantive fairness is generally not "of controlling importance," their fears are unfounded.<sup>128</sup>

### C. Melvin Eisenberg

In one of a series of major articles<sup>129</sup> re-examining the first

describing the will contest and any challenged rulings by a lower court, go on to examine the evidence concerning the testator's life — particularly in the years immediately preceding and following the execution of the will — in minute detail. If, on the basis of that evidence, the court can find a reason for the testator's disposition in the circumstances, the will is upheld.

Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1073 (1987) (footnotes omitted). See also Spaulding, *Testamentary Competency: Reconciling Doctrine with the Role of the Expert Witness*, 9 LAW & HUM. BEHAV. 113, 133-39 (1985) (determination of testator's personal values in will contests promotes freedom of testation). But see Saks, *Capacity to Make Treatment Decisions* (unpublished manuscript on file with the author) (rejecting "different person" standard of capacity on the basis that the fact-finder cannot know the alleged incompetent's values).

125. Kronman makes this point with reference to the contracts of minors:

Anyone who claims that the principle of equal respect for persons requires that we defer to the choices of children as we do to those of adults has lost sight of an important fact: However great their eventual powers of autonomous self-control, persons have a natural history in which they undergo moral and psychological development along predictable lines and normally acquire the various capacities — including judgment or moral imagination — without which freedom in any meaningful sense is impossible.

Kronman, *supra* note 16, at 795-96.

126. Alexander & Szasz, *supra* note 111, at 541.

127. The authors devote most of their attention to cases addressing capacity to make medical treatment choices. *Id.* at 548-53.

128. The cases do not bear out the authors' fears. See *infra* notes 208-21 and accompanying text.

129. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Eisenberg, *supra*

principles of contract law, Professor Eisenberg suggests a reformulation of the capacity doctrine.<sup>130</sup> His argument has implications for both the role of substantive fairness and the appropriateness of contextual analysis in the capacity cases.

Eisenberg's reconceptualization of contract begins with a distinction between donative promises and bargains.<sup>131</sup> A donative promise is a promise "to confer a benefit by gift."<sup>132</sup> A bargain is "an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other."<sup>133</sup> Courts should enforce donative promises, for the most part, where they generate reliance, and the measure of recovery should be the extent of the reliance.<sup>134</sup> Fairness<sup>135</sup> and economic efficiency,<sup>136</sup> rather than reliance, justify enforcement of most bargains, and the appropriate measure of relief is normally the promisee's expectation.<sup>137</sup> Although Eisenberg addresses capacity only in relation to bargains,<sup>138</sup> his argument regarding donative promises also bears on the capacity doctrine.

## 1. Substantive Fairness

A principal focus of Eisenberg's argument is the role of sub-

---

note 85; Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982); Eisenberg, *supra* note 66.

130. Eisenberg, *supra* note 85, at 799-800.

131. The distinction is reminiscent of Green's division between business agreements and gifts. See *supra* text at note 50. Green's study encompasses completed gifts, however, whereas Eisenberg's does not. Compare Green, *Judicial Tests*, *supra* note 36, at 141 (defining "contract" to include gifts) with Eisenberg, *Donative Promises*, *supra* note 129, at 3 n.5 (noting that informal and unrelayed-upon donative promises, unlike completed gifts, are normally not enforceable). For discussion of one consequence of Eisenberg's exclusion of completed gifts, see *infra* note 162.

132. Eisenberg, *Donative Promises*, *supra* note 129, at 1.

133. Eisenberg, *supra* note 85, at 742.

134. Eisenberg, *Donative Promises*, *supra* note 129, at 32 (advocating a general rule: "[a] promise that is reasonably relied upon is enforceable to the extent of the reliance").

135. In Eisenberg's terminology, "fairness" has both substantive and procedural components. See *infra* note 146.

136. According to Eisenberg, a transaction is efficient if it moves a good or service to the party who values it most highly. Eisenberg, *supra* note 85, at 747, 765-66.

137. *Id.* at 798-801 (summarizing his argument with respect to bargains).

138. Eisenberg does note that informal donative promises "may raise a problem akin to capacity, because they are frequently made in highly emotional states brought on by surges of gratitude, impulses of display, or other intense but transient feelings." Eisenberg, *Donative Promises*, *supra* note 129, at 5. He does not, however, locate the concept of capacity in the analytical framework he proposes for donative promises.

stantive fairness in relation to bargains.<sup>139</sup> Yet, perhaps because he does not address the capacity doctrine in detail, he takes no position on the issue over which Green disagrees with Alexander and Szasz — the interplay between substantive fairness and capacity itself. He does not indicate, that is, whether substantive fairness is probative of capacity or substantive unfairness suggests incapacity.

Eisenberg does, however, suggest that substantive fairness bears on enforcement regardless of the alleged incompetent's condition. His suggestion for reformulation of the capacity doctrine is that it might "apply only where exploitation is present."<sup>140</sup> His argument implies that, in at least some circumstances, proof of incapacity alone is insufficient to prevent or to limit<sup>141</sup> enforcement. Even if Yarbrough had been incompetent, for example, his estate might have been liable to the Luzaders for \$12,000 because the transaction was substantively fair.

Proof of substantive unfairness is necessary in cases in which the competent party has performed. Eisenberg points out that, in general, the half-completed exchange presents the strongest possible case for enforceability.<sup>142</sup> Even where the competent party has performed, however, incapacity, as a norm of unconscionability,<sup>143</sup>

---

139. Eisenberg, *supra* note 85, at 752-54.

140. *Id.* at 800.

141. Eisenberg discusses bargains not in terms of enforceability but rather in terms of remedy:

By the bargain principle, I mean the common law rule that, in the absence of a traditional defense relating to the quality of consent (such as duress, incapacity, misrepresentation, or mutual mistake), the courts will enforce a bargain according to its terms, with the object of putting a bargain-promisee in as good a position as if the bargain had been performed.

*Id.* at 742 (footnote omitted). He argues, for example, that "[t]he hard question . . . is not whether half-completed-bargain promises should be legally enforced, but the extent to which such promises should be enforced." *Id.* at 744. Thus, rather than arguing that substantive fairness should bear independently on enforceability, he would probably argue that fairness should bear independently on the issue of remedy.

142. *Id.* at 743.

143. Eisenberg conceives of unconscionability as a paradigm, or general principle that encompasses a variety of norms, both past and future. *Id.* at 751-54. In context, his suggestion for reformulation of the capacity doctrine implies that a reformulated doctrine would function as a specific unconscionability norm:

Looking backward, the new paradigm enables us to reconstruct prior theory and phenomena by providing a general explanation for a wide variety of contract concepts that heretofore seemed distinct. So, for example, duress may now be seen as simply a special case of the exploitation of distress; undue influence may now be seen as simply a special case of unfair persuasion; and the prohibition against exploiting palpable unilateral mistake may now be seen as a specific

may prevent or limit enforcement.<sup>144</sup> Unconscionability requires proof of both inefficiency and unfairness.<sup>145</sup> Moreover, "unfairness," in Eisenberg's terminology, has both substantive and procedural components.<sup>146</sup> Thus, in order to prove unfairness, Yar-

norm of unconscionability. Similarly, the apparent anomaly of review for fairness in courts of equity and admiralty can be explained by the new paradigm, while guidelines can now be set for that review; and the doctrine of general incapacity might be reformulated to apply only when exploitation is present.

*Id.* at 799-800 (footnote omitted). For a discussion of the norms he develops, see *infra* note 146.

144. Eisenberg describes the bargain principle as, "in large part . . . a rule about remedies." Eisenberg, *supra* note 85, at 745. See also *supra* note 141.

145. "Since the bargain principle rests on arguments of fairness and efficiency, it is appropriate to develop and apply a specific unconscionability norm whenever a class of cases can be identified in which neither fairness nor efficiency support the bargain principle's application." Eisenberg, *supra* note 85, at 754.

146. Eisenberg develops four specific norms of unconscionability, centering on (1) exploitation of distress, (2) exploitation of "transactional," as opposed to "general" incapacity, (3) unfair persuasion, and (4) price-ignorance. *Id.* at 754-85. In developing each norm, he incorporates both procedural and substantive components of unfairness. Thus in analyzing a bargain entered into under conditions of distress, Eisenberg argues that "a promise to pay an unfair price, extracted through the promisee's exploitation of the promisor's distress, should not be enforced to its full extent." *Id.* at 755.

He posits a case of transactional incapacity as follows: "Assume . . . that A, who knows or has reason to know of B's inability to deal with a given complex transaction, exploits that incapacity by inducing B to make a bargain that a person who had capacity to deal with the transaction probably would not make . . ." *Id.* at 763-64. He does suggest that an occasional case of transactional incapacity might not involve substantive unfairness: "Unless the [party claiming transactional incapacity] can show not only that he lacked transactional capacity, but that a person who had such capacity would not have made the contract, he will normally lose." *Id.* at 771. Even in the occasional case, however, "the competent party will get back . . . what he transferred . . . or its fair value." *Id.*

Eisenberg defines unfair persuasion as "the use of bargaining methods that seriously impair the free and competent exercise of judgment and produce a state of acquiescence that [the party engaging in unfair persuasion] knows or should know is likely to be highly transitory." *Id.* at 773-74 (footnotes omitted). In the exemplary case of unfair persuasion that follows, the transitory nature of the acquiescence is almost certainly due to the substantive unfairness of the resulting bargain. See *id.* at 774.

And in describing the prohibition of exploitation of price ignorance, Eisenberg begins with the following observation:

One condition of a perfectly competitive market is a homogeneous marketplace in which cost-free information concerning price is readily available. When this condition is not satisfied and marketplaces are differentiated, the price of a homogeneous commodity in a given marketplace may be strikingly higher than the price at which the commodity is normally sold.

*Id.* at 778. Thus the price-ignorance norm, like the other three, proscribes unfairness that has both procedural and substantive components.

Eisenberg does object to Leff's distinction between substantive and procedural unconscionability (discussed *supra* note 9). He writes that the distinction has had the unfortunate effect of "domesticating" unconscionability by "accepting the concept insofar as it could be made harmonious with the bargain principle (that is, insofar as it was 'proce-

brough's estate would be obligated to demonstrate both that he lacked capacity and that the transaction was substantively unfair.

Eisenberg does not discuss unconscionability norms in the context of wholly executory bargains. Where the party seeking enforcement has not performed, the case for expectation relief is obviously less compelling.<sup>147</sup> Something short of unconscionability may, therefore, appropriately limit or prevent enforcement. Had the Luzaders not performed, for example, Yarbrough might have been able to escape liability for the full \$12,000 on the basis of incapacity alone. Yet, because Eisenberg does not address the subject, the application of a reformulated capacity doctrine to executory bargains remains unclear.

Like Green's theory, Eisenberg's suggestion for reformulation of the capacity doctrine places an undue emphasis on substantive fairness, at least in the context of half-completed bargains. Proof that a transaction is substantively unfair should not be a prerequisite for the application of the capacity doctrine.<sup>148</sup> Even where the competent party has performed, the incompetent should be able to avoid contract liability, although she may be liable in quasi-con-

---

dural'), while rejecting its wider implication that in appropriate cases the courts might review bargains for fairness of terms." Eisenberg, *supra* note 85, at 752. He also regards the distinction as "too rigid to provide significant help in either the development or the application of [unconscionability] norms." *Id.* at 754 (footnote omitted). *See also id.* at 800.

To refer to incapacity and substantive unfairness as distinct components of a reformulated doctrine is not, however, to describe either component as an independent form of unconscionability. Rather than producing a "domesticated" version of unconscionability by confining judicial analysis to the procedural issue of capacity, this interpretation of Eisenberg's argument incorporates substantive fairness as a relevant factor in capacity cases. It is thus consistent with his view that "in appropriate cases the courts [may] review bargains for fairness of terms." *Id.* at 752.

147. Eisenberg, *supra* note 85, at 743, 785.

148. *Cf.* Kronman, *supra* note 16, at 789. Kronman writes that minors should be able to avoid their contracts even in the absence of exploitation:

[T]he rule that a child may avoid his contracts if he wishes is intended to do more than protect him against adult exploitation. A child possesses this power of avoidance even when there has been no fraud or overreaching, and both courts and commentators agree that it is appropriate he have such power. Whether or not he has been misled, a child may show poor judgment in making a particular contract, and it is protection against his own ignorance and immaturity — not merely the advantage-taking of others — that the law affords.

*Id.* (footnote omitted).

Even a fair contract may be highly disadvantageous to an incompetent. If, for example, an incompetent pays a fair price for a new car that she does not need, she will probably be unable to sell the car without taking a substantial loss.

tract.<sup>149</sup> Had the court found Yarbrough incompetent, for example, his promise should have been unenforceable but his estate would undoubtedly have been liable for the value of the Luzaders' services.<sup>150</sup> Moreover, if the competent party knew or had reason to know of the incompetent's condition, the latter should arguably not be liable on any basis.<sup>151</sup>

## 2. Social Context

Eisenberg's conception of the appropriate role of social context, and particularly of close relationships, is more restrictive than that of Green.<sup>152</sup> The analytical structure that Eisenberg proposes effectively excludes the norms that Green identifies as bearing on gifts. For example, Green argues that courts properly regard gratitude as a virtue,<sup>153</sup> implying that they should also regard ingratitude as a vice. Eisenberg, however, describes ingratitude as an unfit subject of common law adjudication:

An inquiry into ingratitude involves the measurement of a maelstrom, since many or most donative promises arise in an intimate context in which emotions, motives, and cues are invariably complex and highly interrelated. Perhaps the civil-law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common-law courts, which have traditionally been oriented toward inquiry into acts

---

149. An alternative rule that in many situations will produce the same result is that the incompetent is entitled to avoid the contract upon restoration of the consideration furnished by the competent party. Green writes that a "tolerable compromise" is that the contract is enforceable if "(1) the bargain was fair, and (2) the other party entered into it without knowledge of the incompetency." Green, *The Operative Effect*, *supra* note 36, at 575. Fundamentally, however, he favors a flexible approach to the situation in which the contract is wholly or partly executed:

It is submitted that the rule should be that the agreement of an unadjudicated mental incompetent is voidable, but that in determining how and under what conditions it should be avoided the court should take into consideration all of the equities of both parties and should make a decree adjusting those equities.

*Id.*

For another view of the problem of the restoration of the status quo, see Comment, *supra* note 73, at 1079-91.

Quasi-contractual liability for necessities is discussed *supra* note 73.

150. See *supra* note 73.

151. For discussion of Green's views concerning the state of mind of the competent party, see *supra* note 68.

152. Unlike Green, however, Eisenberg does recognize the implications of a fiduciary relationship for a judicial assessment of substantive fairness. See Eisenberg, *supra* note 85, at 748.

153. See *supra* text accompanying note 55.



rather than into personal characteristics.<sup>154</sup>

The argument presumably applies to bargains as well as to donative promises. Thus, any appreciation Yarbrough felt for goods and services furnished by the Luzaders before the parties entered into their agreement is, in Eisenberg's view, irrelevant to a judicial assessment of the agreement. For similar reasons, courts should not admit evidence of improvidence in contract cases.<sup>155</sup> Norms relating to improvidence and ingratitude are "person-oriented" rather than "act-oriented"<sup>156</sup> and, as such, are ill-suited for judicial consideration.<sup>157</sup>

Eisenberg recognizes that principled dispute-resolution can incorporate person-oriented norms.<sup>158</sup> He also acknowledges that American courts can and do administer those norms in, for example, divorce cases.<sup>159</sup> Moreover, his argument for exclusion of the norms may have less force with respect to narrow classes of cases — those involving disputes over capacity, for example — than with respect to contract cases generally. Nevertheless, his thesis

154. Eisenberg, *Donative Promises*, *supra* note 129, at 15-16 (footnote omitted).

155. *Id.*

156. An act-oriented norm is one whose applicability does not usually depend on "the personal characteristics of the disputants," whereas a person-oriented norm is one whose applicability does depend on those characteristics. Wealth, poverty, and kindness are examples of personal characteristics. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 643-44 (1976).

157. *Id.* at 644.

158. Eisenberg quotes at some length a case history of dispute-negotiation in the Arusha society of northern Tanzania. The dispute was over the land of a man named Makara, and was between his son, Kadume, and his next-door-neighbor and half-brother, Soine. A process of negotiation led to a settlement in which the two divided the land. *Id.* at 640-42.

Eisenberg points out that Professor Gulliver, from whose book he draws the case history, regards the result as inconsistent with principle in that "*despite the enunciated norms of inheritance*, Kadume obtained only about half of his father's land." *Id.* at 645. According to the applicable norm of inheritance — "sons inherit" — Kadume should have owned all of the property. *Id.* Eisenberg argues, however, that the result reflects an accommodation of three relevant norms. The norm of inheritance was not dispositive because two other norms also bore on the dispute:

(1) A well-off relative should not begrudge means of sustenance to a needy relative (Kadume already had a farm almost as big as the land in dispute, Soine did not); (2) One who voluntarily cares for an aging relative until the latter's death should share in his estate (Soine took care of Makara until his death, Kadume did not). Out of the collision between the act-oriented dominant norm favoring Kadume, and the person-oriented subordinate norms favoring Soine, an outcome issued which accommodated all of the relevant norms by tacitly recognizing that *as a matter of principle* Kadume and Soine *each* had a right to the land.

*Id.* at 645-46 (footnote omitted).

159. *Id.* at 644 n.20.

constitutes a fundamental challenge to Green's advocacy of contextual analysis.

The premise of his challenge, however, is false. In *Luzader*, for example, the court did not examine the personal characteristics of any of the parties. It did not decide whether the Luzaders were kind people or whether Yarbrough was an ingrate. Instead, it focused on the interaction between the parties. The norms it applied were essentially relation-oriented rather than person-oriented.<sup>160</sup> And the length and character of a relationship are better suited to judicial inquiry than are the personal qualities of any individual. Whatever their conclusions regarding Yarbrough's capacity, for example, the witnesses in the case agreed that he had long wished to live with the Luzaders and that they fulfilled their promise to care for him.

The need for predictability in capacity cases mandates judicial consideration of relation-oriented norms. If the parties to a close relationship enter into a contract, a court cannot properly evaluate either fairness or capacity without examining the human interaction. Eisenberg characterizes classical contract law as unduly abstract,<sup>161</sup> yet as long as his analytical framework remains

160. Eisenberg recognizes the distinction but rejects it. Thus he describes as person-oriented the norm "‘brothers should help each other’ . . . because, despite its apparent generality, its application depends almost entirely on the personal characteristics of the individual parties — a wealthy brother should not seek economic help from a poor one; an unkind brother may not be entitled to any help at all." *Id.* at 644.

The norm "‘brothers should help each other,'" however, varies in application largely because it is not based upon any substantial interaction between the parties but only upon a family connection. The norm "[a] well-off relative should not begrudge means of sustenance to a needy relative," *id.* at 645, is similarly unstable. Its applicability might well depend, for example, on whether the needy relative had displayed ingratitude.

By contrast, norms that are grounded in interaction are likely to be much more constant. In effect, the interaction establishes certain personal characteristics of each party *vis a vis* the other. Consider, for example, the norm "[o]ne who voluntarily cares for an aging relative until the latter's death should share in his estate." *Id.* The younger relative does demonstrate generosity to the elder by providing care, but she is entitled to a share in the estate because she provided the care rather than because she is a generous person. Evidence that she is not generous to others is irrelevant. Moreover, she is probably entitled to share in the estate even if she is wealthy.

161. The reaction of modern contract scholars against the "standardization" and "objectivity" of the classical theory was proper:

These elements, however, were not necessary features of contract theory, but simply an artifact of the classical model. The task now is to reconceptualize contract law so that it consists of a body of principles that are both intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contract as a social institution.

Eisenberg, *supra* note 66, at 1111.

insensitive to relational factors, it will not accommodate the capacity cases.<sup>162</sup>

---

162. One reason for Eisenberg's exclusion of "person-oriented" norms may be that his analytical framework incorporates donative promises but does not incorporate completed gifts. This approach is standard; the law school curriculum and most texts address donative promises under the heading of contracts and gifts under the heading of property. The consequence is that the field of contracts remains largely free of the kind of relational thinking that pervades the law of donative transfers. *See, e.g.*, E. CLARK, L. LUSKY & A. MURPHY, *CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION* 121-201 (1985).

The line between contracts and property may, of course, be essentially arbitrary. If it is, the norms that apply in the donative capacity cases are also applicable in at least some cases of alleged incapacity to contract. If the line between the two fields reflects substantive differences, however, those differences may justify treating one set of norms as relevant to gifts and another as relevant to contracts.

According to traditional theory, one important difference lies in the "future" orientation of contract law as opposed to the "present" orientation of property law. Many commentators view contracts as concerned primarily with promises. *See, e.g.*, A. CORBIN, *supra* note 66, § 4, at 7-8; A. FARNSWORTH, *supra* note 3, § 1.1, at 4-5. The fact that promises are made with reference to the future means that transactions lacking in future orientation, such as barter and gift, fall outside the domain of contract law. Thus Eisenberg argues that "[a]lthough parties may barter bargained-for performances without making any promises, contract law is concerned with those bargains that involve a present promise to render a future performance — that is, that involve an exchange over time." Eisenberg, *supra* note 85, at 742. This difference arguably has substantive consequences as applied to donative transactions. Farnsworth suggests that "a policy of leaving parties to gratuitous transactions where they stand" may underlie the general rule that a completed gift is enforceable whereas a donative promise is not. A. FARNSWORTH, *supra* note 3, § 2.5, at 47.

Yet recently commentators of diverse viewpoints have indicated that the distinction between present and future-oriented transactions is of limited significance. *See, e.g.*, Baron, *supra* note 80 (questioning the appropriateness of disparate legal treatment of bargains and donative transfers); Barnett, *supra* note 4, at 299 n.123 ("If promising is but a special instance of consent, it may well be that the traditional conception of contracts as *exclusively* concerning the matter of enforceable promises is what has blinded the profession to the more fundamental theoretical role of consent."); Fellows, *Donative Promises Redux*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET* 27 (1988)(donative transfer principles are relevant to the analysis of donative promises: "contractual analysis [of donative promises] is neither wrong nor irrelevant, but it is incomplete, because it highlights the act of promising without considering the donative component of the promise."); MacNeil, *supra* note 91, at 523 n.185 ("so-called present exchanges always, in my view, involve some projection of exchange into the future").

Even if the law maintains a general policy of leaving the parties to a donative transaction where they stand, it nevertheless makes exceptions in many cases involving donative promises. And where capacity to make a donative promise is at issue, the transaction should not be immune to contextual analysis simply because the promise is still executory. The relevance of contextual factors to donative intent and to substantive fairness is at least as great in the absence of delivery as in its presence. *See, e.g.*, *Board of Regents v. Davis*, 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975)(discussed *infra* note 310).

### D. Summary

None of the commentators satisfactorily resolves any of the four fundamental problems posed by the capacity doctrine. Alexander and Szasz properly challenge the courts to refrain from granting undue weight to psychiatric testimony and substantive fairness in assessing capacity. The authors do not demonstrate, however, that the courts fail to meet the challenge. Green recognizes but overstates the relevance of substantive fairness to the issue of capacity. Eisenberg argues cogently that fairness bears directly on enforceability but fails to acknowledge that incapacity can justify invalidation of a fair transaction. While Green's argument for contextual analysis is compelling, his distinction between gifts and business agreements is formalistic and he fails to perceive the relation between context and the concept of capacity. Eisenberg's reconceptualization excludes relation-oriented norms altogether, thereby depriving the capacity doctrine of needed sensitivity and coherence. And Green's position regarding guardianship is unsound and unnecessarily restrictive of contractual and donative liberty.

## II. THE DOCTRINE APPLIED: THE RECENT CASES

The decisions demonstrate that, on the whole, the courts' solutions to the four problems are preferable to those of the commentators. First, judges and juries for the most part avoid undue deference to psychiatric testimony; the opinions generally cite evidence of helplessness, as opposed to proof of mental illness per se, as probative of incapacity. Thus the concept of capacity as applied is legal rather than medical.<sup>163</sup> Second, courts generally treat substantive fairness as relevant to but not dispositive of the issue of capacity,<sup>164</sup> and perhaps as bearing independently on enforceability.<sup>165</sup> Third, courts display considerable sensitivity to social context in connection with both fairness and capacity. The opinions reflect judicial awareness of the importance of close relationships,<sup>166</sup> as well as solicitude for the interests of entrustors in their dealings with fiduciaries.<sup>167</sup> And fourth, recent legislation and

---

163. See *infra* notes 169-207 and accompanying text.

164. See *infra* notes 208-21 and accompanying text.

165. See *infra* note 222 and accompanying text.

166. See *infra* notes 245-308 and accompanying text.

167. See *infra* notes 312-35 and accompanying text.

case law demonstrate some movement toward more flexible rules regarding guardianship and conservatorship.<sup>168</sup>

### A. Mental Illness and Psychiatry

In general, the courts assess capacity by reference to lay testimony of disability. While no set of generalizations can convey a full sense of the evidence in any given case,<sup>169</sup> the nature of the proof that courts typically cite indicates that Alexander and Szasz's fears are largely unfounded. The most common factor evidencing loss of capacity is probably forgetfulness, particularly of recent events.<sup>170</sup> Almost as common is disorientation with respect to time or place.<sup>171</sup> Confusion is probative of incapacity,<sup>172</sup> as is rambling or fragmented conversation.<sup>173</sup> Many of the cases involve

168. See *infra* notes 336-76 and accompanying text.

169. The core of the opinion in a capacity case is a narrative that relates part of the life of the alleged incompetent. Whether the opinion conveys an impression of incapacity is largely a matter of the force of the narrative. Bruner argues that the narrative mode of thought is not reducible to the mode of logical argument:

A good story and a well-formed argument are different natural kinds. Both can be used as means for convincing another. Yet what they convince of is fundamentally different: arguments convince one of their truth, stories of their lifelikeness. The one verifies by eventual appeal to procedures for establishing formal and empirical proof. The other establishes not truth but verisimilitude. It has been claimed that the one is a refinement of or an abstraction from the other. But this must be either false or true only in the most unenlightening way.

J. BRUNER, *supra* note 67, at 11.

170. See, e.g., *Gulf Life Ins. v. Wilson*, 123 Ga. App. 631, 633, 181 S.E.2d 914, 916 (1971)(incompetent requested daily bath shortly after receiving one); *Krasner v. Berk*, 366 Mass. 464, 466, 319 N.E.2d 897, 898-99 (1974)(incompetent doctor forgot appointments and other matters, manifesting a "disorder of immediate recall"); *Peterein v. Peterein*, 408 S.W.2d 809, 811 (Mo. 1966)(incompetent forgot close relations); *Bach v. Hudson*, 596 S.W.2d 673, 675 (Tex. Civ. App. 1980)(incompetent forgot "people and recent occurrences"); *Gaston v. Bruton*, 358 S.W.2d 207, 213 (Tex. Civ. App. 1962)(incompetent failed to recognize family members and friends, and failed to use correct names).

171. See, e.g., *Barth v. Gregory*, 79 Ill. App. 3d 510, 513-18, 398 N.E.2d 849, 851-55 (1979); *Costello v. Costello*, 186 N.W.2d 651, 653-54 (Iowa 1971); *In re Estate of Nordorf*, 364 N.W.2d 877, 879 (Minn. Ct. App. 1985); *Westerdale v. Johnson*, 191 Neb. 391, 394, 215 N.W.2d 102, 104 (1974); *Jackson v. Henninger*, 482 S.W.2d 323, 325-26 (Tex. Civ. App. 1972).

172. See, e.g., *Knott v. Pervere*, 285 F. Supp. 274, 278 (D. Mass. 1968)(confusion resulting from manic-depression and alcoholism); *Citizens Nat'l Bank v. Pearson*, 67 Ill. App. 3d 457, 458, 384 N.E.2d 548, 550 (1978)(confusion and disorientation basis for inability to comprehend nature and effect of deed); *In re Estate of Faris*, 159 N.W.2d 417, 419 (Iowa 1968)(confusion and senility); *Pollard v. El Paso Nat'l Bank*, 343 S.W.2d 909, 911 (Tex. Civ. App. 1961)(confused behavior plus undue influence).

173. See, e.g., *Knott v. Pervere*, 285 F. Supp. 274, 279 (D. Mass. 1968)(incoherent speech probative of incapacity to transact business); *Krueger v. Zoch*, 285 Minn. 332, 333, 173 N.W.2d 18, 20 (1969)(finding of incompetence based in part on rambling conversa-

impaired physical health, often incident to old age.<sup>174</sup> The courts cite a wide variety of ailments, the most common of which are arteriosclerosis<sup>175</sup> and organic brain syndrome.<sup>176</sup> Alcoholism is

tion); *Peterein v. Peterein*, 408 S.W.2d 809, 811-12 (Mo. 1966)(inability to hold conversation noted in opinion cancelling deed).

174. As one court said of an incompetent grantor, "[t]hese utterances demonstrate that age and illness with their 'stealing steps' had removed his power to realize his situation or whereabouts." *Jackson v. Henninger*, 482 S.W.2d 323, 326 (Tex. Civ. App. 1972)(footnote to "Hamlet" omitted).

175. See, e.g., *Neal v. Jackson*, 2 Ark. App. 14, 22, 616 S.W.2d 746, 750 (1981)(arteriosclerotic heart disease); *Barth v. Gregory*, 79 Ill. App. 3d 510, 513, 398 N.E.2d 849, 851 (1979)(generalized and cerebral arteriosclerosis); *Citizens Nat'l Bank v. Pearson*, 67 Ill. App. 3d 457, 459, 384 N.E.2d 548, 550 (1978)(cerebral arteriosclerosis); *In re Estate of Faris*, 159 N.W.2d 417, 418 (Iowa 1968); *Anderson v. Claussen*, 200 Neb. 74, 75, 262 N.W.2d 438, 439 (1978)(cerebral arteriosclerosis); *Westerdale v. Johnson*, 191 Neb. 391, 394, 215 N.W.2d 102, 104 (1974)(general cerebral arteriosclerosis).

176. See, e.g., *Williamson v. Matthews*, 379 So. 2d 1245, 1248 (Ala. 1980)(early organic brain syndrome); *Neal v. Jackson*, 2 Ark. App. 14, 22, 616 S.W.2d 746, 750 (1981)(chronic brain syndrome); *In re Estate of Faris*, 159 N.W.2d 417, 421 (Iowa 1968)(chronic brain syndrome); *Interdiction of Burns*, 486 So. 2d 977, 979 (La. Ct. App. 1986)(organic brain syndrome); *Anderson v. Claussen*, 200 Neb. 74, 75, 262 N.W.2d 438, 439 (1978).

According to Kolb and Brodie, brain syndromes "are induced by a general derangement of cerebral metabolism, which produces a diffuse dysfunction of brain tissue and thereby impairs those functions most expressive in human beings of brain action — the positive functions of awareness, retention, memory, and comprehension." L. KOLB & H. BRODIE, *MODERN CLINICAL PSYCHIATRY* 226 (1982). The authors describe the symptoms of acute brain syndromes at some length:

The characteristic symptoms of the delirium usually associated with the acute brain syndromes are fearfulness, clouding of consciousness with bewilderment, restlessness, confusion, disorientation, and impairment in thinking, sometimes with delusions and hallucinations. Thus the acute brain syndrome differs from the so-called functional psychosis in the marked impairment of cognitive functions. It must be emphasized that the recognition of the cerebral insufficiency should not wait until the full appearance of the previously mentioned symptoms. Long before gross cognitive disorganization takes place, the acute observer will note failures in cognition. In the earliest stages, in which the condition might be likened to the mild intoxication experienced by many persons when drinking, there is a blurring or haziness of perception so that the sufferer notices a limitation in the accuracy of identification and apperception of sensations. He has difficulty in focusing attention on important percepts and in screening out interfering percepts. Again, one with incipient delirium will note a difficulty in thinking clearly and coherently; he may complain of inability to bring forward desired memories and associations. In the milder stages of the delirious process, such difficulties can sometimes be overcome by heightened attention and effort on the part of the affected person. Unless complained about, they may be quite inapparent to the clinical observer, who may note only some vagueness, uncertainty, and hesitancy on the part of the patient.

At a further level of impairment of consciousness, the affected person has difficulty performing correctly in spite of personal effort, and there now is evidence of confusion and bewilderment. In addition to hesitation in responses to

relevant,<sup>177</sup> as is erratic or imprudent behavior.<sup>178</sup> While an occasional opinion indicates that eccentricity is evidence of incapacity,<sup>179</sup> the *Luzader* court, for example, emphasized that eccentric behavior per se is irrelevant.<sup>180</sup>

---

questions, it is possible to expose defects in memory, retention, and recall . . . . At this level of impairment, the patient usually has some difficulty in dealing with abstract concepts; the earliest expression may be in disturbance of time orientation, initially expressed for days of the week and later expanding to confusion concerning the month and the year. Furthermore, an examiner will note problems in retention of instructions, grasping their meaning, and carrying out directions. The patient may complain of inability to read as he cannot retain what has been put before him. At a still later stage of cerebral insufficiency, orientation as to place fails, and misidentification of perceptions with a development of illusions is noticeable. At this time, language difficulties appear, and there develops a defect in a coherent train of expression. Eventually, there takes place a deterioration in motor activity with problems in writing, eating, and grooming, and finally, incontinence of urine and feces may take place. In the later stage of delirium, complete disorientation exists, with delusory and hallucinatory experiences and severe impairment of motor control. Grasping and groping movements may occur. Delirium of this degree represents a *critical impairment* of cerebral function and should be recognized as diagnostically serious for life if it proceeds without arrest. The final stages of progressive cerebral insufficiency are stupor and coma.

*Id.* at 229-30.

177. See, e.g., *Williamson v. Matthews*, 379 So. 2d 1245, 1248 (Ala. 1980)(vendor's excessive drinking and alcohol consumption on day of negotiations contributed to diminished capacity to transact business); *Chesson v. Pilot Life Ins.*, 268 N.C. 98, 99, 150 S.E.2d 40, 41 (1966)("acute alcoholism" resulted in mental disorders); *Hunt v. Golden*, 271 Or. 321, 323, 532 P.2d 26, 27 (1975)(excessive alcohol consumption resulting in mental and physical disabilities).

178. See, e.g., *Barth v. Gregory*, 79 Ill. App. 3d 510, 516, 398 N.E.2d 849, 853-54 (1979) (telephoning a neighbor as many as forty-five times in one day, leaving \$2,000 in cash on a tray in the living room); *In re Estate of Faris*, 159 N.W.2d 417, 419-20 (Iowa 1968)("bouncing" checks despite wealth, keeping frozen meat for up to twelve years, having a building roofed from the top down); *Krueger v. Zoch*, 285 Minn. 332, 333, 173 N.W.2d 18, 20 (1969)(sale of "valuable antiques for next to nothing when approached by various dealers"); *Bach v. Hudson*, 596 S.W.2d 673, 675 (Tex. Civ. App. 1980)(erratic and irrational business decisions).

179. See, e.g., *Costello v. Costello*, 186 N.W.2d 651, 653 (Iowa 1971)(citing evidence of the "idiosyncracies" of an incompetent grantor). The case, however, involved considerable evidence of confusion and forgetfulness. *Id.* at 653-54.

180. The court quoted from an earlier case that addressed testamentary capacity:

The fact that the testator was filthy, forgetful and eccentric, or that he was miserly and filthy, or that he was blasphemous, filthy, believed in witchcraft, and had dogs eat at the same table with him or that he was filthy, frequently refused to eat, and would lie in bed with his clothes on for two weeks at [a] time, or that he would leave his home only at night, and would count or recount his money, or that he was high tempered and violent, or was irritable and profane, or that testator thought that others were plotting against him and was afraid to go out in the dark, or that he was inattentive when spoken to and mumbled when trying to talk, does not establish lack of capacity.

Although capacity is not synonymous with a high degree of intelligence,<sup>181</sup> evidence of severely impaired intellect is probative of incapacity.<sup>182</sup> If the promisor or donor is declared incompetent or committed to a mental institution soon after the transaction takes place, the court may reason that the condition that gave rise to the declaration was present at least to some degree at the time of the transaction.<sup>183</sup> By the same token, the fact that the alleged incompetent has not been adjudicated as such may militate in favor of a finding of capacity.<sup>184</sup> Moreover, in general the threshold of capacity remains appropriately low; an appellate court will reverse a trial court finding of incompetence if the trial court imposes too high a standard.<sup>185</sup>

As Alexander and Szasz point out, recent years have indeed

*Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 310, 438 S.W.2d 25, 30 (1969)(quoting *Harwell v. Garrett*, 239 Ark. 551, 559, 393 S.W.2d 256, 261 (1965)). In fact, the court overstated its case. The excerpt describes evidence that is, at a minimum, relevant on the issue of capacity. *See, e.g., Barth v. Gregory*, 79 Ill. App. 3d 510, 398 N.E.2d 849 (1980) (discussed *infra* note 216).

For discussion of the relation between contractual capacity and testamentary capacity, see *supra* notes 94-100 and accompanying text.

181. *See, e.g., Kruse v. Coos Head Timber Co.*, 248 Or. 294, 306-07, 432 P.2d 1009, 1015-16 (1967)("dullness of intellect" does not amount to incapacity).

182. *See, e.g., Oncale v. Clement*, 411 So. 2d 543, 544-46 (La. Ct. App. 1982)(evidence of retardation); *Coburn Fin. Corp. v. Bennett*, 241 So. 2d 802, 803-04 (La. Ct. App. 1970)(promisor with mentality of a five or six year-old); *Coke v. Coke*, 242 Or. 486, 489, 410 P.2d 214, 215-16 (1966)(grantor was "low on marbles").

183. For example, in *Krueger v. Zoch*, the alleged incompetent contracted to sell his farm to the plaintiff. *Krueger v. Zoch*, 285 Minn. 324, 173 N.W.2d 18 (1969). The contract was signed six weeks before the appointment of a guardian for the alleged incompetent. *Id.* at 333, 173 N.W.2d at 20. In affirming the trial court's finding of incapacity, the appellate court emphasized the guardianship proceeding:

The finding of incompetence in this case is greatly strengthened by the fact that [the alleged incompetent] was placed under guardianship on January 9, 1967. The subsequent adjudication of incompetency in guardianship is relevant and probative on the issue of his competence at the time he signed the earnest money contract, November 30, 1966. The closer in time the adjudication of incompetency is to the transaction, the greater the weight that can and should be given it.

*Id.* at 335, 173 N.W.2d at 21. *See also Citizens Nat'l Bank v. Pearson*, 67 Ill. App. 3d 457, 384 N.E.2d 548 (1978)(grantor adjudicated incompetent four weeks after signing deed).

Not all courts agree, however. *See, e.g., Cohen v. Crumpacker*, 586 S.W.2d 370, 376 (Mo. Ct. App. 1979)("adjudication of incompetency is only prospective in application and is inadmissible as evidence to show prior mental disability").

184. *See, e.g., Curry v. Curry*, 31 Ill. App. 3d 972, 334 N.E.2d 742 (1975).

185. *See, e.g., Columbia Sav. & Loan v. Carpenter*, 33 Colo. App. 360, 521 P.2d 1299 (1974), *rev'd on other grounds sub nom., Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975).



witnessed efforts to expand the capacity doctrine to encompass volitional and affective as well as cognitive disorders.<sup>186</sup> While these efforts have met with some success, they have not produced undue deference to psychiatric testimony. Courts continue to assess capacity primarily by reference to lay testimony of forgetfulness, confusion, disorientation, and erratic or imprudent behavior.

The Restatement provides that under some circumstances a volitional disorder can produce incapacity.<sup>187</sup> The provision is based principally on a series of New York cases that includes *Ortelere v. Teachers' Retirement Board*,<sup>188</sup> perhaps the best-known of the modern contractual capacity cases. *Ortelere* involved an election of pension benefits<sup>189</sup> by a teacher who suffered from "involutional psychosis, melancholia type."<sup>190</sup> After the teacher's

186. Alexander & Szasz, *supra* note 111, at 542-44.

187. The Restatement provides as follows:

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1979). Thus a promisor's volitional or motivational disorder renders his promise voidable if the other party knew or should have known of his condition.

188. 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969).

189. The court assumed without discussion that, for purposes of its capacity analysis, the transaction was a contract. This characterization finds support in Green's argument that a change of beneficiary of a life insurance policy represents a modification of the original contract of insurance. Green, *The Operative Effect*, *supra* note 36, at 577. The election was neither a contract nor a contract modification in the traditional sense, however. It followed no bargaining and involved no promise, and was certainly susceptible of analysis as a donation rather than as a contract.

Although the court treated the transaction as a contract, it did not emphasize that the applicable standard of capacity was higher than the standard for gifts or wills. For an argument that a differential standard is inappropriate, see *supra* notes 99-100 and accompanying text.

190. *Ortelere*, 25 N.Y.2d at 200, 250 N.E.2d at 462, 303 N.Y.S.2d at 365. According to Kolb and Brodie, the "involutional period" is the stage during which "the endocrine and reproductive glands begin to suffer a decrease in functional activity." L. KOLB & H. BRODIE, *supra* note 176, at 435. The authors describe the symptoms of major depression during the involutional period in part as follows:

As with all the affective disorders, the major component in the disturbance is the development of an unpleasant affective state. This state is compounded of a number of subjective components, of which grief and sadness represent only a part. Those others are varying degrees and combinations of intense anxiety, shame, and guilt. To these affects are added, as major components of the state, ego attitudes of profound helplessness and diminution of self-esteem, with severe inhibitions of previous personality functioning.

death, her husband sought to invalidate the election, which deprived him of the benefit of her contributions to the pension fund.<sup>191</sup>

In remanding the case for a new trial, the New York Court of Appeals stated that the teacher's cognitive ability was unimpaired but strongly suggested that her mental illness nevertheless deprived her of capacity.<sup>192</sup> The court took the position that a "medically classified psychosis" can justify a finding of incompetence.<sup>193</sup> According to the opinion, "traditional [cognitive] standards of incompetency for contractual capacity are inadequate in light of contemporary psychiatric learning and applied modern standards."<sup>194</sup> The court expressed optimism that advances in psychiatry would lead to a workable standard of capacity, thereby diminishing the role of substantive fairness.<sup>195</sup>

Despite its considerable reputation,<sup>196</sup> *Ortelere* is of questionable precedential value for three reasons. First, the holding was based in part on fiduciary principles. The court perceived the

The manifest symptoms of the psychosis are often preceded by a period of several weeks or a few months during which the patient exhibits hypochondriacal trends, becomes irritable, peevish, pessimistic, suffers from insomnia, is perhaps suspicious, shows a disinclination for effort, and may be given to spells of weeping. She is unable to concentrate and shows doubt and indecision. Frequently there are a narrowing of interests and a shrinking from the environment. The patient complains of distressing sensations in the head, eats poorly, loses weight, worries about health or finance, and becomes apprehensive and restless. In a more or less typical case, the most conspicuous symptoms are profound depression, anxiety, agitation, hypochondriasis, and guilty delusions of sin, unworthiness, disease, and impending death.

*Id.* at 437.

191. *Ortelere*, 25 N.Y.2d at 199, 250 N.E.2d at 462, 303 N.Y.S.2d at 364.

192. *Id.* at 205-06, 250 N.E.2d at 465-66, 303 N.Y.S.2d at 369-70.

193. *Id.* at 206, 250 N.E.2d at 466, 303 N.Y.S.2d at 370.

194. *Id.* at 204, 250 N.E.2d at 465, 303 N.Y.S.2d at 369.

195. In the court's view, movement toward a "modern posture" was "glacial" and generally covert; "[v]arious devices have been used to avoid unacceptable results under the old rules by finding unfairness or overreaching in order to avoid transactions . . ." *Id.* at 204, 250 N.E.2d at 465, 303 N.Y.S.2d at 368 (citing Green, *Proof, supra* note 36, at 298-305). Green, of course, saw the findings of unfairness and overreaching as applications of the true test rather than as devices for avoiding unacceptable results. See *supra* notes 45-58 and accompanying text.

196. The case figures prominently in RESTATEMENT (SECOND) OF CONTRACTS § 15, comment b (1979), and is noted with general approval in Comment, *Restatement of Contracts Formulation for Mental Competency to Contract Adopted in New York*, 45 N.Y.U. L. REV. 585, 591-94 (1970), and with qualified approval in Note, *Contracts-Competency to Contract of Mentally Ill Person Who Fully Understands Transaction But Is Unable to Control Conduct*, 16 WAYNE L. REV. 1188, 1193-95 (1970) (criticizing the court's emphasis on psychosis as well as its stress on the state of mind of the competent party).

transaction as unfair to the teacher in light of the retirement board's obligation to protect its members.<sup>197</sup> Second, the teacher's cognitive functioning may have been impaired.<sup>198</sup> If it was, she probably lacked capacity according to the traditional standard, and her mental illness furnished at most an alternative ground for the court's decision. Third, there is persuasive evidence that the court's suggestion that she lacked capacity was based on an uncritical reading of the psychiatric testimony presented in the case.<sup>199</sup>

---

197. See *infra* text accompanying note 323.

198. Trial Transcript, *Ortelere v. Teachers' Retirement Bd.*, (docket number unavailable)(N.Y. Sup. Ct. Jan. 31, 1968), *rev'd*, 31 A.D. 139, 295 N.Y.S.2d 506 (1968), *rev'd*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969), *reprinted in* R. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 161-200 (1978). The principal evidence of Mrs. Ortelere's cognitive ability was a letter sent to the retirement board three days before she made her election. *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 200-01, 250 N.E.2d 460, 462-63, 303 N.Y.S.2d 362, 366 (1969). The letter asked a series of detailed questions about her retirement options. One of the questions suggested that she might make her daughter her beneficiary. Both the testimony of her daughter, R. DANZIG, *supra*, at 175-76, and that of her husband, *id.* at 165, indicated that she acted withdrawn during the two months before she made the election (although her husband testified that she continued to write the checks to pay their bills). *Id.* at 173. This raises the possibility that her daughter wrote the letter, and that her cognitive functioning was indeed impaired. Her daughter testified, however, that she "just listened any time [Mrs. Ortelere] said anything about pensions." *Id.* at 176. \*

199. Most of the proof of incapacity consisted of testimony presented by Mrs. Ortelere's husband and by her psychiatrist, Dr. D'Angelo. The Court of Appeals focused principally on the doctor's opinion. *Ortelere*, 25 N.Y.2d at 202, 250 N.E.2d at 463-64, 303 N.Y.S.2d at 367. Dr. D'Angelo treated Mrs. Ortelere for several months. He held monthly consultations, or "interviews" with her during the period when she made her election. R. DANZIG, *supra* note 198, at 177-78. He diagnosed her as suffering from involuntal psychosis, melancholia type, *id.*, and cerebral arteriosclerosis. *Id.* at 181. He testified that at no time when she was under his care was she mentally competent. *Id.* at 182. He stated that her arteriosclerosis caused some confusion and forgetfulness. *Id.* at 183-84. The principal thrust of his testimony, however, was that Mrs. Ortelere was so preoccupied with her own depression that she was unable to engage in rational thought. *Id.* at 180.

Dr. D'Angelo nevertheless testified that Mrs. Ortelere had lucid intervals. *Id.* at 189. One such interval occurred several days after she made her election. She consulted him about the election, indicating that she thought she had made a mistake. As the doctor put it, "she realized she couldn't have been thinking right when she made her first choice. Now, then I say she was — she had a lucid interval." *Id.* at 190. Asked whether she might have executed the election form during a lucid interval, he answered: "Not the remotest possibility. She would never have signed such a document." *Id.* at 195. His testimony was thus shaped in significant measure by his conviction that the election was foolish. The Court of Appeals' opinion made no reference to his views on lucid intervals.

As Judge Jason argued in dissent, the election, which afforded Mrs. Ortelere and her husband more income during her life, may not have been foolish. *Ortelere*, 25 N.Y.2d at 207-08, 250 N.E.2d at 467, 303 N.Y.S.2d at 372. Even if it was, however, the court's reliance on Dr. D'Angelo's testimony is ironic in light of the fact that he, in turn, relied on the nature of the transaction for his opinion regarding lucid intervals. The virtue of the

At least two other New York cases have recognized the volitional approach, but the broader standard is by no means well-established in the state.<sup>200</sup> Moreover, although decisions in other

modern approach to the issue of capacity, according to the court, is a reduced emphasis on the nature of the transaction. *Id.* at 205, 250 N.E.2d at 465, 303 N.Y.S.2d at 369.

200. The two cases are *Fingerhut v. Kralyn Enter.*, 71 Misc. 2d 846, 337 N.Y.S.2d 394 (N.Y. Sup. Ct. 1971) and *Faber v. Sweet Style Mfg.*, 40 Misc. 2d 212, 242 N.Y.S.2d 763 (N.Y. Sup. Ct. 1963). In *Fingerhut*, the court rejected a claim of incapacity based on manic depression, concluding that the plaintiff was not psychotic. *Fingerhut*, 71 Misc. 2d at 856-57, 337 N.Y.S.2d at 405. In *Faber*, the plaintiff sought to rescind a contract to purchase a parcel of vacant land on the basis that a manic-depressive psychosis deprived him of capacity. Two of the three doctors who testified supported his claim; the third believed that, when he signed the contract, "there was no abnormality in [the plaintiff's] thinking, that his judgment [on the day when he signed the contract] was intact." *Faber*, 40 Misc. 2d at 214, 242 N.Y.S.2d at 766. The court released the plaintiff from the contract. *Id.* at 218, 242 N.Y.S.2d at 769.

Although the *Faber* court permitted the plaintiff to avoid the agreement, the opinion reflected considerable skepticism as to the value of psychiatric opinion evidence of incapacity:

The psychiatrist in presenting his opinion is, in final analysis, evaluating factual information rather than medical data, and is working largely with the same evidence presented to the court by the other witnesses in the action. Moreover, in the great majority of cases psychiatrists of equal qualification and experience will reach diametrically opposed conclusions on the same behavioral evidence. The courts have, therefore, tended to give less weight to expert testimony than to objective behavioral evidence.

*Id.* at 216, 242 N.Y.S.2d at 768 (citations omitted). The testimony of the two doctors who supported the plaintiff's claim was "but confirmatory of the conclusion reached by the court on the basis of [other evidence]." *Id.* at 217, 242 N.Y.S.2d at 769.

The evidence to which the court referred consisted of accounts of the plaintiff's behavior in business and personal matters which suggested that his illness was responsible for his entry into the contract:

[T]he rapidity with which plaintiff moved to obtain an architect and plans, hire laborers, begin digging on the property, and his journey to Albany to obtain building approval, all prior to title closing, are abnormal acts. Viewing those acts in the context of [certain other business decisions], and his complaint to [one of the psychiatrists] . . . that his wife was in need of help because she was trying to hold him back, the court is convinced that the contract in question was entered into under the compulsion of plaintiff's psychosis.

*Id.* During the several weeks preceding the execution of the contract, the plaintiff's behavior had changed radically:

Though under care of [one of the psychiatrists] . . . for his depression, he cancelled [a particular appointment] and refused to see the Doctor further. Previously frugal and cautious, he became more expansive . . . began to drive at high speeds, to take his wife out to dinner, to be sexually more active and to discuss his prowess with others. In a short period of time, he purchased three expensive cars for himself, his son and his daughter, began to discuss converting [a] bathhouse and garage property into a twelve story cooperative and put up a sign to that effect, and to discuss the purchase of [certain land] for the erection of houses . . . [A]gainst the advice of his lawyer, he contracted for [certain land] costing \$11,500 and gave a \$500 deposit on acreage, the price of which was

jurisdictions lend qualified support to the notion that volitional disorders can produce incapacity, the cases do not reflect judicial deference to psychiatric opinion evidence of incapacity.<sup>201</sup> As one

---

\$41,000 and talked about erecting a 400 room hotel with marina and golf course on the land.

*Id.* at 213, 242 N.Y.S.2d at 765.

The court's conclusion that the plaintiff lacked capacity was arguably unjustified. The wheeling and dealing that the opinion describes might have constituted generally effective business behavior on the part of a person who had the ability to evaluate projects quickly and to engage in a variety of different enterprises at one time. The court was probably motivated by the episodic nature of the plaintiff's activities, but the opinion fails to demonstrate a pattern of improvident or unrealistic decision-making even during his manic episodes.

The plaintiff's lawyer was evidently not satisfied that he could finance the transaction, and withdrew from the negotiations because the seller would not agree to a condition relating to another piece of property. *Id.* at 213, 242 N.Y.S.2d at 765. This suggests that the plaintiff was acting imprudently even if the price was otherwise fair, arguably demonstrating a lack of understanding of the transaction's consequences as opposed to its nature. The court, however, did not explore the question. The opinion suggests but does not demonstrate that the plaintiff made a series of very unwise business decisions. While the holding may have been justifiable on the facts, it is not supported by the court's narrative.

*Faber* is noted in Note, *Manic-Depressive Held Incompetent to Contract Despite Apparent Ability to Understand Transaction*, 39 N.Y.U. L. REV. 356 (1964).

201. For example, in *Knott v. Pervere*, 285 F. Supp. 274 (D. Mass. 1968), a United States district court, applying California law, invalidated a pre-incorporation agreement on the basis that the principal subscriber was incompetent. Medical evidence indicated that the subscriber had suffered from manic depression for many years and that he was in a manic state when he executed the agreement. *Id.* at 278-80. He also suffered from other ailments, however, including acute brain syndrome and both chronic and acute alcoholism. *Id.* In addition, there was considerable lay testimony of erratic and imprudent behavior. *Id.*

Five days after the United States District Court's decision in *Knott*, however, the California Court of Appeal interpreted the relevant sections of the California Civil Code to mean that manic depression did not produce incapacity. *Smalley v. Baker*, 262 Cal. App. 2d 824, 69 Cal. Rptr. 521 (1968). Similarly, in *Walton v. Bank of California*, 218 Cal. App. 2d 527, 32 Cal. Rptr. 856 (1963), the California District Court of Appeal rejected a claim of incapacity to execute an inter vivos trust despite medical evidence that the settlor "suffered from an anxiety neurosis, was subject to fits of depression, sought relief and escape in the use of alcohol and experienced an unpleasant relationship with her son . . . itself productive of additional tension and stress." *Id.* at 531, 32 Cal. Rptr. at 859.

In *First Nat'l Bank v. Williams*, 346 So. 2d 257 (La. Ct. App. 1977), the Louisiana Court of Appeal affirmed a finding of capacity to enter into an agreement for the purchase of cattle and agricultural implements and for the lease of certain land. The court upheld the finding despite the fact that all three doctors who testified agreed that, as of eight days after he signed the contract, the buyer suffered from manic depressive psychosis. *Id.* at 262.

In *Star Realty v. Bower*, 17 Mich. App. 248, 169 N.W.2d 194 (1969), the Michigan Court of Appeals upheld a trial court's denial of specific performance of a contract to sell real estate. The trial court's holding was supported by the testimony of a psychiatrist. *Id.* at 253-55, 169 N.W.2d at 197. The appellate court observed that emotional disorders per se do not produce contractual incapacity. Yet it concluded that an emotional disorder could vitiate understanding:

court put it, "[t]he science of psychiatry . . . has not yet reached the plateau of infallibility where courts must cede their powers of

---

We are not concerned with what impairs capacity. There is considerable testimony of emotional instability on the part of defendant. While plaintiff urges that such testimony is immaterial, there is unrefuted testimony by [a psychiatrist who treated the defendant] that defendant's emotional state could overwhelm any intellectual appraisals that he should make. In such case defendant would lack capacity to contract.

*Id.* at 258, 169 N.W.2d at 199. The record, however, also contained lay testimony that the defendant drank heavily and behaved in an erratic and imprudent fashion:

Robert Porter, a cousin of defendant, testified as to defendant's behavior in the hospital after an automobile accident which occurred the day after the contract was signed. Mr. Porter stated that defendant broke down and cried about his condition; that his appearance was unkempt, unshaven and dirty; that he was fighting with his wife over the divorce; that he was drinking quite a bit and that he was completely in debt and "flat broke." Mr. Porter testified that defendant's despondency continued and that he made threats against his wife's new boyfriend. According to Mr. Porter, defendant would break down, cry and become incoherent. He lacked self control. His emotions would run from anger to very low fits of depression. He suffered from gastrointestinal distress, nausea, throwing up — he couldn't retain food and was constantly broken out in a rash. His business and personal behavior was erratic.

*Id.* at 255, 169 N.W.2d at 197-98. Other lay witnesses concurred. *Id.* at 255, 169 N.W.2d at 198.

In *Gore v. Gadd*, 268 Or. 527, 522 P.2d 212 (1974), the plaintiff argued that she suffered from an affective disorder that rendered her incompetent to contract for the sale of her home. *Id.* at 528, 522 P.2d at 213. The Oregon Supreme Court assumed arguendo that affective disorders could produce incapacity, but upheld the trial court's decision that the plaintiff was competent. *Id.* at 530, 522 P.2d at 214. The Supreme Court noted that two psychiatrists had reached opposing conclusions regarding the plaintiff's capacity and that the trial court had relied primarily on lay testimony. *Id.* at 528, 522 P.2d at 213. In *Kruse v. Coos Head Timber Co.*, 248 Or. 294, 432 P.2d 1009 (1967), the court upheld a trial judge's determination that the plaintiff had produced insufficient evidence for the jury on the issue of his capacity to execute a release. The plaintiff, who was examined by experts, argued that he signed the release at a time when he suffered from "post-traumatic psychoneurosis," and there was evidence to support his claim. The court noted that "there was no evidence that this type of psychoneurosis would interfere with his mental capacity to enter into a contract." *Id.* at 305, 432 P.2d at 1015.

In *Nohra v. Evans*, 509 S.W.2d 648 (Tex. Civ. App. 1974), the Texas Court of Civil Appeals followed the New York cases in holding that the trial court should have included a volitional prong in its instruction to the jury on the issue of the plaintiff's capacity to enter into a business transaction. The plaintiff was entitled to a trial on the issue of whether she lacked capacity in the depressed phase of a manic-depressive illness. *Id.* at 654-55. The appellate court remanded the case for a new trial, but did not indicate whether the testimony in the record would serve as proof of either the illness or the connection between the illness and the plaintiff's capacity. *Id.* at 655. Members of the plaintiff's family testified that, although she was a shrewd businesswoman, she was in the depressed phase of a manic depressive illness — that she understood the transaction but was "very susceptible to suggestion" and did not care about what she was doing. *Id.* at 649-50. The only medical testimony referred to in the opinion related to manic depression generally and not to the plaintiff in particular. *Id.* at 649.

adjudication even when a pronouncement has been made by a psychiatrist in answering the ultimate question at issue, that his patient was incompetent."<sup>202</sup>

In capacity disputes that do not involve volitional disorders or mental illness per se, judges have buttressed their conclusions by reference to medical evidence,<sup>203</sup> or to its absence,<sup>204</sup> without treating it as dispositive. Many cases involve conflicting medical testimony.<sup>205</sup> Even where there is no disagreement among doctors, however, lay testimony may prevail over contrary medical opinion evidence.<sup>206</sup> The standard, then, remains legal rather than medical. The promisors in the capacity cases may indeed be moving "from contract to status" with respect to particular transactions, but in general they are not doing so via psychiatry.<sup>207</sup>

## B. Substantive Fairness

According to Green, transactional fairness now furnishes the standard of capacity.<sup>208</sup> This view is not entirely without support

202. *Mills v. Kopf*, 216 Cal. App. 2d 780, 785-86, 31 Cal. Rptr. 80, 84 (1963)(rejecting a claim of contractual incapacity despite supporting testimony by the promisor's psychiatrist).

203. *See, e.g.*, *Knighten v. Davis*, 358 So. 2d 1022 (Ala. 1978); *Bryant v. Bryant*, 379 So. 2d 382 (Fla. Dist. Ct. App. 1979); *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960); *Barth v. Gregory*, 79 Ill. App. 3d 510, 398 N.E.2d 849 (1979); *Krasner v. Berk*, 366 Mass. 464, 319 N.E.2d 897 (1974); *Coke v. Coke*, 242 Or. 486, 410 P.2d 214 (1966).

204. *See, e.g.*, *Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 309, 438 S.W.2d 25, 29 (1969)(capacity upheld in part because no medical evidence of incapacity was introduced)(the case is discussed *supra* text accompanying notes 19-35).

205. *See, e.g.*, *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981); *Costello v. Costello*, 186 N.W.2d 651 (Iowa 1971).

206. *See, e.g.*, *Cundick v. Broadbent*, 383 F.2d 157, 161 (10th Cir. 1967), *cert. denied*, 390 U.S. 948 (1968)("It has even been said that opinion evidence in cases of this kind is . . . 'generally considered low grade, and not entitled to much weight against positive testimony of actual facts.'")(citation omitted); *Alley v. Rodgers*, 269 Ark. 262, 265, 599 S.W.2d 739, 741-42 (1980)(doctor had treated alleged incompetent primarily for physical ailments); *Smith v. Blum*, 143 So. 2d 419, 421-22 (La. Ct. App. 1962) (applicable statute required that incapacity be evident to other party to transaction); *First Nat'l Bank v. Nennig*, 92 Wis. 2d 518, 532-33, 285 N.W.2d 614, 621-22 (1979)(opinion evidence of incapacity based upon diagnosis of chronic paranoid schizophrenia, but doctors conceded entry into contract might have occurred during lucid interval).

207. *See supra* note 111 and accompanying text.

208. The Restatement commentary adopts this view in part: "Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made." RESTATEMENT (SECOND) OF CONTRACTS § 15, comment b (1979).

in the cases. In the unlikely event that a trial court excludes evidence of fairness — of the value of property sold by an alleged incompetent, for example — the appellate court will probably reverse and remand for a new trial.<sup>209</sup> More importantly, courts do tend to find capacity to enter fair transactions<sup>210</sup> and incapacity to enter unfair transactions.<sup>211</sup> The decisions demonstrate clearly that substantive fairness is relevant to the issue of capacity.<sup>212</sup>

Yet the cases fail in at least three respects to justify Green's view. First, substantive unfairness is not a prerequisite for a finding of incapacity. In some cases involving no evidence of unfairness, appellate courts uphold findings of incapacity<sup>213</sup> or conclude that the evidence of disability creates a question for the jury.<sup>214</sup> Where there is some evidence of unfairness but no overall assessment of the substance of the transaction, the court may be willing to affirm as to incapacity<sup>215</sup> or even to reverse a trial judge's find-

209. See *Bach v. Hudson*, 596 S.W.2d 673, 677 (Tex. Civ. App. 1980).

210. See, e.g., *Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 438 S.W.2d 25 (1969) (discussed *supra* text accompanying notes 19-35); *Eslick v. Montgomery*, 3 Ill. App. 3d 447, 278 N.E.2d 412 (1972) (discussed *infra* text accompanying notes 297-306); *Estate of Ferling v. Abernathy*, 670 S.W.2d 109 (Mo. Ct. App. 1984); *Gindhart v. Skourtes*, 271 Or. 115, 530 P.2d 827 (1975) (contract upheld where transaction was not grossly unfair); *Cyrus v. Tharp*, 147 W. Va. 110, 126 S.E.2d 31 (1962) (discussed *infra* notes 247-63 and accompanying text); *First Nat'l Bank v. Nennig*, 92 Wis. 518, 285 N.W.2d 614 (1979) (discussed *infra* notes 266-76 and accompanying text).

211. See, e.g., *Knott v. Pervere*, 285 F. Supp. 274 (D. Mass. 1968) (evidence that contract was irrational or probative of incapacity); *Knighten v. Davis*, 358 So. 2d 1022 (Ala. 1978) (drastically insufficient consideration furnished indication of incompetence); *Costello v. Costello*, 186 N.W.2d 651 (Iowa 1971) (contract and deed set aside where purchase price was one-half of appraised value); *Krasner v. Berk*, 366 Mass. 464, 319 N.E.2d 897 (1974) (improvident agreement relating to rent supported finding of incompetence).

212. Cf. *Baron*, *supra* note 124, at 1059 ("Cases sounding the rationality theme and the self-consistency theme alike hold that the fact finder may consider the will's dispositive provisions in evaluating the testator's mental capacity."); *Fellows*, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 621 (1988) ("The nature of the distribution plan is probably the most critical observable fact influencing the outcomes of cases in which [testamentary] capacity . . . [is] at issue.") (footnote omitted).

213. See, e.g., *Coburn Fin. Corp. v. Bennett*, 241 So. 2d 802 (La. Ct. App. 1970); *Krueger v. Zoch*, 285 Minn. 332, 173 N.W.2d 18 (1969); *Faber v. Sweet Style Mfg.*, 40 Misc. 2d 212, 242 N.Y.S.2d 763 (N.Y. Sup. Ct. 1963) (discussed *supra* note 200).

214. See, e.g., *Ludwig v. Hart*, 40 N.C. App. 188, 252 S.E.2d 270 (1979); *Nohra v. Evans*, 509 S.W.2d 648 (Tex. Civ. App. 1974).

215. In *In re Estate of Faris*, 159 N.W.2d 417 (Iowa 1968), an eighty-four year old widow leased her 220-acre farm for a period of five years. The appellate court viewed the lease as unduly long but made no finding with respect to the rent. The case is discussed *infra* text accompanying notes 236-41.

In *Fidelity Fin. Serv. v. McCoy*, 392 So. 2d 118 (La. Ct. App. 1980), the appellate court affirmed a finding of incapacity to execute a promissory note and a chattel mortgage.



ing of capacity.<sup>216</sup>

Second, evidence of fairness is not essential for a determination that the promisor or donor had capacity. An appellate court may uphold a finding of capacity,<sup>217</sup> or even reverse a judgment of incapacity,<sup>218</sup> where the evidence as to fairness is inconclusive. Indeed, the higher court may reverse a finding of incompetence in the face of a suggestion that the transaction is substantively unfair.<sup>219</sup> Moreover, in some of the cases in which the appellate

---

The only indication of substantive unfairness in the opinion is a suggestion that the chattel mortgage covered property other than the car the borrower was financing. *Id.* at 119. Even assuming that the mortgage included the other property, however, there is no indication that the value of the security exceeded the amount of the debt.

216. In *Barth v. Gregory*, 79 Ill. App. 3d 510, 398 N.E.2d 849 (1979), Barth, a seventy-two year old widower, entered into a contract to sell his farm for \$400,000. *Id.* at 511-12, 398 N.E.2d at 850. Two doctors, one of whom was a psychiatrist, testified that they believed him to be incompetent. *Id.* at 513-15, 398 N.E.2d at 851-52. Several lay witnesses testified that his living conditions were deplorable. *Id.* at 515-17, 398 N.E.2d at 853-56. The court summarized the testimony of a witness named Pakosta:

[T]he house was dirty, dishes were scattered over the floor in the kitchen, and located just outside of the house was a big pile of garbage. Barth would wear the same pair of pants day after day. His eating habits were poor, and beginning the end of August, Pakosta began to bring Barth food.

Until January of 1976, Pakosta saw Barth on a regular basis, sometimes visiting as often as four or five times a day. Pakosta testified that during these November and December visits the odor inside Barth's house was "very, very terrible." He would often find the floors of the house full of human excrement, particularly the floors in the kitchen and the main bedroom. Human waste could also be found outside of the house, as Barth would defecate outdoors when the weather was warm. ("You kind of had to watch where you were walking or else you would walk all over it," Pakosta said). Barth himself would often have feces on his pants and underwear.

*Id.* at 515-16, 398 N.E.2d at 853. Pakosta and other witnesses also stated that Barth behaved in a confused and erratic fashion. *Id.* at 515-18, 398 N.E.2d at 853-56. The defendants, who had persuaded Barth to enter into the contract, testified to the contrary. *Id.* at 521-22, 398 N.E.2d at 857. The court, however, did not believe them: "[W]e think it unusual for Barth to be disoriented and confused on every occasion when a disinterested witness was with him, but perfectly lucid whenever he was in the presence of one of the defendants." *Id.* at 524, 398 N.E.2d at 859.

The evidence of substantive unfairness was minimal. The court decided neither that the property was worth more than the sales price, *id.* at 527, 398 N.E.2d at 861, nor that the six percent commission that was to go to the defendant brokerage firm was excessive. It pointed out only that one of the individual defendants, who was to receive part of the commission, had not done much to earn it. *Id.* at 525, 398 N.E.2d at 860. If the price was fair and the commission was standard, the transaction may even have been advantageous from Barth's point of view.

217. See, e.g., *Richard v. Smith*, 235 Ark. 752, 361 S.W.2d 741 (1962).

218. See, e.g., *Columbia Sav. & Loan v. Carpenter*, 33 Colo. App. 360, 521 P.2d 1299 (1974), *rev'd on other grounds sub nom.*, *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 137 (1975).

219. In *Meadors v. Pacific Int'l Petroleum*, 449 So. 2d 26 (La. Ct. App. 1984), the

courts find capacity, the opinions simply cite no evidence that goes to substantive fairness.<sup>220</sup>

Third, the opinions do not suggest that courts have ignored the question of capacity in cases in which a correlation exists between capacity and fairness or incapacity and unfairness. Most of the opinions present substantial evidence of either capacity or incapacity apart from the nature of the transaction.<sup>221</sup> If anything, the appellate courts often present more evidence than appears necessary to support trial court determinations. On balance, then, the cases indicate that substantive fairness, while unquestionably important, does not control the work of the appellate courts on the issue of capacity.

Moreover, the cases suggest that under at least some circumstances fairness bears independently on enforceability. For example, an incompetent may be bound by a fair transaction that is no longer executory if the competent party acted without knowledge of the incompetent's condition.<sup>222</sup> To the extent that courts recog-

court reversed a trial judge's finding of incompetence to execute a mineral lease. With respect to substantive fairness the opinion suggests only that the alleged incompetent's neighbors were paid more for their mineral rights than he was for his. *Id.* at 31. In *Estate of McGovern v. State Employees' Retirement Bd.*, 512 Pa. 377, 517 A.2d 523 (1986), the court reversed a finding of incapacity to execute an arguably unfair selection of retirement benefits. The court expressly rejected the Restatement's call for a "post-hoc" assessment of fairness. *Id.* at 385, 517 A.2d at 526.

220. See, e.g., *Mills v. Kopf*, 216 Cal. App. 2d 780, 31 Cal. Rptr. 80 (1963); *Curry v. Curry*, 31 Ill. App. 3d 972, 334 N.E.2d 742 (1975); *Smith v. Blum*, 143 So. 2d 419 (La. Ct. App. 1962); *Looney v. Chastain*, 395 P.2d 571 (Okla. 1964).

221. See, e.g., cases cited *supra* note 210 (finding capacity) and note 211 (finding incapacity). There are, of course, occasional cases of invalid transactions in which the evidence of unfairness is much more impressive than the evidence of incapacity. See, e.g., *Williamson v. Matthews*, 379 So. 2d 1245 (Ala. 1980) (invalidating a transaction on the basis of gross inadequacy of consideration and some evidence of incapacity).

222. The Restatement supports this view:

Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the [incompetent's power of avoidance] terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust.

In such a case a court may grant relief as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1979).

In *Upton v. Hall*, 225 Va. 168, 300 S.E.2d 777 (1983), for example, an incompetent entered into an agreement for the sale of real estate. The trial court enforced the agreement without determining whether the buyers were aware of her incompetence. The Virginia Supreme Court held that this was error:

It is undisputed that [the seller] was incompetent at the time she entered into the contract with [the buyers]. Therefore, if . . . [the buyers] knew of this incompetency, [the seller] is entitled to have the contract set aside without placing [the buyers] *in statu quo*. If, on the other hand, [the buyers] had no knowl-

nize an independent role for fairness, they will be less tempted to exaggerate its relevance to the alleged incompetent's condition.

### C. Social Context

To date, the principal doctrinal expression of the role of social context is the notion that contracts and wills require different levels of capacity. The judicial rhetoric relating to the consequences of transactional form remains highly variable. Some courts continue to assert that a higher level of capacity is required to sustain a contract than to uphold either an inter vivos or a testamentary gift.<sup>223</sup> Other courts state that one standard applies to both business transactions and donations.<sup>224</sup> Still others adopt the rhetoric of donative capacity in cases involving contracts<sup>225</sup> or employ the language of contractual capacity in cases involving gifts.<sup>226</sup>

To the extent that methods of judicial analysis vary from case to case, however, they tend to do so in response to social context rather than transactional form. Although the courts do not expressly classify cases according to their social context, the decisions fall into three general categories. The first consists of more or less discrete<sup>227</sup> business transactions, and the second consists of

edge of [the seller's] incompetency, the transaction may be voided only if [the buyers] can be placed *in statu quo*. The trial court erred in not hearing evidence in order to decide these issues.

*Id.* at 173, 300 S.E.2d at 779-80.

223. *See, e.g.*, *Citizens Nat'l Bank v. Pearson*, 67 Ill. App. 3d 457, 459, 384 N.E.2d 548, 550 (1978) ("Greater mental capacity is required to make a deed than is required to execute a will. However, no greater mental capacity is required to make a deed of voluntary settlement reserving a life estate than is required to make a will." (citations omitted)); *Costello v. Costello*, 186 N.W.2d 651, 654-55 (Iowa 1971) (higher standard for contracts than for wills); *Peterein v. Peterein*, 408 S.W.2d 809, 813 (Mo. 1966) (higher standard for contracts than for inter vivos gifts or wills).

The notion that a contract requires a higher level of capacity than a gift or a will is implicit in the opinions in both *Columbia Sav. & Loan v. Carpenter*, 33 Colo. App. 360, 368, 521 P.2d 1299, 1303 (1974), *rev'd on other grounds sub nom.*, *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 137 (1975); and *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 567, 169 N.E.2d 97, 103 (1960).

224. *See, e.g.*, *Rose v. Dunn*, 284 Ark. 42, 46-47, 679 S.W.2d 180, 182-83 (1984); *Bach v. Hudson*, 596 S.W.2d 673, 675-76 (Tex. Civ. App. 1980).

225. *See, e.g.*, *Cundick v. Broadbent*, 383 F.2d 157, 160 (10th Cir. 1967); *Richard v. Smith*, 235 Ark. 752, 754-55, 361 S.W.2d 741, 742-43 (1962).

226. *See, e.g.*, *Conerly v. Lewis*, 238 Miss. 68, 79-80, 117 So. 2d 460, 465 (1960) (quoting *Lambert v. Powell*, 199 Miss. 397, 24 So. 2d 773 (1946)).

227. The term is MacNeil's. He describes a discrete contract as "one in which no relation exists between the parties apart from the simple exchange of goods." I. MACNEIL,

transactions between parties to close relationships. In a third category, fiduciary principles have a substantial impact on both business and social transactions. The presence of the fiduciary does not create a wholly separate social context. Yet as a result of the courts' solicitude for the interests of entrustors, the fiduciary relation tends to overshadow other contextual factors. This Section reviews cases in each category and recommends approaches for future decisions.

### 1. The Business Context

In general, the courts assess both capacity to engage in business transactions and the substantive fairness of the transactions with little reference to human relationships. In *Bach v. Hudson*,<sup>228</sup> for example, the alleged incompetent agreed to sell a parcel of real estate to a party he had first met several weeks earlier.<sup>229</sup> The trial court held that the buyer was entitled to specific performance, but the appellate court reversed and remanded for a new trial. The testimony relating to the seller's capacity focused largely on his lack of business acumen. His son testified that he had once executed a deed for no consideration and that he was unable to remember commercial values.<sup>230</sup> Other witnesses stated that the seller's appearance and physical health had deteriorated, and that he had made "erratic and irrational decisions concerning sales of fruit and of [sic] agricultural conditions."<sup>231</sup> The evidence of substantive unfairness, erroneously excluded by the trial court, was simply that the fair market value of the property was considerably higher than the contract price.<sup>232</sup>

The court's analysis of both capacity and substantive fairness reflected the apparently discrete nature of the transaction. The issue was whether the seller was able to further his economic interests by functioning effectively in an arena in which competition was not complicated by relationships. Although the case presents perhaps the clearest example of this approach, it is by no means unique.<sup>233</sup>

---

*supra* note 4, at 10.

228. 596 S.W.2d 673 (Tex. Civ. App. 1980).

229. *Id.* at 674-75.

230. *Id.* at 674-77.

231. *Id.* at 675.

232. *Id.* at 676-77.

233. In *Cundick v. Broadbent*, 383 F.2d 157 (10th Cir. 1967), the court affirmed a finding of capacity to sell range land, development company stock, and livestock and equip-

Even in cases of apparently discrete transactions, however, courts may admit evidence of social functioning. In a case of alleged incapacity to contract for the sale of a farm, for example, the court cited evidence that the seller did not protect his own interests effectively and also observed that he "trusted strangers rather than his own family."<sup>234</sup> And in assessing a claim of incompetence to execute a stock subscription agreement, another court noted that the subscriber behaved in a bizarre fashion in his personal life.<sup>235</sup>

Indeed, impaired relational skills may help to explain a party's entry into a disadvantageous business transaction. In *In re Estate of Faris*,<sup>236</sup> the Iowa Supreme Court affirmed a finding that Addie Faris, an eighty-four year old widow, lacked capacity

---

ment. The seller and the buyer had a business relationship that predated the transaction; the buyer had purchased the seller's lamb crop in earlier years. *Id.* at 162. The contract called for seller financing over a period of at least one year. *Id.* at 163. Moreover, the court placed considerable stress on the fact that the seller's wife participated in the negotiation of the transaction. *Id.* at 163. The appellate court nevertheless treated the transaction as discrete. Its analysis of the seller's capacity did not include an assessment of his ability to relate to either the buyer or his wife. Nor did its evaluation of the fairness of the transaction make any reference to the relationship between the seller and the buyer.

In *Freiders v. Dayton*, 61 Ill. App. 3d 873, 378 N.E.2d 1191 (1978), Martha Dayton, aged 85, signed an agreement for the sale of her home. The purchaser, Lawrence Freiders, was engaged to Jane Tallent, who worked at the Roosevelt Square Shelter Care Home where Dayton was a patient. In her capacity as a social rehabilitation worker, Tallent assisted Dayton in handling her finances, and the two had an "amicable and friendly" relationship. *Id.* at 880, 378 N.E.2d at 1197. The relationship did not figure in the court's analysis of either capacity or fairness, although it was relevant on the issue of undue influence.

In *Smith v. Blum*, 143 So. 2d 419 (La. Ct. App. 1962), an alleged incompetent and his wife agreed to sell their home and to pay a brokerage commission to the plaintiff, whom they had not met before. The court resolved the issue of the husband's capacity without reference to the nature of his relationship with his wife. *Id.* at 420-22.

In *Krasner v. Berk*, 366 Mass. 464, 319 N.E.2d 897 (1974), the plaintiff and the defendant were doctors who shared a suite of offices for five years. Near the end of the five-year term, they renewed the lease for a period of three years and also agreed in writing to share rent and taxes even if one of them became disabled. The defendant sought to escape liability under the agreement on the basis of incapacity. *Id.* at 465, 319 N.E.2d at 898. The Massachusetts Supreme Judicial Court affirmed the trial court's finding of incompetence essentially without reference to the relationship between the plaintiff and the defendant. *Id.* at 469, 319 N.E.2d at 900-01.

234. *Krueger v. Zoch*, 285 Minn. 332, 333, 173 N.W.2d 18, 20 (1969).

235. *Knott v. Pervere*, 285 F. Supp. 274, 280 (D. Mass. 1968) (The subscriber proposed to a married woman and, three days before his marriage to another woman, "he solicited advice from his sister and others as to which of three girls then under his consideration he should marry.").

236. 159 N.W.2d 417 (Iowa 1968).

to execute a five-year lease of her 220-acre farm.<sup>237</sup> The lease worked to her disadvantage in that, unlike the annual rentals that were customary in the area, it deprived her of flexibility in managing her property.<sup>238</sup> The court took note of Faris' general inability to get along with others. She was confused about her affairs and needed a conservator,<sup>239</sup> but was "one of those extremely independent old persons who would not hear of any such thing, and was irrationally suspicious of those who would otherwise have helped her."<sup>240</sup> The court suggested strongly that had she been under conservatorship the transaction would not have taken place.<sup>241</sup> Her relational incapacity thus deprived her of protection that would have compensated for her other disabilities.

In analyzing business transactions, then, the courts can and do take relational factors into account. In future cases, judges should be open to consideration of those factors on issues of both capacity and substantive fairness. The approach of *Bach v. Hudson*<sup>242</sup> is probably justifiable in some instances. Yet business is inevitably a social activity,<sup>243</sup> and a competent assessment of a potential transaction often involves a reasonably sensitive appraisal of a human interaction. Judges may be more hesitant to inquire into human factors in a business setting than they are in a family context.<sup>244</sup> Where those factors are important from a business

237. *Id.* at 421. The lessees, Everett and Edna Lyman, operated another farm in the neighborhood and were already in possession of Faris' farm under an earlier three-year lease. *Id.* at 419. The court noted that Faris "probably did lean on Mr. Lyman some." *Id.* at 421. It concluded, however, that the relationship was not confidential and that there was therefore no presumption of undue influence. Undue influence and confidential relationships are discussed *infra* notes 288-308 and accompanying text.

238. *Faris*, 159 N.W.2d at 421.

239. The court's account of Faris' incapacity is graphic. The opinion indicates, for example, that her personal hygiene deteriorated to an "atrocious" point and that her household was in complete disarray:

Litter filled the kitchen, as well as a very bad odor. She used a pail for a toilet, and did not keep it emptied. She used a hot plate for such cooking as she did, and slept behind the stove on a cot. The bed clothing consisted of gunny sacks, and the pillow was an old article of clothing filled with rags. The whole thing was very dirty, and the room was a boar's nest.

*Id.* at 419. There was medical testimony that she suffered from "severe arteriosclerosis and chronic brain syndrome, advanced." *Id.* at 421.

240. *Id.* at 419.

241. *Id.* at 421.

242. 596 S.W.2d 673 (Tex. Civ. App. 1980) (discussed *supra* text accompanying notes 228-33).

243. See *supra* note 79 and accompanying text.

244. Professor Llewellyn observes that judges "have an experience with family matters which is earlier and more intimate than any understanding of business." Llewellyn,

standpoint, however, they are inevitably relevant to a claim of contractual incapacity.

## 2. The Family or Social Context

Many capacity cases involve transactions between parties who know each other socially or who are members of the same family. In these cases, judicial conceptions of both capacity and substantive fairness are strongly affected by relational factors. The courts' approach effectively counters the principal criticisms of relational analysis<sup>245</sup> that are either explicit or implicit in the commentary. Moreover, a relational perspective illuminates the close connection between incapacity and undue influence. This Subsection focuses first on capacity cases per se and second on decisions involving undue influence.

### a. Capacity Cases and Close Relationships

Alexander and Szasz's argument suggests that, in assessing close relationships, the courts will defer to psychiatric testimony regarding affective functioning<sup>246</sup> and will adhere rigidly to traditional family values. Eisenberg's argument implies that judicial responses to evidence of allegedly close relationships will be unpredictable. In general, however, the decisions indicate that these fears are unfounded.

In *Cyrus v. Tharp*,<sup>247</sup> for example, Olive Adkins executed both a contract and a deed. Pursuant to the contract, the deed conveyed her home in Huntington, West Virginia, to Mr. and Mrs. Tharp.<sup>248</sup> Mrs. Adkins was over eighty years old when she signed the documents<sup>249</sup> and was hospitalized for treatment of a severe infection that developed following the extraction of two of

---

*Our Case Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 785 (1939).

245. As used in this Article, the term "relational analysis" refers to analysis of personal relationships and does not incorporate a general theory of relational contract. See *supra* note 91.

246. Alexander and Szasz do not develop this implication of their argument. One commentator on the subject of testamentary capacity, however, argues that courts should seek to identify the members of the testator's "psychological" family, and that psychiatric or psychological evidence can be particularly useful in that process. Spaulding, *supra* note 124, at 130, 137-38.

247. 147 W. Va. 110, 126 S.E.2d 31 (1962).

248. *Id.* at 115-16, 126 S.E.2d at 35.

249. *Id.* at 112, 126 S.E.2d at 33.

her teeth.<sup>250</sup>

Mrs. Adkins and the Tharps had maintained a close friendship for many years. Mrs. Adkins took in boarders,<sup>251</sup> and the Tharps met and were married at her home.<sup>252</sup> After they were married, they saw her often, both at her house and at their own. Mr. Tharp ran errands for Mrs. Adkins, paid bills for her, painted and repaired her home, and handled the funeral arrangements after the death of her son. Mrs. Adkins referred to Mr. Tharp either as like a son to her or as her best friend.<sup>253</sup> She often told others that she wanted the Tharps to have her home.<sup>254</sup> Her brother lived with her during the two years preceding her death, but he gave her very little help and the two were not close.<sup>255</sup>

While Mrs. Adkins was in the hospital, she insisted that Mr. Tharp have a deed prepared so that she could convey her home to him and his wife.<sup>256</sup> Mr. Tharp instructed an attorney to draft both a deed and a contract. The contract provided that the conveyance of the property was in consideration of ten dollars and the Tharps' promise to provide Mrs. Adkins for the rest of her life with "food, clothing, shelter and necessary medical and hospital care if needed . . . ."<sup>257</sup> Mrs. Adkins executed the documents, and, three days later, suffered a stroke and died.<sup>258</sup> Her brother, who was her sole heir, sued the Tharps, alleging that she lacked capacity to transfer the property. The trial court invalidated the conveyance,<sup>259</sup> but the Supreme Court of Appeals of West Virginia reversed.<sup>260</sup>

The supreme court's perception of the relationship between Mrs. Adkins and the Tharps was clearly critical to the outcome of the case.<sup>261</sup> Although the Tharps did not pay Mrs. Adkins for the property in cash, the conveyance was fair in light of all they had

---

250. *Id.* at 113, 126 S.E.2d at 34.

251. *Id.* at 113, 126 S.E.2d at 33.

252. *Id.* at 113, 126 S.E.2d at 34.

253. *Id.*

254. *Id.* at 113-18, 126 S.E.2d at 34-37.

255. *Id.* at 112-13, 126 S.E.2d at 33-34.

256. *Id.* at 119, 126 S.E.2d at 37.

257. *Id.* at 115, 126 S.E.2d at 35.

258. *Id.* at 119-20, 126 S.E.2d at 37-38.

259. *Id.* at 112, 126 S.E.2d at 33.

260. *Id.* at 123, 126 S.E.2d at 39.

261. The court denied that the friendship was dispositive, but nonetheless described it at some length and noted that it did bear on Mrs. Adkins' reason for executing the documents. *Id.* at 113-15, 126 S.E.2d at 34-35.



done for her in the past, what they promised to do for her in the future, and her relative estrangement from her brother. She had the capacity to appreciate the transaction's fairness in light of those factors; she was aware of what the Tharps meant to her, particularly in contrast to her brother, and of what she could count on them to do for her in the future.

Indeed, like Yarbrough's agreement with the Luzaders, the conveyance represented a contribution to Mrs. Adkins' friendship with the Tharps. The urgency she felt about executing the deed<sup>262</sup> may well have reflected her desire to avoid feeling unduly indebted to the Tharps — to maintain a degree of pride and a kind of independence without which the relationship would be diminished.

In *Cyrus v. Tharp* the transaction was, on one level at least, essentially donative. Even though the Tharps provided economic benefits to Mrs. Adkins and the transaction was contractual in form, the parties were motivated fundamentally by gratitude and generosity. In cases involving gifts, traditional doctrine can accommodate relational considerations fairly easily; as the *Cyrus* court observed, the character of the relationship was relevant to Mrs. Adkins' reason for executing the documents.<sup>263</sup> Although the courts' relational analysis is not always explicit, the holdings in other cases addressing donative capacity are consistent with the *Cyrus* approach.<sup>264</sup>

---

262. A Mrs. Nickel, who shared Mrs. Adkins' hospital room, testified to the urgency Mrs. Adams felt:

During the time [Mrs. Adkins] was there she had numerous visitors, however, Mr. and Mrs. Tharp seemed to come most often and appeared to have the most to do with taking care of Mrs. Adkins. Each time Mr. Tharp came in I would hear Mrs. Adkins ask him if he had brought the deed for her to sign to [her home]. The first few times she asked this, Mr. Tharp would tell her to wait until she was well and out of the hospital and that they would fix up the deed later. However, Mrs. Adkins *deep* [sic] insisting to him that she wanted him to bring the deed in so that she could deed the [home] to Mr. and Mrs. Tharp. On Friday, the day before the deed was finally signed, Mrs. Adkins talked with me at length while we were [alone] in the room, telling me about her [home] and that she wanted to deed it to Mr. and Mrs. Tharp.

*Id.* at 118-19, 126 S.E.2d at 37.

263. *Id.* at 115, 126 S.E.2d at 35.

264. See, e.g., *Eslick v. Montgomery*, 3 Ill. App. 3d 447, 278 N.E.2d 412 (1972) (discussed *infra* notes 297-306 and accompanying text); *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960) (discussed *infra* note 284); *Conerly v. Lewis*, 238 Miss. 68, 117 So. 2d 460 (1960) (upholding deeds to sons who had helped the grantor save the land during the depression); *Estate of Ferling v. Abernathy*, 670 S.W.2d 109 (Mo. Ct. App. 1984) (upholding gift of interest in savings account to friend who furnished a home and

Moreover, despite doctrinal obstacles,<sup>265</sup> courts maintain this approach in assessing transactions that are clearly contractual. For example, in *First National Bank v. Nennig*,<sup>266</sup> Leona Nennig entered into an agreement to sell her eighty-acre farm to her second cousin, Norman Nennig.<sup>267</sup> The two had known each other for many years, and Norman Nennig had worked on the farm and assisted her in various other ways.<sup>268</sup> After negotiating, they agreed that he would purchase the farm for \$32,000, part down and the rest over time, and would supply her with food for the rest of her life.<sup>269</sup> An acceleration clause obligated him to make payments in advance of the schedule if she incurred emergency bills that would otherwise require her to go into debt.<sup>270</sup>

Thirteen days after the parties entered into the agreement, the First National Bank of Appleton became Leona Nennig's guardian. The bank sued to invalidate the sale on the theory that she lacked contractual capacity.<sup>271</sup> On the basis of conflicting evidence on the issues of her capacity<sup>272</sup> and the substantive fairness of the transaction,<sup>273</sup> the trial court enforced the contract,<sup>274</sup> and

care during the donor's illness).

265. See *supra* note 77.

266. 92 Wis. 2d 518, 285 N.W.2d 614 (1979).

267. *Id.* at 520, 285 N.W.2d at 616.

268. *Id.* at 521-22, 285 N.W.2d at 616-17.

269. *Id.* at 523-25, 285 N.W.2d at 617-18.

270. *Id.* at 528, 285 N.W.2d at 620.

271. *Id.* at 521, 285 N.W.2d at 616.

272. According to medical experts, Leona Nennig suffered from chronic paranoid schizophrenia and was incompetent much of the time. *Id.* at 532-33, 285 N.W.2d at 621-22. The court found that her condition made her susceptible to Norman Nennig's influence. *Id.* at 535-37, 285 N.W.2d at 623-24 (susceptibility to undue influence is discussed *infra* text at note 290). Moreover, the bank's appointment as guardian only thirteen days after the parties entered into the agreement suggests that she lacked capacity. *Id.* at 520-21, 285 N.W.2d at 616.

On the other hand, the doctors who testified agreed that she might have executed the agreement during a lucid interval. *Id.* at 533, 285 N.W.2d at 621-22. Her "friends and acquaintances testified that they could see nothing wrong with her, that she was capable of playing good cards and conducted business transactions involving the sale of personal property in a manner indicating that she knew what she was doing." *Id.* at 534, 285 N.W.2d at 622. And the lawyer who drafted the agreement and supervised its execution thought she understood the transaction. *Id.* at 531, 285 N.W.2d at 621.

273. Three witnesses testified that the property was worth substantially more than the contract price: one broker thought it was worth \$39,750 and another appraised it at \$65,000; an auctioneer and appraiser set its value at \$41,000. *Id.* at 528, 285 N.W.2d at 620. And Leona Nennig testified that after she signed the contract a neighbor offered her \$65,000. *Id.* at 524, 285 N.W.2d at 618. On the other hand, both the acceleration clause and Norman Nennig's promise to supply her with food for the rest of her life provided her with benefits above and beyond the contract price. *Id.*

274. *Id.* at 520, 285 N.W.2d at 616.

the Wisconsin Supreme Court affirmed.<sup>275</sup> The supreme court's explanation focused squarely on the relationship between the parties:

[Leona] wanted to give Norman the first chance to buy the farm because he had worked it so long, had done her personal favors, and . . . at the time, his children were the principal beneficiaries under her will. The evidence also indicates that the price and interest rates, while low, were of her own choosing because she felt that Norman could afford to purchase the farm at those terms and that price, and that the acceleration clause and her other resources would enable her to get along, particularly in view of the agreement for Norman to furnish her with meat and vegetables for the rest of her life.<sup>276</sup>

In short, the transaction made sense in the context of the relationship. Other courts have maintained the same approach in cases of alleged incapacity to contract.<sup>277</sup>

The method of analysis exemplified by *Cyrus* and *Nennig* effectively refutes the commentators' criticisms. First, in neither case did the court seek the aid of expert testimony regarding the relevant relationship.<sup>278</sup> While an occasional decision in the family or social context turns on psychiatric testimony, the testimony seldom, if ever, addresses the nature of a relationship per se.<sup>279</sup> In

---

275. *Id.* at 534-35, 285 N.W.2d at 623.

276. *Id.*

277. *See, e.g.,* *Anderson v. Anderson*, 399 So. 2d 831, 835 (Ala. 1981)(upholding sale of real estate to family member who was closer to the seller than were the parties challenging the transaction); *Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 438 S.W.2d 25 (1969)(discussed *supra* text accompanying notes 19-35); *Interdiction of Burns*, 486 So. 2d 977 (La. Ct. App. 1986)(invalidating sale of real estate to nephew in absence of close relationship).

278. In neither case was psychiatric testimony regarding the nature of the relevant relationship offered by a party and rejected by the court. The fact that neither court sought expert testimony on that issue is nevertheless significant, since at times courts emphasize that expert testimony would be of assistance. For example, in *Simmons Nat'l Bank v. Luzader*, 246 Ark. 302, 309, 438 S.W.2d 25, 29 (1969), the court emphasized the absence of any medical testimony of incapacity (without, however, relating medical testimony to relational considerations).

279. In *Lindsey v. Lindsey*, 369 N.W.2d 26 (Minn. Ct. App. 1985), *modified*, 388 N.W.2d 713 (Minn. 1986), a former wife sought to invalidate a stipulation to which she had agreed in the process of her divorce. She argued that mental illness deprived her of capacity to enter into the stipulation, and the court agreed:

To deny relief here would be to create an unconscionable result. The unimpeachable fact remains that respondent's severe mental illness for a period of years prior to and at the time of the original decree rendered her incapable of understanding the agreements she was signing. Her subsequent bouts with debilitating

most cases, courts assess human interactions without expert assistance.<sup>280</sup>

Second, neither *Cyrus* nor *Nennig* reflects rigid judicial adherence to traditional family values. Both courts were more interested in the quality of the relevant relationships than in whether the parties were members of the same family. Mrs. Adkins was evidently unrelated to the Tharps and the *Nennig* court did not emphasize Leona Nennig's rather remote family relationship with Norman Nennig. Courts are, of course, willing to recognize the importance of family ties.<sup>281</sup> Yet in the capacity cases family members do not always prevail over friends.<sup>282</sup> Nor do the courts invariably define families,<sup>283</sup> or rank inter-family relationships,<sup>284</sup>

---

depression corresponded to any legal proceeding associated with the dissolution. 369 N.W.2d at 29. The only testimony the appellate court cited was that of the former wife's psychiatrist. *Id.* at 28. The doctor, however, did not address the nature of her marriage. *Id.* On appeal, the state supreme court modified the decision without disturbing the appellate court's finding on the issue of capacity. *Lindsey v. Lindsey*, 388 N.W.2d 713, 716 (Minn. 1986).

In *Coleman v. Coleman*, 681 P.2d 1269 (Utah 1984), a psychologist described a party to a divorce as deeply depressed but able to "continue her demanding employment and to make day-to-day decisions." *Id.* at 1270. The party's family physician expressed essentially the same opinion. *Id.* The court cited the doctors' testimony in support of its conclusion that the party was competent to enter into the property settlement that became part of her divorce. *Id.* at 1271. Neither doctor's testimony related to her relationship with her former husband.

A divorce stipulation, of course, differs from most family and social transactions in that it represents part of the process of ending many if not all aspects of the relationship. That process tends to be much more adversarial than the negotiations that result in most family and social agreements. Despite the heightened emphasis on bargaining, however, a stipulation is clearly not a discrete business transaction. It is responsive to the history of the relationship and it may contemplate continuing cooperation in some matters, such as raising children.

280. See, e.g., *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981); *Estate of Ferling v. Abernathy*, 670 S.W.2d 109 (Mo. Ct. App. 1984).

281. See, e.g., *Simmons First Nat'l Bank v. Luzader*, 246 Ark. 302, 312, 438 S.W.2d 25, 31 (1969)(discussed *supra* text accompanying notes 19-35).

282. See, e.g., *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984)(deed to neighbor upheld despite challenge by heirs); *Estate of Ferling v. Abernathy*, 670 S.W.2d 109 (Mo. Ct. App. 1984)(addition of friend's name to bank account upheld despite challenge by family member); *McSpadden v. Mahoney*, 431 P.2d 432 (Okla. 1967)(inter vivos gift to close friend upheld despite challenge by family members).

283. In *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981), Albert Neal and his wife, Mary Neal, conveyed certain real estate to their neighbor and friend, Cleo Jackson. They also executed wills under which Jackson was the principal beneficiary. David Neal, who was almost certainly Albert Neal's illegitimate son, sued Jackson claiming that Albert Neal lacked the capacity to transfer the property and that he was unduly influenced. The trial court upheld the deed, but the court of appeals reversed on both issues. The appellate court treated the wills and the deed as constituting essentially one transaction in favor of Jackson. It noted that Albert and Mary Neal "gave David their name and

by reference to traditional criteria. Judges do not insist that inter vivos dispositions of property replicate the intestacy laws.

Third, in *Cyrus* and *Nennig* the courts assessed the allegedly close relationships by relatively objective criteria. Both cases involved relationships of long standing. Mrs. Adkins had known the Tharps for many years, and Leona Nennig had known her cousin all her life. The length of the relationship suggested in each case that the transaction was indeed consonant with the alleged incompetent's basic values. Courts generally grant greater recognition to relationships that have persisted over time than to those of lesser duration.<sup>285</sup>

---

treated him as a son." *Id.* at 19, 616 S.W.2d at 748. And it observed that the transaction in favor of Jackson was inappropriate in light of that relationship:

The disposition of this property made by Albert Neal in his will was not a natural one. David Neal was Albert's natural son, and had been treated as a son by both Albert and Mary. They had sufficient love for him in 1971, at a time when Albert was 86 years old, to deed to him the one-half acre upon which their home was located, describing David in the deed as their grandson, and in 1974, when Albert was 89 years old, they built a new brick home on David's land. Until about December 1, 1975, soon after Mary Neal suffered her first stroke, there was no evidence of disharmony in the family.

*Id.* at 25-26, 616 S.W.2d at 752.

284. In *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960), Myrtle Wienold, who was over seventy years old, married Ira Vosburgh, who was in his early forties. Shortly before she married him, Wienold deeded a parcel of real estate to him; soon after the marriage she placed other properties that she owned in their names as joint tenants. Less than four months after the marriage, she died. *Id.* at 557, 169 N.E.2d at 98.

The parties had known each other for some years and Vosburgh had furnished assistance to Wienold, whose health was precarious in the months preceding the marriage. *Id.* at 558-59, 169 N.E.2d at 99. After her death, her siblings and descendants of deceased siblings sued to invalidate the marriage and the deeds, alleging among other things that she lacked capacity. *Id.* at 558, 169 N.E.2d at 98. The trial court dismissed the plaintiffs' suit. *Id.* at 557, 169 N.E.2d at 98. The Illinois Supreme Court affirmed, *id.* at 574, 169 N.E.2d at 107, rejecting the argument that the marriage was inappropriate:

Although the briefs of counsel have variously described this marriage as "unnatural" or "uncommon," we believe that the marriage is more properly generally described as a marriage between a wealthy 72-year-old widow dying of cancer and a 42-year-old man who had been a family friend, who had lived in her home prior to the marriage, who had administered narcotics to her upon a doctor's prescription and recommendation, who had performed duties for her under a general power of attorney prepared by her attorney at her request, and who had consulted with her on various business matters.

*Id.* at 567, 169 N.E.2d at 103.

In *Columbia Sav. & Loan v. Carpenter*, 33 Colo. App. 360, 521 P.2d 1299 (1974), *rev'd on other grounds sub nom.*, *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975), the court upheld a gift to the donor's granddaughter while the granddaughter's parent was still living, reversing a trial court's finding of incapacity.

285. Compare *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960)(upholding inter vivos gifts to friend of long standing)(discussed *supra* note 284) and *McSpad-*

Moreover, in both *Cyrus* and *Nennig* the stronger party had furnished economic benefits to the weaker party. In each case, one of the terms of the transaction was essentially that the more capable party would continue to provide economic benefits in the future. Thus neither case turned solely on emotional considerations. Rather, the overall dynamic that the courts described incorporated an important element of economic exchange.<sup>286</sup> In general, courts are more inclined to enforce challenged transactions if that factor is present.<sup>287</sup>

### b. Incapacity and Undue Influence

The nature of the relationships described in *Cyrus* and *Nennig* holds the key to a fundamental continuity between incapacity in the family and social cases, on the one hand, and undue influence on the other hand.<sup>288</sup> In both *Cyrus* and *Nennig*, the courts'

den v. Mahoney, 431 P.2d 432 (Okla. 1967)(facts similar to those in *Greathouse*) with *Costello v. Costello*, 186 N.W.2d 651 (Iowa 1971)(invalidating sale to nephew in absence of evidence of longstanding relationship) and *Interdiction of Burns*, 486 So. 2d 977 (La. Ct. App. 1986)(facts similar to those in *Costello*) and *Jackson v. Henninger*, 482 S.W.2d 323 (Tex. Civ. App. 1972)(invalidating deeds to niece in absence of evidence of longstanding relationship).

286. For discussion of the applicability of social exchange theory, encompassing both economic and noneconomic components, to the marriage relation, see Shultz, *supra* note 77, at 255-61. For discussion of gifts as exchanges, see Baron, *supra* note 80.

287. Compare *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960)(upholding inter vivos gifts to stronger party who had furnished services)(discussed *supra* note 284) and *McSpadden v. Mahoney*, 431 P.2d 432 (Okla. 1967)(facts similar to those in *Greathouse*) with *Costello v. Costello*, 186 N.W.2d 651 (Iowa 1971)(invalidating sale to nephew in absence of any evidence that he had furnished benefits) and *Jackson v. Henninger*, 482 S.W.2d 323 (Tex. Civ. App. 1972)(invalidating deeds to niece in absence of any evidence that she had furnished benefits).

288. Traditional theory recognizes, of course, that incapacity and undue influence are related concepts; evidence of impaired capacity is probative of susceptibility to influence. Green, *Fraud*, *supra* note 36, at 191-93. One whose capacity is diminished is likely to be unusually dependent on others in many ways. Yet Green notes that the weight of authority holds that the concepts are distinct: undue influence, unlike incapacity, involves a relation of dependence and a substitution of the dominant party's will for that of the dependent party. *Id.* at 190.

Green argues that the courts are willing to blur the traditional distinction for the sake of invalidating unfair transactions. *Id.* at 204-05; Green, *Proof*, *supra* note 36, at 307. Thus in some cases "a partial showing of undue influence plus a partial showing of mental incompetency creates a composite ground for avoiding the transaction." Green, *Fraud*, *supra* note 36, at 196. Yet Green does not emphasize the common relational thread running through the capacity cases involving close relationships and the undue influence decisions.

Eisenberg does not discuss the possible connection between the two concepts. He acknowledges the relational nature of undue influence, Eisenberg, *supra* note 85, at 774-75,

narratives described interactions that involved trust. Mrs. Adkins and Leona Nennig knew that they could rely on their transactional partners not to engage in exploitation. In each case, any donative element in the transaction was appropriate in light of that confidence. The Tharps and Norman Nennig no doubt exercised considerable influence over their partners, but the influence was warranted.<sup>289</sup> The relationships were confidential in the best sense of the term.

Many cases, however, involve relationships that are confidential in a less than ideal sense — ties that are characterized by either forced dependence or unwarranted trust. These relationships generally lack either longstanding mutual affection or substantial economic exchange, or both. The result often is that any potential finding of incapacity is either displaced or buttressed by a finding of undue influence.<sup>290</sup> The confidential nature of a close relationship generates a presumption of undue influence that the stronger party is unable to rebut. Evidence of disability is probative of susceptibility to influence rather than, or in addition to, incapacity.

The analytical continuity is evident in two cases that reach opposite results on the issue of undue influence. In *Davis v. Pitti*,<sup>291</sup> the Missouri Supreme Court affirmed a trial court's can-

---

which he views as "a special case of unfair persuasion." *Id.* at 799. He also suggests a possible link between unfair persuasion and incapacity by defining the former as "the use of bargaining methods that seriously impair the free and *competent* exercise of judgment and produce a state of acquiescence that the promisee knows or should know is likely to be highly transitory." *Id.* at 773-74 (emphasis added)(footnotes omitted). Yet his view of the process of common law adjudication leads him to exclude relation-oriented norms from his analytical structure. *See supra* notes 152-57 and accompanying text. His argument implies that he would by no means emphasize the relational connection between the two concepts.

Although many undue influence cases arise out of transactions between parties to close relationships, courts also employ the concept in other contexts. *See, e.g.,* *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 54 Cal. Rptr. 522 (1966)(employer-employee relationship); *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App. 1978)(stockbroker-client relationship).

289. Thus there was no impropriety in Norman Nennig's effort to persuade his cousin to sell him her farm for less than its fair market value. *First Nat'l Bank v. Nennig*, 92 Wis. 2d 518, 538-39, 285 N.W.2d 614, 624 (1979). As the court put it in *McSpadden v. Mahoney*, 431 P.2d 432 (Okla. 1967), "[i]t is perhaps unnecessary to state that 'influences' arising from affection and kindness are natural and lawful and do not render a gift voidable." *Id.* at 438.

290. Indeed, at least one court has gone so far as to state that the two concepts can be functionally indistinguishable. *Rose v. Dunn*, 284 Ark. 42, 45, 679 S.W.2d 180, 182 (1984)("The question of undue influence and mental capacity . . . are so closely interwoven that they are considered together.").

291. 472 S.W.2d 382 (Mo. 1971).

cellation of a deed on the basis of undue influence.<sup>292</sup> The grantor, Joseph Stallone, was seventy-four years old when he conveyed a four-family apartment building in St. Louis to one of his four daughters and her husband.<sup>293</sup> The daughter, Ann Pitti, had had little contact with her father during the years preceding the conveyance. Agnes Davis, another daughter, had lived at home and contributed financially to the household much of the time. Even when she lived elsewhere, Agnes Davis had frequently visited her father.<sup>294</sup>

Ann Pitti and her husband, however, saw Stallone frequently during his last illness, and were in constant contact with him around the time of the conveyance.<sup>295</sup> In affirming the trial court's judgment, the supreme court emphasized Stallone's relationships with his daughters:

We are persuaded particularly by the following facts: . . . that the transfers of this and all [Stallone's] other property were wholly inconsistent with his regard throughout the years for his other daughters and particularly for Agnes; that as Agnes testified, he "changed overnight;" . . . that [Ann and her husband] had paid little attention to [Stallone] through the years until March, 1969 . . . and that [Ann and her husband] did not even notify [Agnes and the other two daughters] that [Stallone] was in the hospital until three or four days after he entered.<sup>296</sup>

Stallone's relationship with Ann Pitti, in contrast to his relationship with Agnes Davis, was characterized by neither longstanding affection nor substantial economic exchange, and thus failed to justify the conveyance.

292. *Id.* at 389.

293. *Id.* at 383.

294. The court elaborated as follows:

Agnes, the youngest [child], stayed at home until she married about 1949. In the meantime, she had been working for 10 years and either turned her paycheck over to her father . . . or, as in later years, paid board. For 20 years thereafter she saw him two or three times a week. There is considerable evidence to indicate that [Stallone] regarded and treated Agnes as his favorite daughter until very shortly before his death.

*Id.*

295. Ann and her husband moved Stallone into their home on May 14, 1969. They discouraged contact between him and his three other daughters thereafter. On July 2, 1969, Stallone conveyed the apartment building to himself and Ann as joint tenants. The transaction was completed at about 5:15 p.m. Later that night, Ann and her husband checked Stallone into the hospital for the final time. He died on July 15, 1969. *Id.* 384-85.

296. *Id.* at 388-89.



In *Eslick v. Montgomery*,<sup>297</sup> on the other hand, the Appellate Court for the Second District of Illinois upheld a trial court finding that an eighty-one year old mother's creation of a joint tenancy in her farm with one of her children was not the result of undue influence.<sup>298</sup> The mother, Dolly Montgomery, suffered from poor eyesight and hearing, diabetes, and hardening of the arteries, and at times her mind wandered. Although she "enjoyed harmonious relations with all of her children,"<sup>299</sup> George Montgomery, the child to whom she deeded the real estate, lived with her on the farm and helped care for her.<sup>300</sup> According to her other children, George was born a female and christened "Maxine."<sup>301</sup> Dolly Montgomery referred to him as "Maxine" when not in his presence, but in his presence deferred to his wish to be known as "George."<sup>302</sup>

When Dolly Montgomery executed the deed, she explained to the lawyer who prepared the documents that George Montgomery had been working the farm and taking care of her.<sup>303</sup> Her other children claimed after her death that her willingness to acquiesce in his "ambivalent sexual identity . . . established proof of [his] long continued control . . . over [her] mind and thought processes . . . amounting to undue influence."<sup>304</sup> The court rejected the claim:

The fact that [Dolly], who lived with and depended on George for daily assistance, chose to treat George as a male, thus preventing acrimony in the household and not forcing a confrontation with her child, is not evidence that [Dolly] participated in the world of unreality out of fear or coercion such as would viti-

---

297. 3 Ill. App. 3d 447, 278 N.E.2d 412 (1972).

298. *Id.* at 449, 278 N.E.2d at 414 (the trial court's finding of no undue influence was "fully supported by the record").

299. *Id.* at 450, 278 N.E.2d at 414.

300. *Id.* at 449, 278 N.E.2d at 414.

301. The court did not resolve the issue of George's gender:

The complaint named "Maxine Montgomery, a/k/a George Montgomery" as defendant. Plaintiffs' counsel and various of the witnesses have used the name "Maxine" and the feminine pronoun in referring to the defendant; while defendant's counsel and other witnesses have used "George," and the masculine pronoun. For convenience, we adopted defendant's usage.

*Id.* at 449 n.1, 278 N.E.2d at 414 n.1.

302. *Id.* at 450, 278 N.E.2d at 414. "George testified he was always known as 'George.'" *Id.*

303. *Id.* at 450-51, 278 N.E.2d at 415.

304. *Id.* at 452, 278 N.E.2d at 416.

ate free will.<sup>305</sup>

Although Dolly Montgomery “participated in [a] world of unreality” she did so for reasons that made sense in light of her relationship with her child — a relationship of longstanding mutual affection that involved substantial economic exchange.<sup>306</sup>

*Davis* and *Eslick*, then, illustrate a basic continuity between the family and social cases decided under the rubric of capacity and those decided under the heading of undue influence.<sup>307</sup> The cases often involve allegations of both incapacity and undue influence, and a more or less standard form of relational analysis contributes substantially to the resolution of each issue.<sup>308</sup>

Future capacity and undue influence cases will involve increasing numbers of unconventional family arrangements and friendships. One consequence of the spread of AIDS, for example, may well be an increase in inter vivos transactions between homosexual lovers, one of whom is critically ill.<sup>309</sup> As social patterns continue to change, judges must maintain a high degree of sensitivity to genuinely important relationships even where those relationships are at odds with convention. Courts must also be prepared to apply principles developed in the family and social context to other transactions, such as charitable subscriptions, that properly involve consciousness of interdependence but not necessarily of close relationships.<sup>310</sup> On the whole, the cases de-

305. *Id.*

306. George Montgomery’s economic contribution to his mother’s welfare was evidently considerably greater than that of his siblings. According to the court, Dolly Montgomery’s other children “visited her with varying regularity, from weekly visits to semiannual or annual visits . . . . The children made very nominal contributions of food and money during the course of these visits.” *Id.* at 450, 278 N.E.2d at 414.

307. There are, of course, some differences between the cases decided under the two headings. Some of the undue influence cases, for example, involve a degree of judicial disapproval of the stronger party’s conduct that the capacity cases generally do not reflect. *See, e.g., Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App. 1978)(upholding an award of exemplary damages against a party who exercised undue influence). Moreover, the capacity cases do not always display the straightforward form of relational analysis that the concept of undue influence mandates.

308. *See, e.g., Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981)(discussed *supra* note 283); *Greathouse v. Vosburgh*, 19 Ill. 2d 555, 169 N.E.2d 97 (1960)(discussed *supra* note 284); *Estate of Ferling v. Abernathy*, 670 S.W.2d 109 (Mo. Ct. App. 1984); *First Nat’l Bank v. Nennig*, 92 Wis. 2d 518, 285 N.W.2d 614 (1979)(discussed *supra* notes 266-76 and accompanying text).

309. The parties may enter into an inter vivos transaction in an effort to forestall a will contest. For a report that will contests involving AIDS are increasingly common, see Johnson, *AIDS Victims’ Wills Under Attack*, N.Y. Times, Feb. 19, 1987, at B1, col. 2.

310. Charitable subscriptions are often based on a mixture of tax considerations and

cided to date represent an encouraging start on the road to a sensitive and reasoned elaboration of the concept of relational capacity.<sup>311</sup>

---

generosity. The generosity, however, is not that of the family or the close friendship. Rather, it reflects, in Erikson's terms, an awareness of mankind beyond the group that "counts" in the subscriber's life. E. ERIKSON, *supra* note 95, at 52. Yet certain of the norms that relate to capacity and fairness in the family context also bear on the charitable subscription. For example, in *Board of Regents v. Davis*, 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975), the California Supreme Court held that the existence of a conservatorship per se did not deprive an elderly donor of the capacity to make a pledge to his alma mater (the court's views regarding the consequences of conservatorship for capacity are discussed *infra* notes 352-60 and accompanying text). Although the court merely remanded the case for trial, it noted that the university was prepared to prove that the pledge was (1) not improvident in light of the donor's large estate, and (2) reasonable in light of his "long and friendly association with the university." *Davis*, 14 Cal. 3d at 43 n.15, 533 P.2d at 1054 n.15, 120 Cal. Rptr. at 414 n.15.

311. Eisenberg might argue that a study based primarily upon appellate opinions cannot prove that the courts' assessments of relationships are accurate. While this point is well taken, the fact that the courts engage in relational analysis in capacity cases — as in divorce cases, *see supra* text at note 159 — suggests that the burden is on critics rather than on advocates of a relational approach.

Danzig's treatment of *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969), sheds some light on the New York Court of Appeals' assessment of a marriage. The holding was based in part on the court's impression that the couple, Mr. and Mrs. Ortelere, were "happily married" for approximately thirty-nine years.

After his wife's death, Mr. Ortelere described their marriage as happy: "I had 40 years the most happiest life a man could have." R. DANZIG, *supra* note 198, at 174. In recent years, Erik Erikson, Joan Erikson, and Helen Kivnick conducted interviews with twenty-nine octogenarians who had been subjects of an extended "life-historical" study in Berkeley, California. E. ERIKSON, J. ERIKSON & H. KIVNICK, *VITAL INVOLVEMENT IN OLD AGE* 7 (1986). The octogenarians almost all described their marriages in terms similar to Mr. Ortelere's. Yet in reviewing the files of the life-historical study the authors found "various suggestions . . . of earlier-life marital difficulties and dissatisfactions." *Id.* at 110. They speculate that for some elderly people "integrating a sense of love across the whole life cycle may involve the reevaluating and recasting of earlier experiences to such an extent that these experiences become unrecognizable to the outsider." *Id.* at 110-11. This suggests that Mr. Ortelere's recollection may not have been entirely accurate.

However, Erikson, Erikson, and Kivnick write that, for most of the couples they interviewed, the retrospective view represented integration rather than self-deception:

[S]incere affection and good natured patience often made possible marriages that weathered their stormy beginnings and proved, ultimately, to be mutually satisfying and enduring. As they seek to reintegrate qualities of fondness, affection, and sexuality into a lifelong sense of love, the elders in our study are able to pass over short-lived early difficulties and to focus, instead, on a long lifetime of marital satisfaction.

*Id.* at 112-13. Moreover, Mr. Ortelere gave up his job to care for his wife full-time for approximately the last fifteen months of her life, R. DANZIG, *supra* note 198, at 169, and neither the transcript nor the opinion provides any substantial evidence that the marriage was unhappy.

### 3. The Fiduciary Principle

Many capacity cases involve contracts between fiduciaries and their allegedly incompetent entrustors. Despite the increasing social importance of fiduciary relations,<sup>312</sup> the presence of a fiduciary does not create a separate social context. Rather, it introduces fiduciary principles into either a business context or a family or social context.<sup>313</sup> In general, those principles mandate a high standard of substantive fairness<sup>314</sup> and a requirement of complete

---

312. Frankel, *supra* note 79, at 801-02.

313. Of course, the mere existence of the fiduciary relation means that the transaction is not discrete. Yet as a legal construct the fiduciary relation is relatively impersonal. Frankel notes that the entrustor need not prove actual reliance on or trust in the fiduciary in order to be entitled to the benefits of the relation. The delegation of power to the fiduciary, rather than the attitude of the entrustor, creates the obligation. Fiduciary relations thus differ from the confidential relationships courts frequently find in family and social settings, which do involve actual reliance. Frankel, *supra* note 79, at 825 n.100. In MacNeil's terminology, fiduciary relations per se do not involve the whole person and are not unlimited in scope, although they may be unique and nontransferable. See I. MACNEIL, *supra* note 4, at 13 (ascribing those qualities to personal relations).

The fiduciary construct, however, serves a wide variety of purposes, *see, e.g.*, Frankel, *supra* note 79, at 795-96, in both business and family or social contexts. For example, contracts between lawyers and wards or conservatees are often relatively discrete transactions. In *In re Estate of Bradshaw*, 606 P.2d 578 (Okla. 1980), a lawyer sought to recover for services rendered in connection with an accounting and with the ward's effort to obtain a restoration to capacity. *Id.* at 579. There was no indication that the relationship between the ward and the lawyer had any important personal dimension. A restoration to capacity would probably have affected the ward's closest relationships, but there was no proof that her chance of success in the restoration proceeding was affected by her employment of the particular lawyer involved in the case.

In *Breaux v. Allied Bank*, 699 S.W.2d 599 (Tex. Civ. App. 1985), *cert. denied*, 107 S. Ct. 638 (1988), an attorney sued to recover for services rendered to a party who was under limited guardianship. There was no evidence of a personal or other important relationship between the attorney and the ward. The services for which the attorney sought to recover may have included defense of the ward's competence to decide where to live and whether to marry. *Id.* at 602. While those decisions were obviously highly personal, there was no evidence that the ward's ability to make them depended upon her employment of the attorney. The contract therefore did not necessarily implicate any important relationships.

On the other hand, the fiduciary and the entrustor may have a close or even an intimate relationship. This is particularly common in cases in which relatives or family members serve as guardians or conservators. *See, e.g.*, *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983)(nephew appointed as guardian); *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977), *aff'd*, 156 N.J. Super. 194, 383 A.2d 742 (N.J. Super. Ct. App. Div. 1978)(sister who instituted incompetency proceeding later appointed as guardian). The relationship may militate either in favor of enforceability of a transaction between the fiduciary and the entrustor or against it. A gift from the ward to the guardian, for example, may be fair in light of assistance provided gratuitously by the guardian over a period of many years and before the establishment of the guardianship. The same gift may be unfair if assistance was provided not by the guardian but by others.

314. *See supra* notes 83-85 and accompanying text.

comprehension by entrustors.<sup>315</sup> Courts should therefore find it easy to release allegedly incompetent entrustors from the consequences of their contractual and donative choices.

Most of the cases are indeed resolved in favor of the entrustors and against the fiduciaries. In some instances, judges apply fiduciary principles appropriately.<sup>316</sup> In other instances, however, the courts' protective approach produces a distorted analysis. In the future, courts must apply fiduciary principles in a more open and discriminating fashion.

The cases tend to involve either parties who are under judicially supervised protection or beneficiaries of life insurance policies or pensions. In cases involving wards or conservatees, courts often engage in little or no discussion of fiduciary principles. The analysis turns instead on the traditional rule that declared incompetents can neither contract nor make valid gifts.<sup>317</sup> The rule is

315. See *supra* notes 101-02 and accompanying text.

316. For example, in *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App. 1978), the appellate court upheld a trial court judgment that invalidated large gifts by an elderly widow to her stockbroker and awarded \$150,000 in exemplary damages to her estate. The appellate court reversed the trial court's finding that the widow was incompetent, *id.* at 799-800, but affirmed the rulings that she did not intend to make the gifts and that the stockbroker had exerted undue influence over her. *Id.* at 797-99. In the process, the appellate court made it clear that the stockbroker's fiduciary obligation gave him a heavy burden on the issues of capacity and substantive fairness:

A gift between persons occupying confidential relations toward each other is, if its validity is attacked, always jealously scrutinized by a court of equity, and unless found to have been [consented to] freely, voluntarily, and with a full understanding of the facts, [is invalid].

Improvidence of the donor may be considered, with other evidence, as tending to establish undue influence or abuse of a confidential or fiduciary relationship so as to make a gift invalid. It has been held that if, at the time of the gift, the donor's mind has been enfeebled by age and disease, even though not to the extent of producing mental unsoundness, and the donor acted without independent advice, such gift being of a large portion or all of the donor's estate and operating substantially to deprive those having a natural claim to the donor's bounty of all benefit from the donor's estate, these circumstances, if proved and unexplained, will authorize a finding that the gift is void, through undue influence, without proof of specific acts and conduct of the donee. Improvidence may also be a factor in the determination of the mental capacity of the donor to make a gift.

*Id.* at 798-99 (quoting 38 AM. JUR. 2D *Gifts* § 36 (1968)). The broker failed to show that the gifts were fair and that the widow understood the transactions. 574 S.W.2d at 799.

317. See, e.g., *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983)(ward's deed to her guardian held invalid); *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977), *aff'd*, 156 N.J. Super. 194, 383 A.2d 742 (N.J. Super. Ct. App. Div. 1978)(deed by ward to his guardian held invalid); *In re Estate of Bradshaw*, 606 P.2d 578 (Okla. 1980)(contract between incompetent and attorney declared invalid); *Breaux v. Allied Bank*, 699 S.W.2d 599 (Tex. Civ. App. 1985)(facts similar to

arbitrary and inappropriate.<sup>318</sup> In most cases, fiduciary principles furnish a preferable basis for the same result by imposing upon the fiduciary the burden of demonstrating either informed consent or substantive fairness, or both.<sup>319</sup>

In cases involving pension or life insurance benefits,<sup>320</sup> how-

---

those in *Bradshaw*).

318. The theoretical basis for the rule is discussed *supra* notes 107-10 and accompanying text. Its application is discussed *infra* notes 336-76 and accompanying text.

319. See Frankel, *supra* note 79, at 819 n.75. The narratives in the cases typically suggest that the fiduciaries would be unable to meet the burden. For example, in *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983), the ward conveyed property to her nephew, then her guardian, apparently without consideration. He then sold the property to a third party. *Id.* at 546-47, 299 S.E.2d at 731-32. At no point did he seek court approval for his actions, and his tenure as guardian ended when he was removed for failure to make returns. *Id.* at 546, 299 S.E.2d at 731.

In *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977), *aff'd*, 156 N.J. Super. 194, 383 A.2d 742 (N.J. Super. Ct. App. Div. 1978), the ward conveyed his home to his sister, then his guardian, for no consideration. She had initiated the incompetency proceeding that led to the guardianship and had probably called as a witness a doctor who testified that the ward was and would remain totally incompetent. *Id.* at 553-54, 376 A.2d at 213.

In *Breaux v. Allied Bank*, 699 S.W.2d 599 (Tex. Civ. App. 1985), a lawyer provided a client with estate planning services. Approximately one month later, the client became ill and the lawyer prepared an application requesting that the probate court appoint a relative as her temporary guardian. The application stated that the ward was "unable to handle day-to-day affairs, care for herself, or to do those things necessary to protect and preserve her property." *Id.* at 601. The probate court appointed the relative as temporary guardian, after which the lawyer allegedly furnished additional services, for which she then sought payment on the basis of a contract with the ward.

Even if the transactions in these cases were substantively fair, the courts would probably have received evidence of informed consent with great skepticism.

The fiduciary principle unquestionably applies to transactions between protected persons and their guardians or conservators. See, e.g., Frankel, *supra* note 79, at 795. In *Breaux*, however, the attorney who claimed to have contracted with the ward for legal services was neither the ward's guardian nor her conservator. Frankel notes that courts generally treat contracts establishing fiduciary relations as arm's length transactions. Frankel, *supra* note 79, at 819. This suggests that the lawyer in *Breaux* had no fiduciary obligation in negotiating for fees. There may have been a pre-existing attorney-client relationship, however, resulting from the estate planning services and, perhaps, from the lawyer's participation in the guardianship proceeding. Moreover, in negotiating a fee with a prospective client, an attorney has duties of both disclosure, see generally C. WOLFRAM, MODERN LEGAL ETHICS § 9.3.1, at 514-15 (1986), and substantive fairness. *Id.* at 516-18.

320. Pension and life insurance arrangements involve, in Frankel's terminology, both specialization and pooling. See Frankel, *supra* note 79, at 803-04. Arrangements that have those characteristics pose the problem of potential abuse of delegated power, *id.*, and thus merit treatment as fiduciary. For general discussion of the fiduciary obligations of pension systems under federal law, see S. BRUCE, PENSION CLAIMS RIGHTS AND OBLIGATIONS 299-307 (1988).

According to Couch, the relation between insurer and insured is not that of trustee and beneficiary. G. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 23:11, at 785 (1984). Nevertheless, an insurer has an obligation to protect the interests of the insured:

ever, the courts at times engage in unsound analysis of either capacity or substantive fairness in order to further their protective policy. This tendency is well illustrated by *Ortelere v. Teachers' Retirement Board*,<sup>321</sup> in which the New York Court of Appeals strongly suggested that a teacher's election of pension benefits was invalid.<sup>322</sup> The court was clearly influenced by fiduciary principles:

Nor should one ignore that in the relationship between retirement system and member, and especially in a public system, there is not involved a commercial, let alone an ordinary commercial, transaction. Instead the nature of the system and its announced goal is the protection of its members and those in whom its members have an interest. It is not a sound scheme which would permit 40 years of contribution and participation in the system to be nullified by a one-instant act committed by one known to be mentally ill. This is especially true if there would be no substantial harm to the system if the act were avoided.<sup>323</sup>

The court should have rejected as irrelevant the thought that invalidating the election would result in "no substantial harm" to the retirement system,<sup>324</sup> and the opinion relates no evidence that the teacher's choice was either actuarially unsound or unwise in light of her health.<sup>325</sup> Moreover, the court's impression of the

[I]nsurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting. Particularly where the language expressing the extent of the coverage may be deceptive to the ordinary layman, there is an implied covenant in insurance contracts of good faith and fair dealing and that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract.

*Id.*

321. 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969). The decision's considerable reputation stems from the court's treatment of the issue of mental illness. See *supra* notes 188-99 and accompanying text.

322. The election deprived the teacher's husband of the benefit of her contributions to the pension system. *Ortelere*, 25 N.Y.2d at 199, 250 N.E.2d at 462, 303 N.Y.S.2d at 364.

323. *Id.* at 205-06, 250 N.E.2d at 466, 303 N.Y.S.2d at 370.

324. *Id.* at 206, 250 N.E.2d at 466, 303 N.Y.S.2d at 370. Also irrelevant was the court's observation that "there are no significant changes of position by the system other than those that flow from the barest actuarial consequences of benefit selection." *Id.* at 205, 250 N.E.2d at 466, 303 N.Y.S.2d at 370.

325. Although the teacher died soon after making her election, the court's reasoning makes sense only if she was or should have been aware of her diminished life expectancy. If, as Judge Jason argued in dissent, she had no reason to think she would die soon, then the higher monthly payment was a reasonable choice. The excerpts from the transcript reprinted in R. DANZIG, *supra* note 198, contain no clear evidence of her awareness of her

teacher's capacity was based in large part on its view that the election was foolish.<sup>326</sup> Yet as Judge Jason pointed out in dissent, her choice may have made sense in light of her family's financial circumstances.<sup>327</sup> The court's determination to protect the teacher's husband from the consequences of her election thus led to flawed analyses of both substantive fairness and capacity.<sup>328</sup>

In a 1986 decision,<sup>329</sup> the Pennsylvania Supreme Court upheld an alleged incompetent's selection of retirement benefits.<sup>330</sup> However, three courts have reached opposite results in cases involving surrender of life insurance policies<sup>331</sup> or release of health

---

imminent death, yet she may have feared it. Her psychiatrist testified that she regretted the election after making it, *id.* at 190, which suggests that as of then she was afraid that she might die soon.

326. The election deprived the teacher's husband of the benefits of her contribution to the retirement fund. *Ortelere*, 25 N.Y.2d at 200, 250 N.E.2d at 462-63, 303 N.Y.S.2d at 365. The court concluded that she was probably psychotic:

On the record none may gainsay that her selection of [benefits] while under psychiatric care, ill with cerebral arteriosclerosis, aged 60, and with a family in which she had always manifested concern, was so unwise and foolhardy that a fact finder might conclude that it was explainable only as a product of psychosis.

*Id.* at 206, 250 N.E.2d at 466, 303 N.Y.S.2d at 370.

327. *Id.* at 207-08, 250 N.E.2d at 467, 303 N.Y.S.2d at 372.

328. Federal law now protects certain surviving spouses directly. If a pension plan is subject to the Employment Retirement Income Security Act, the participant's spouse must consent to an election not to take a joint and survivor annuity. 29 U.S.C. § 1055(c)(2)(A)(i) (Supp. 1988). See generally S. BRUCE, *supra* note 320, at 273-77.

329. *Estate of McGovern v. State Employees' Retirement Bd.*, 512 Pa. 377, 517 A.2d 523 (1986).

330. *Id.* The employee, Francis J. McGovern, chose his wife as his beneficiary under a joint survivor annuity retirement arrangement. She predeceased him by several days, with the result that his estate received a lump sum payment of \$27,105 and a portion of one monthly benefit in the amount of \$499.92. Had McGovern chosen either no beneficiary or one who survived him, his estate would have been entitled to \$154,311.45. *Id.* at 380, 517 A.2d at 524.

The State Retirement Board held a hearing at which it determined that McGovern had the capacity to execute the retirement option. *Id.* at 381, 517 A.2d at 524-25. The Commonwealth Court of Pennsylvania reversed, finding that the board's conclusion resulted from a capricious disregard of the evidence. *Id.* at 381, 517 A.2d at 525. The Pennsylvania Supreme Court reversed again, upholding the decision of the State Retirement Board. *Id.* at 387, 517 A.2d at 527-28.

331. In *Gulf Life Ins. v. Wilson*, 123 Ga. App. 631, 181 S.E.2d 914 (1971), the opinion provides no indication of either the face amount or the surrender value. The insured, who was hospitalized for terminal cancer, executed the request for surrender ten days before his death. *Id.* at 631, 181 S.E.2d at 915. The insurance agent who dealt with him testified that he was coherent and seemed to know what he was doing. His wife stated that he was weak both physically and mentally. His doctors reported that he was toxic, which would inevitably have affected his thinking, and a nurse testified that he suffered from loss of recent memory. On the basis of this conflicting evidence the appellate court upheld a jury finding of incompetence. *Id.* at 634, 181 S.E.2d at 916.



insurance claims.<sup>332</sup> In at least one of the surrender cases, the finding of incapacity was probably unjustified.<sup>333</sup>

The pension and insurance cases highlight the potential for abuse of the fiduciary principle. They offer judges and juries the temptation to find unfairness<sup>334</sup> and incapacity on less than adequate proof in order to reach deep-pocket results. A high standard of substantive fairness and a requirement of full understanding on the part of entrustors are indeed appropriate in cases involving fiduciaries. Moreover, the volume of appellate litigation to date by no means suggests that the burden on fiduciaries is unduly heavy.<sup>335</sup> Rather than disregarding fiduciary principles, courts

---

In *Chesson v. Pilot Life Ins.*, 268 N.C. 98, 150 S.E.2d 40 (1966), the insured surrendered for the sum of \$25.40 a policy whose face amount was \$5,000. Twenty days later, at the age of 39, he suffered a cerebral hemorrhage and died. His wife sued to rescind the surrender. The insured was a heavy drinker who had been hospitalized several times for "acute alcoholism with resulting mental disorders." *Id.* at 99, 150 S.E.2d at 41. He was released from the hospital five days before surrendering the policy. According to psychiatrists at the hospital, he suffered from a "depressive reaction." *Id.* at 101, 150 S.E.2d at 42. One of the doctors testified that he was competent and not in need of further psychiatric treatment on the day of his release. *Id.* A doctor who attended him on the day of his death stated that he was hypertensive but "not feeble-minded." *Id.* at 100, 150 S.E.2d at 42. His wife handled all of their business affairs. The insurance company official who accepted the surrender of the policy testified that he appeared competent. *Id.* The jury concluded that he lacked capacity and the appellate court upheld the jury finding. *Id.* at 99-103, 150 S.E.2d at 41-44.

332. *Allied Reserve Life Ins. v. Pierson*, 357 P.2d 205, 209-10 (Okla. 1960).

333. *Chesson v. Pilot Life Ins.*, 268 N.C. 98, 150 S.E.2d 40 (1966). In both *Chesson* and *Gulf Life Ins. v. Wilson*, 123 Ga. App. 631, 181 S.E.2d 914 (1971), the other surrender case, the probative force of the affirmative evidence of capacity is difficult to assess — it turns largely on the credibility of the insurance company employees who dealt with the allegedly incompetent insureds. Even if the employee in *Chesson* lacked credibility, however, there was little evidence of incapacity. *Chesson*, 268 N.C. at 100-01, 150 S.E.2d at 42-43.

334. The problem lies chiefly in a failure to relate the issue of substantive fairness back to the original agreement, which in each case fixes the terms of the challenged transaction. For example, in *Chesson v. Pilot Life Ins.*, 268 N.C. 98, 150 S.E.2d 40 (1966), the trial court put a series of questions to the jury. The jury found, *inter alia*, that: (1) the insured lacked capacity to surrender the policy, (2) the insurance company was aware of his incapacity, (3) the company paid a "full and fair consideration" for the surrender, and (4) the company took unfair advantage of the insured. *Id.* at 101, 150 S.E.2d at 43. If the answer to the fourth question meant only that it was unfair for the company to deal with someone who lacked capacity, then the series is at least internally consistent. Yet the jury probably thought that after seven years a \$5,000 life insurance policy should have a surrender value of more than \$25.40, despite the fact that the policy provided for loans and paid dividends. *Id.* at 99-100, 150 S.E.2d at 41-42. In *Estate of McGovern v. State Employees' Retirement Bd.*, 512 Pa. 377, 517 A.2d 523 (1986), the court expressly rejected the Restatement's call for a "post-hoc" assessment of fairness. *Id.* at 385, 517 A.2d at 526.

335. Professor Langbein comments that in America most will contests are intended to generate pretrial settlements. This suggests that the appellate cases form only a small

should recognize that issues of capacity and substantive fairness remain relevant and demand candid and intellectually honest analysis. The presence of a fiduciary should thus function simply as one important contextual factor.

Although the recent capacity cases fall into business, social, and fiduciary categories, the categories should by no means become doctrinal compartments. Social context remains relevant in cases involving fiduciaries, many business agreements are affected by personal relationships, and considerations of self-interest often bear on family and social transactions. The true lesson of the decisions is that courts can indeed visualize transactions as incidents in ongoing relationships. In future cases, judges must engage in relational analyses of both capacity and substantive fairness wherever the facts warrant it, even at the expense of their traditional conceptions of commercial activity and their desire to protect entrustors.

#### D. Guardianship and Conservatorship

As Green and Weihofen noted, a traditional protective proceeding culminates in a judicial declaration of incompetence and the appointment of a guardian or conservator with virtually complete authority over the property of the protected person. As a consequence of the declaration and in order to assure the fiduciary control over the estate, the ward or conservatee has no power to contract or to make inter vivos donations.<sup>336</sup> For the reasons that Weihofen adduced, however, the rule of per se incapacity is inappropriate.<sup>337</sup>

Although the necessary reform is by no means complete, recent years have witnessed considerable movement toward protective arrangements that do not necessarily deprive disabled individ-

---

fraction of the total volume of testamentary capacity litigation. Langbein's estimates support an argument in favor of a system of "living probate," whereby the issue of testamentary capacity may be resolved at the time of execution of the will. Langbein, *supra* note 65, at 64-68. If the volume of litigation involving fiduciaries were comparable, it might justify an alternative system of establishing capacity to contract or to donate in a fiduciary setting. Measured by appellate cases, however, the capacity law relating to fiduciaries is minuscule in comparison to the law of testamentary capacity. Moreover, the factors that buttress the nuisance value of a typical will contest, *see id.* at 66, are not present in most of the fiduciary cases.

336. For a summary of Green's views regarding protective proceedings, see *supra* notes 59-60 and accompanying text.

337. *See supra* notes 108-10 and accompanying text.

uals of contractual or donative capacity. The law relating to protective proceedings is largely statutory and legislatures have acted on two different fronts.

First, virtually all the states have increased the range of alternatives to conservatorship and guardianship<sup>338</sup> by adopting statutes that provide for durable powers of attorney. A durable power either survives or takes effect upon the principal's incapacity.<sup>339</sup> The purpose of the arrangement is to permit the agent to carry out tasks that the principal is unable to perform; to execute a durable power is thus to anticipate disability. The creation of the agency, however, does not involve a judicial assessment of the principal's condition, and the existence of the power per se should have no effect on the principal's capacity to engage in inter vivos property transactions.<sup>340</sup>

Second, the Uniform Probate Code<sup>341</sup> and some states<sup>342</sup> now provide for limited protective arrangements. Under the Code, for example, a court may establish a conservatorship without finding

338. The alternatives include informal arrangements and inter vivos trusts.

339. Most of the statutes are modeled after Article 5, Part 5, of the Uniform Probate Code. *See* UNIF. PROB. CODE §§ 5-501 to -505 (1983). The sections are identical to UNIF. DURABLE POWER OF ATTORNEY ACT §§ 1-5 (1983). The statutes are collected in Meiklejohn, *supra* note 73, at 116 n.12.

340. In the case of a springing power the agent theoretically has no authority until the principal suffers "disability or incapacity." UNIF. PROB. CODE § 5-501 (1983). If the power provides that the principal's incapacity triggers the agent's authority, the principal should lack capacity for as long as the agent is entitled to act under the power. The code does not specify how the principal's incapacity is established. The comment to the section suggests that "two or more named persons, possibly including the principal's lawyer, physician or spouse, [might] concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact." *Id.* at comment. Whatever the process, however, it would not even create a presumption of incapacity in a suit over a transaction entered into by the principal after the agent began to act.

As a practical matter, of course, the effect of any durable power is to transfer at least some degree of control over the principal's property to the holder of the power. Following the onset of the principal's incapacity, the holder of the power is not subject to effective supervision. The arrangement therefore inevitably diminishes the principal's economic autonomy. Unlike guardianships and conservatorships, durable powers do not involve judicial supervision over the fiduciary. Under some circumstances, the lack of supervision may pose serious problems. *See, e.g.,* Union Nat'l Bank v. Mayberry, 216 Kan. 757, 760, 533 P.2d 1303, 1306 (1975) ("[I]n many situations [a] conservatorship may have [an] advantage over the sometimes used but questionable power of attorney in that the conservator is under bond under judicial supervision."); Friedman & Savage, *supra* note 6, at 287.

341. UNIF. PROB. CODE (1983).

342. *See, e.g.,* CAL. PROB. CODE §§ 1801-2112 (West 1981); KAN. STAT. ANN. §§ 59-3001 to -3038 (1983); TENN. CODE ANN. §§ 34-4-101 to -310 (1984); TEX. PROB. CODE ANN. §§ 108-127A, 130A-1300 (Vernon 1980).

incapacity,<sup>343</sup> and may also restrict the conservator's power over the conservatee's property.<sup>344</sup> The arrangement is designed to maintain at least some of the flexibility and dignity that plenary guardianships and conservatorships tend to destroy.<sup>345</sup>

The appellate case law relating to protective proceedings for the most part reflects the legislative mixture of traditional and modern rules. According to the Restatement, plenary guardianship or conservatorship forecloses any inquiry into the protected person's capacity.<sup>346</sup> In general, courts agree as to both contracts<sup>347</sup> and gifts.<sup>348</sup> There are, however, occasional exceptions.<sup>349</sup>

343. The court may appoint a conservator on the basis of the following:

(i) the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (ii) the person has property that will be wasted or dissipated unless property management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money.

UNIF. PROB. CODE § 5-401(c) (1983). Thus, for example, the court might appoint a conservator on the basis that the person is unable to manage his assets and business effectively by reason of physical infirmity or old age, with resulting waste. That finding would by no means amount to a declaration of mental incompetence.

A separate subsection provides that "[a] determination that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person." *Id.* § 5-407(d).

344. *Id.* § 5-425.

345. The Code directs that a court "shall exercise [its protective authority] to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure." *Id.* § 5-407(a). See also *id.* prefatory note to Article 5 (explaining the decision to incorporate limited protective proceedings).

For an argument in favor of limited protective proceedings, see Frolik, *Plenary Guardianship: An Analysis, A Critique and A Proposal for Reform*, 23 ARIZ. L. REV. 599 (1981). See also Fellows, *supra* note 212, at 622 n.63 ("In recent years, we have become more sensitive in designing procedures and protections that minimally intrude on the liberties and prerogatives of the protected person . . . . If the property owner is capable of giving consent, the conservator and the court should consult and abide by the property owner's decisions.") (footnotes omitted).

346. Section 13 of the Restatement states that "[a] person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect." RESTATEMENT (SECOND) OF CONTRACTS § 13 (1979). A comment to the section explains that "[t]he control of the ward's property is vested in the guardian, subject to court supervision; that control and supervision are not to be impaired or avoided by proof that the ward has regained his reason or has had a lucid interval, unless the guardianship is terminated or abandoned." *Id.* at comment a.

347. See, e.g., *In re Estate of Spengler*, 12 Ill. App. 3d 30, 297 N.E.2d 401 (1973) (contract entered into by adjudicated incompetent held invalid); *Breaux v. Allied*

Moreover, some of the decisions that follow the general rule are intelligible in light of principles that have nothing to do with *per se* incapacity. For example, in the cases that invalidate promises and gifts from protected persons to their guardians or conservators, fiduciary law furnishes an alternative ground for the results.<sup>350</sup>

The Restatement recognizes limited protective proceedings.<sup>351</sup>

---

Bank, 699 S.W.2d 599, 603 (Tex. Ct. App. 1985)(ward's contract for legal services held invalid).

348. See, e.g., *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983)(ward's conveyance of real estate to guardian, evidently without consideration, held invalid); *In re Estate of Spengler*, 12 Ill. App. 3d 30, 297 N.E.2d 401 (1973)(gift by adjudicated incompetent held invalid); *In re Estate of Taylor*, 114 R.I. 562, 337 A.2d 236 (1975) (transfer by ward to his wife, evidently without consideration, held invalid); *Freshour v. Aumack*, 567 S.W.2d 176 (Tenn. Ct. App. 1977)(facts similar to those in *Taylor*).

349. In *Brisacher v. Tracy-Collins Trust Co.*, 277 F.2d 519 (10th Cir. 1960), the court held that *Brisacher* had capacity to execute an *inter vivos* trust agreement in Utah naming *Tracy-Collins* as trustee. *Brisacher* was under guardianship in Utah at the time. The parties agreed that the sole basis of the Utah guardianship proceeding had been a California adjudication of incompetence that was no longer in force when *Brisacher* executed the trust agreement. *Id.* at 521-22. The court concluded that "under the circumstances of this case the reasons for the rule of technical disability in a ward who is in fact fully competent do not exist and the rule does not therefore apply." *Id.* at 523. The circumstances included ratification by *Brisacher* and by the trust company, which also served as his guardian. *Id.* at 521-23. Both ratifications constitute alternative grounds for the result. See *supra* note 71 and accompanying text.

For a case in which a court upheld a promissory note executed while the maker was technically subject to a judicial order declaring him incompetent, see *Lakeside State Bank v. Dearmond*, 671 P.2d 674 (Okla. 1983). The order was issued in connection with the maker's involuntary commitment to a hospital, *id.* at 675, and the opinion does not indicate that he was ever under guardianship. The Restatement indicates that under those circumstances the normal rule of automatic contractual incapacity was never triggered in the first place. RESTATEMENT (SECOND) OF CONTRACTS § 13, comment c (1979).

350. See, e.g., *Beavers v. Weatherly*, 250 Ga. 546, 299 S.E.2d 730 (1983)(ward's conveyance of real estate to guardian, evidently without consideration, held invalid); *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977), *aff'd*, 156 N.J. Super. 194, 383 A.2d 742 (N.J. Super. Ct. App. Div. 1978)(ward's deed to his guardian held invalid). For discussion of fiduciary principles, see *supra* notes 312-35 and accompanying text.

351. A comment to section 13 provides as follows:

[The rule of *per se* incapacity] does not apply to cases where a person is committed or voluntarily admitted to an asylum or hospital without the appointment of a guardian, or where a guardian of the person only is appointed . . . In some states it makes no difference that the guardian is known as a committee, conservator, or curator, or by some other title, but in others, conservatorship is a less drastic procedure not conclusive and sometimes not even probative on the issue of incompetency. Where a statute authorizes the appointment of a guardian on the voluntary application of the ward-to-be without any adjudication of disability, the ward may retain some capacity to contract, subject to subsequent judicial approval, either where the guardian consents or where the guardian's control

The judicial response to the concept, however, has been mixed. Two cases that reach opposite results on the issue of the conservatee's capacity illustrate the courts' disagreement over the policy underlying limited protective arrangements. In *Board of Regents v. Davis*,<sup>352</sup> Davis, a voluntary conservatee who had not been declared incompetent, executed a pledge to his alma mater to match other contributions "up to a total of \$150,000." The university publicized the pledge widely in order to raise other funds, but after Davis' death his estate refused to honor his promise.<sup>353</sup> The university sued,<sup>354</sup> contending that the pledge was reasonable in light of both the size of Davis' estate and his "long and friendly" association with the institution.<sup>355</sup> The trial court granted the estate's motion for judgment on the pleadings, holding that the conservatorship deprived Davis of capacity to execute the pledge.<sup>356</sup>

The California Supreme Court reversed, holding that the lower court had misconstrued the limited conservatorship law.<sup>357</sup> The court reasoned that the act carried out the legislative purpose of permitting people to take advantage of assistance in the management of their property without the stigma of incompetency.<sup>358</sup> In answer to the argument that the holding would prevent conservators from fulfilling their responsibilities, the opinion likened a conservator for a competent conservatee to a co-manager or supervisor, and pointed out that any transaction would remain "subject to supervision and review by the probate court."<sup>359</sup> The case thus

of the property is not impaired.

RESTATEMENT (SECOND) OF CONTRACTS § 13, comment c (1979).

352. 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975).

353. *Id.* at 37, 533 P.2d at 1049, 120 Cal. Rptr. at 409.

354. *Id.*

355. *Id.* at 43 n.15, 533 P.2d at 1054 n.15, 120 Cal. Rptr. at 414 n.15. For discussion of the transaction's social context, see *supra* note 310.

356. *Davis*, 14 Cal. 3d at 37, 533 P.2d at 1049-50, 120 Cal. Rptr. at 409-10.

357. The court pointed out that the limited conservatorship statute provided that the conservator should pay debts incurred by the conservatee, other than for necessities, only if they "appear to be such as a reasonably prudent person might incur." *Id.* at 43, 533 P.2d at 1054, 120 Cal. Rptr. at 414. The size of Davis' estate and his association with the university bore on the reasonableness of the pledge. *Id.* at 43 n.15, 533 P.2d at 1054 n.15, 120 Cal. Rptr. at 414 n.15. The court also noted that the trial court's position was inconsistent with other provisions of the law relating to conservatorships and guardianships. Under those provisions, "both a ward and conservatee, if employed, retain complete control of his wages or salary unless the court directs otherwise." *Id.* at 41 n.12, 533 P.2d at 1054 n.12, 120 Cal. Rptr. at 413 n.12.

358. *Id.* at 38, 533 P.2d at 1051, 120 Cal. Rptr. at 411.

359. *Id.* at 43, 533 P.2d at 1054, 120 Cal. Rptr. at 414.

represents full judicial recognition of the notion underlying limited protective proceedings — that a need for judicially supervised assistance in the management of affairs does not necessarily reflect incapacity.<sup>360</sup>

In *Citizens State Bank & Trust Co. v. Nolte*,<sup>361</sup> however, the Kansas Supreme Court effectively rejected that notion. The case involved an agreement between Helen Reller, an elderly widow, and her longtime friend and neighbor, Larry Nolte. The agreement provided essentially that Nolte, who had already been caring for Reller and her husband,<sup>362</sup> would provide her with certain assistance until her death, and would then receive her farm.<sup>363</sup> Helen Reller executed the agreement while under a voluntary conservatorship that was established without any finding of incompetence.<sup>364</sup>

Citizens State Bank & Trust, in its capacity as conservator, brought suit to invalidate the agreement, but the trial court entered judgment in Nolte's favor.<sup>365</sup> The court found that Helen Reller was competent when she executed the contract, that her promise was supported by adequate consideration, and that Nolte did not exert undue influence. The bank appealed, arguing that the voluntary conservatorship deprived Helen Reller of capacity as a matter of law.<sup>366</sup>

---

360. For a report that, in practice, California conservatorships almost invariably amount to traditional, plenary arrangements, see Friedman & Savage, *supra* note 6. Professor Friedman and Mr. Savage suggest, however, that the fundamental problem does not lie in the conservatorship law: "The words of the statute point toward a fair, flexible system, and ostensibly this is the goal." *Id.* at 290. Rather, it results from a stereotype of the elderly as incompetent. Genuine reform of the process "must begin with a change in attitude toward people in the twilight of their lives." *Id.*

361. 226 Kan. 443, 601 P.2d 1110 (1979).

362. Nolte provided considerable assistance to the Rellers:

In 1967, Harvey F. Reller became ill and was operated on for a cancer. Thereafter, he was unable to perform his usual farm duties. The trial court, in its findings, found that those farm duties were performed by . . . Nolte, willingly and without expecting compensation. [Nolte] shopped for the Rellers and ran errands for them and took Harvey to St. Joseph about twice a month for checkups. This continued until Harvey's death. Harvey, for a period, was placed in a nursing home. During that time, the defendant made daily visits and tended to Harvey's needs which included cleaning him and dressing him up. He also assisted Helen Reller with chores and shopping and visited her every day.

*Id.* at 444, 601 P.2d at 1111. Harvey Reller lived for approximately seven years after becoming ill in 1967. *Id.*

363. *Id.*

364. *Id.* at 446, 601 P.2d at 1112.

365. *Id.*

366. *Id.*

Before the Kansas Supreme Court, Nolte relied principally on the California court's decision in *Davis*.<sup>367</sup> The Kansas Supreme Court declined to follow *Davis*, however, citing differences between the Kansas conservatorship law and the California statute.<sup>368</sup> The court held that, given the conservatorship, Nolte was not entitled to enforce the contract.<sup>369</sup> Nowhere in its opinion did the court question the trial court's findings that Helen Reller was competent and that the contract was supported by adequate consideration and untainted by undue influence.

The *Citizens State Bank* holding may represent a reasonable construction of the Kansas limited conservatorship statute.<sup>370</sup> The opinion, however, effectively eviscerates the notion of limited conservatorship. The court did acknowledge that the principal purpose of the Kansas statute was to permit voluntary conservatees to avoid humiliation.<sup>371</sup> It argued, however, that the only way to achieve that purpose was to make limited conservatorship functionally the same as plenary conservatorship; a truly limited arrangement would be attractive to neither the conservatee's relatives nor a person considering acting as conservator.<sup>372</sup>

The court's reasoning depends upon at least three assumptions. One is that a person who needs assistance will have relatives who are concerned enough to institute a protective proceeding. Another is that those relatives will inevitably lack respect for the person's liberty. And a third is that the court will be willing to approve a plenary arrangement when a less restrictive alternative would suffice — to brand the disabled person incompetent without justification. In any given case, one or more of those assumptions may well be incorrect.<sup>373</sup>

---

367. *Id.* at 449, 601 P.2d at 1114.

368. *Id.* at 450, 601 P.2d at 1114-15. The court did not seek to distinguish *Davis* on its facts. A possible distinction is that Helen Reller's four-hundred acre farm probably constituted the bulk of her property, whereas the \$150,000 that *Davis* pledged amounted to less than ten percent of his net estate. *Board of Regents v. Davis*, 14 Cal. 3d 33, 36, 533 P.2d 1047, 1049, 120 Cal. Rptr. 407, 409 (1975). In general, the argument for requiring approval by the conservator may be stronger with respect to transactions of major importance. The argument should not prevail, however, in a case in which the conservatee is in fact competent to enter into the transaction.

369. *Citizens State Bank*, 226 Kan. at 452, 601 P.2d at 1116.

370. The court pointed out, for example, that unlike the California statute at issue in *Davis*, the Kansas statute did not explicitly grant to a voluntary conservatee the right to incur debts or to enter into contracts. *Id.* at 450, 601 P.2d at 1115.

371. *Id.*

372. *Id.* at 450-51, 601 P.2d at 1115.

373. For example, the conservatee's relatives might recognize, as the *Davis* court



Moreover, even assuming that the assumptions prove correct much of the time, they do not provide a basis for failing to recognize limited conservatorship. The solution to the problem of over-protection<sup>374</sup> lies in reform of the process whereby courts approve plenary conservatorships rather than in refusal to provide an alternative vehicle for supervised assistance.<sup>375</sup> To the extent that the problem is one of unfounded attitudes toward people who suffer from disabilities, *Citizens State Bank* serves only to compound it by announcing that a conservatorship cannot function properly if it respects the conservatee's abilities and autonomy.

*Davis* and *Citizens State Bank* are two of only a small number of cases to date that address the issue of the capacity of a party under limited conservatorship or guardianship.<sup>376</sup> It is too early to predict whether the courts will be genuinely receptive to the concept of co-management. If they are, the result will be a less formalistic capacity doctrine and an increase in the liberty and dignity of at least some people who need judicially supervised assistance in the handling of their property.

---

pointed out, that the probate court may review transactions entered into by the conservatee. *Davis*, 14 Cal. 3d at 43, 533 P.2d at 1054, 120 Cal. Rptr. at 414.

Moreover, the *Citizens State Bank* court undercut its own rationale by pointing out two features of Kansas law that it said mitigated the impact of its holding. First, the court noted that under the conservatorship statute, a voluntary conservatee who wishes to contract can do so simply by requesting that the court terminate the conservatorship. The supervising court must comply and the conservatee, if competent in fact, may then contract. *Citizens State Bank*, 226 Kan. at 451, 601 P.2d at 1115. Second, the court pointed out that powers of attorney offer an alternative vehicle for assistance that has no effect on capacity to engage in inter vivos transactions. *Id.* To take advantage of either of those provisions, however, a person must enjoy a degree of liberty that is inconsistent with the court's assumptions.

374. A study of conservatorship in California, where the *Davis* decision established the possibility of co-management, indicates that plenary conservatorships are probably used inappropriately in "some small number of instances." Friedman & Savage, *supra* note 6, at 285-86.

375. Reform is not necessarily structural. A report on civil commitment proceedings in California suggests that the educational background of those making commitment decisions probably influences the outcome of the decisions. Morris, *Civil Commitment Decisionmaking: A Report on One Decisionmaker's Experience*, 61 S. CAL. L. REV. 291, 335 (1988). The author also concluded that follow-up studies of decisions to release individuals from commitment might well produce more appropriate release rates. *Id.* at 351.

376. See also *Edmunds v. Equitable Sav. & Loan*, 223 A.2d 630 (D.C. 1966)(party under conservatorship was competent under law of Maryland to agree to other party's withdrawal from joint savings account); *Jones v. Kuhn*, 59 Or. App. 135, 650 P.2d 999 (1982)(option executed by person under conservatorship declared void).

## CONCLUSION

In capacity cases, most courts successfully meet the commentators' challenges. Judges maintain a legal rather than a medical standard of capacity, treating psychiatric testimony as relevant but not dispositive. Despite the temptation to base their decisions entirely on notions of substantive fairness, they generally remain committed to a serious analysis of capacity. Many of the opinions display a degree of responsiveness to social context that is foreign to traditional contract theory. And courts and legislatures have made some progress toward more flexible rules relating to guardianship and conservatorship.

The capacity doctrine is but one manifestation of a general tension between the abstract, formalistic nature of traditional contract theory and the complexity and importance of transactional contexts. As Kronman observes, the traditional approach carries serious risks:

The law of contracts does not encourage or even permit, except in extreme cases, an inquiry into the promisor's motives, emotions, and personal circumstances. When the promisor is treated in this way, as a disembodied ego or will without personal qualities, it is easy to forget that even the most impersonal market transaction occurs between human beings with a natural history, and to underestimate the importance, for freedom itself, of the capacities people normally acquire as they mature.<sup>377</sup>

The courts are justified in continuing to apply the capacity doctrine, and their sensitivity to human relationships in the family and social cases is both appropriate and important. Judges must maintain that sensitivity in assessing disputes that arise out of business transactions and fiduciary relationships. To the degree that they succeed, the result will be a more principled doctrine that better resolves competing claims of liberty and substantive fairness and that more clearly illuminates the law of contract and of gift.

---

377. Kronman, *supra* note 16, at 797 (footnote omitted).

