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## Rethinking the Testamentary Capacity of Minors

Mark Glover

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# Rethinking the Testamentary Capacity of Minors

Mark Glover\*

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## I. INTRODUCTION

“An individual 18 or more years of age who is of sound mind may make a will.”<sup>1</sup> This provision of the Uniform Probate Code (UPC), which reflects the longstanding laws of nearly all American jurisdictions,<sup>2</sup> does two things. First, it grants all competent adults testamentary capacity. Second, it categorically prohibits minors from distributing their property through wills.<sup>3</sup> The UPC and the laws of all states simply deny children testamentary capacity. Because this rule conflicts with the primary objective of the law of wills, which is to allow people to freely choose how their estates will be distributed,<sup>4</sup> it should be founded upon a coherent and compelling policy rationale. Nonetheless, it is not.

Despite the tradition and ubiquity of the testamentary incapacity of minors, case law and legal scholarship devote little attention to the rule’s rationale.<sup>5</sup> Likewise, although the rule has appeared in the UPC since its original promulgation in 1969, the drafters of the UPC have not questioned the rule’s underlying justification.<sup>6</sup> Moreover, the few authorities that do discuss

1. UNIF. PROBATE CODE § 2-501 (1990, as amended 2010).

2. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES 141 n.1 (7th ed. 2005); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 (2003); see also, e.g., CAL. PROB. CODE § 6100(a) (West, Westlaw through Ch. 19 of 2014 Reg.Sess. and all propositions on the 6/3/2014 ballot); 755 ILL. COMP. STAT. ANN 5/4-1 (West, Westlaw through P.A. 98-628 of the 2014 Reg. Sess.); OHIO REV. CODE ANN. § 2107.02 (West, Westlaw through Files 1 to 95 and Statewide Issue 1 of the 130th GA (2013-2014)). The two exceptions are Georgia and Louisiana. GA. CODE ANN. § 53-4-10 (West, Westlaw through the end of the 2014 Reg. Sess.) (authorizing children age fourteen and older to execute a will); LA. CIV. CODE ANN. art. 1476 (Wes, Westlaw Current through the 2013 Regular Session) (authorizing children age sixteen and older to execute a will).

3. See Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 320 (2006) (“Testamentary capacity is based, in part, on the age of the testator. A minor is deemed not to have the capacity to make a valid will or to otherwise make a testamentary designation.”).

4. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 883-85 (2012).

5. See *infra* notes 270-272 and accompanying text.

6. The comments to the section of the UPC dealing with testamentary capacity makes no mention of the rationale of denying minor the ability to execution wills. UNIF. PROBATE CODE § 2-501 cmt. (1990, as amended 2010). Moreover, the transcripts of the Uniform Law Commission meetings that reference the age requirement for executing wills contain no discussion of the rule’s underlying rationale. See, e.g., National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, Proceedings of the Committee of the Whole, July 30, 1968, at 111-12; National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, Proceedings of the Committee of the Whole, August 2, 1969, at 134-35; National Con-

the rule's rationale do not satisfactorily explain the categorical incapacity of minors.<sup>7</sup> These authorities describe the rule as serving a protective policy, which portrays minors as too inexperienced to make considered choices and too young to be held accountable for their imprudent decisions.<sup>8</sup> However, because this justification mirrors the rationales of minor incapacity rules in other areas of law, it ignores the unique circumstances of testamentary decision-making.<sup>9</sup>

Consider, for example, the need to protect children from their unwise choices when assenting to contracts or giving gifts. Absent a minor incapacity doctrine, children would experience the potentially devastating ramifications of their irresponsible contractual and donative decisions.<sup>10</sup> Incapacity rules in these contexts safeguard children from squandering their resources by limiting their abilities to give gifts and enter into contracts.<sup>11</sup> By contrast, minors do not need the same protection in the context of testamentary gift-giving because they would not suffer the consequences of their haphazard testamentary decisions. A will only becomes effective upon the testator's death,<sup>12</sup> and therefore the very nature of testamentary decision-making forecloses the possibility that children will experience the negative effects of their poor choices. Certainly, minors could make foolish testamentary decisions, but because they would not suffer the consequences of these decisions, the need for protection is diminished.

The distinction between wills, which become effective upon death, and contracts or gifts, which are effective during life, illustrates the need for a critical reexamination of the minor incapacity doctrine in the law of wills. By analyzing three potential explanations for the testamentary incapacity of minors, this Article seeks to establish a coherent connection between the rule's underlying policy and its mechanics. These potential rationales include the traditional justification and two alternative explanations.

First, as traditionally explained, the age requirement could represent a categorical capacity threshold that is aimed at protecting children from suffering the consequences of improvident testamentary decisions.<sup>13</sup> Second, the age requirement could be seen as a proxy for the minimum mental competen-

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ference of Commissioners on Uniform State Laws, Uniform Probate Code, Proceedings of the Committee of the Whole, August 5, 1969 (evening), at B106-07.

7. See *infra* Part III.

8. See *infra* Part III.

9. See *infra* Part III.

10. See *infra* Part II.B.

11. See *infra* Part II.B.

12. See C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 176 (1991) ("A will has literally no effect until the maker is dead.").

13. See *infra* Part III.

cy that the law requires of all testators.<sup>14</sup> Under this rationale, the age requirement aids courts in making a determination of whether the testator's mental capacity reaches the requisite level for valid will-execution. Finally, the age requirement could implement forced parental inheritance, pursuant to which the estates of minors are funneled into intestacy and are distributed to the minors' parents.<sup>15</sup>

A critical examination of the traditional justification of the testamentary incapacity of minors and the identification of alternative rationales has important implications. Specifically, the analysis suggests that, regardless of which rationale explains the doctrine's place in the law of wills, lawmakers should reexamine their minor incapacity rules and implement reforms so that the rule adequately serves its intended purpose. Indeed, regardless of whether a minimum age requirement furthers a protective policy, serves as a proxy for competency, or implements forced parental inheritance, reform of the minor incapacity rules in the law of wills is needed. By recognizing this need and proposing specific reforms, this Article fills an analytical void that has been left unaddressed by both trusts and estates scholars and those who study minor incapacity rules generally.

This Article proceeds in five main parts. Part II provides the context for examining different rationales for the testamentary incapacity of minors. In particular, it explains the doctrine's place in the law of wills and describes the minor incapacity rules in the related areas of contracts and lifetime gifts. Parts III through V analyze three rationales for the testamentary incapacity of minors. Part III reexamines the traditional explanation, which views the age requirement as furthering a protective policy. Part IV suggests an alternative rationale, namely that age serves as a proxy for competence, and Part V analyzes a second alternative, which suggests that the testamentary incapacity of minors implements forced parental inheritance. Finally, Part VI suggests reforms of the rules governing the testamentary capacity of minors. Specifically, Part VI proposes that the categorical age restriction should be abolished or, alternatively, that the law should grant minors testamentary capacity when parents authorize their children to execute wills.

## II. THE LEGAL CAPACITY OF MINORS

Before the various rationales for the testamentary incapacity of minors can be examined, the rule's place in the law of wills must be established. An understanding of the relationship between the testamentary age requirement and other capacity rules in the law of wills provides the context in which to critically examine the categorical incapacity of minors. Further aiding the analysis is the relationship between the incapacity of minors in the law of wills and the corresponding capacity rules in other areas of law, specifically

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14. See *infra* Part IV.

15. See *infra* Part V.

in the law of contracts and the law of lifetime gifts. A comparison of the rules in these related areas illuminates the disconnect between the possible rationales for the testamentary incapacity of minors and the mechanics of the rule as it currently exists.

### A. Testamentary Capacity

To validly execute a will, a testator must have testamentary capacity,<sup>16</sup> a requirement that contains two components.<sup>17</sup> First, the testator must have the mental capacity to execute a will.<sup>18</sup> Just as those who marry<sup>19</sup> or enter into contractual relationships must possess a certain level of competency,<sup>20</sup> those who wish to dispose of their property through wills must also satisfy a mental capacity requirement.<sup>21</sup> Second, the testator must have the legal capacity to execute a will.<sup>22</sup> This requirement denies certain categories of individuals the ability to execute wills, regardless of whether they satisfy the minimum mental capacity requirement.<sup>23</sup> Although the law of wills traditionally denied several categories of individuals testamentary capacity, today only minors are categorically incapable of executing wills.<sup>24</sup>

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16. See UNIF. PROBATE CODE § 2-501 (1990, as amended 2010); Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2220 (2011).

17. See JOHN T. GAUBATZ ET AL., *ESTATES AND TRUSTS: CASES, PROBLEMS AND MATERIALS* 146-47 (1989) (explaining that “[c]apacity” in this context has two meanings,” which include “the testator’s legal capacity under the local statutes regulating who may make wills” and “the testator’s mental state”).

18. *Id.* at 147.

19. See DUKEMINIER ET AL., *supra* note 2, at 146 (explaining that “[l]egal capacity to make a will requires a greater mental competency than is required for marriage”).

20. See RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1981) (explaining that to enter into a non-voidable contract a person must be “[a]ble to understand in a reasonable manner the nature and consequences of the transaction”).

21. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(a) (2003) (“A person must have mental capacity in order to make or revoke a donative transfer.”); DUKEMINIER ET AL., *supra* note 2, at 141 (explaining that “[i]n the law of wills, the requirements for mental capacity are minimal.”); Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB & TR. J. 67, 72-82 (2007).

22. GAUBATZ ET AL., *supra* note 17, at 146.

23. See *id.* at 146-47.

24. See Lawrence A. Frolik & Mary F. Radford, “Sufficient” Capacity: *The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 306-07 (2006).

## 1. Mental Capacity

To validly execute a will, the testator must possess a minimum level of mental competency.<sup>25</sup> As the UPC illustrates, this requirement typically mandates that a testator be of “sound mind” at the time he executes a will.<sup>26</sup> The Restatement (Third) of Property explains that, to satisfy this mental capacity requirement, “the testator . . . must be capable of knowing and understanding in a general way [(1)] the nature and extent of his or her property, [(2)] the natural objects of his or her bounty, and [(3)] the disposition that he or she is making of that property. . . .”<sup>27</sup> Furthermore, the testator “must . . . be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.”<sup>28</sup> Put simply, to validly execute a will, the testator must be capable of understanding what he owns, who his family is, and how the will disposes of his property. In most states, a testator is presumed to possess this requisite level of competency.<sup>29</sup> Pursuant to such an approach, once a duly executed will is submitted to the probate court, the contestants of the will have the burden of establishing that the testator lacked the required mental capacity.<sup>30</sup>

Two primary rationales underlie the mental capacity requirement. First, the requirement ensures that a will reflects testamentary intent.<sup>31</sup> If a decedent was unable to understand the decisions that he was making at the time of will-execution, the document should not be considered a valid will because

25. See *supra* note 18 and accompanying text.

26. UNIF. PROBATE CODE § 2-501 (1990, as amended 2010); see, e.g., COLO. REV. STAT. ANN. § 15-11-501 (West, Westlaw through laws effective May 2, 2014) (“An individual eighteen or more years of age who is of sound mind may make a will.”); TENN. CODE ANN. § 32-1-102 (West, Westlaw through 2014 Second Reg. Sess., eff. through April 8, 2014) (“Any person of sound mind eighteen (18) years or older may make a will.”); WYO. STAT. ANN. § 2-6-101 (West, Westlaw through the 2013 General Session) (“Any person of legal age and sound mind may make a will.”); *Pyle v. Sayers*, 34 S.W.3d 786, 789 (Ark. Ct. App. 2000) (“Every person of sound mind and disposing memory has the untrammelled right to dispose of his or her property by will as he or she pleases.”).

27. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (2003).

28. *Id.*

29. See *DUKEMINIER ET AL.*, *supra* note 2, at 165. In a minority of states, the proponent of the will must establish the mental capacity of the testator. See *id.*

30. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. f (2003); UNIF. PROBATE CODE § 3-407 (1990, as amended 2010).

31. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. b (2003) (“The law of donative transfers is premised upon implementing the donor’s intent. The law requires that the donor have the mental capacity to form such an intent.”); *DUKEMINIER ET AL.*, *supra* note 2, at 147-48 (“[T]he requirement of mental capacity assures a sane person that the disposition he desires will be carried out even if he later becomes insane and makes another will.”).

the decedent did not make a rational decision to dispose of his property.<sup>32</sup> Second, the mental capacity requirement serves a family protection function.<sup>33</sup> By requiring that the testator possess a minimum level of mental competency, the law protects the testator's family from irrational disinheritance.<sup>34</sup>

## 2. Legal Capacity

Even if a decedent satisfied the mental competency requirement at the time of will-execution, the attempted exercise of testamentary power is valid only if he also possessed the legal capacity to execute a will.<sup>35</sup> To satisfy this requirement, the decedent must not fall within certain categories of individuals that necessarily lack the ability to execute wills regardless of whether they satisfy the mental competency requirement.<sup>36</sup> For example, under the early common law, a married woman inherently lacked the legal ability to convey real property via testamentary disposition and could only dispose of personal property through the terms of a will if she had the consent of her husband.<sup>37</sup> These restrictions did not depend upon the competency of

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32. See STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, *ESTATES AND TRUSTS* 99 (4th ed. 2011) (explaining that one justification for requiring testamentary capacity is that the law should reflect only the testator's "true" intentions).

33. See DUKEMINIER ET AL., *supra* note 2, at 146 ("[T]he law . . . requires mental capacity to protect the decedent's family."); Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 *VILL. L. REV.* 25, 49 (2006) (explaining that "[o]ne view posits that the best way to assure that the testator had the capability to exercise sound judgment is to examine the content of the will that the testator's judgment produced" and further explaining that "[t]his view is associated with the policy of protecting the testator's family . . . because it is the closest family members who most typically will benefit from a successful will contest.").

34. See STERK, LESLIE & DOBRIS, *supra* note 32, at 425 ("Another justification for requiring capacity rests on the notion that family members may be entitled to an inheritance . . . because they have developed expectation about inheritance which ought not to be disappointed unless testator has a rational basis for disinheriting them."). Other rationales may also explain the mental capacity requirement. For example, "the public acceptance of law rests upon a belief that legal institutions, including inheritance, are legitimate, and legitimacy cannot exist unless decisions are reasoned. Hence, it is important that the succession to property be perceived as a responsible, reasoned act, according the survivors their just deserts." DUKEMINIER ET AL., *supra* note 2, at 147.

35. See GAUBATZ ET AL., *supra* note 17, at 146-47.

36. For example, under the current Uniform Probate Code, those who possess the required level of mental competency must also be at least eighteen years old in order to possess testamentary capacity. See UNIF. PROBATE CODE § 2-501 (1990, as amended 2010).

37. See *Van Winkle v. Schoonmaker*, 15 N.J. Eq. 384, 386 (N.J. Prerog. Ct. 1862) ("As to the real estate, the will is clearly invalid. A married woman is incapable of devising real estate. She is also incapable of disposing of her chattels by will without the consent of her husband. Such a will, being a mere nullity, will not be



the married woman. Instead, these rules restricted the testamentary capacity of all married women.

The testamentary incapacity of married women was based upon the common law doctrine of coverture,<sup>38</sup> which treated married women as having no separate legal identity apart from their husbands.<sup>39</sup> As such, married women could not enter contracts or own property independently from their husbands.<sup>40</sup> Likewise, married women lacked the legal capacity to execute wills.<sup>41</sup> As women gradually gained legal rights and coverture disappeared,<sup>42</sup> states amended the law of succession to grant married women the ability to transfer property through wills, and today women possess the same testamentary capacity as men.<sup>43</sup> Similar categorical legal incapacity rules also existed at various times for other classes of individuals, such as felons<sup>44</sup> and slaves.<sup>45</sup>

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admitted to probate.”); WILLIAM BLACKSTONE, COMMENTARIES 498 (“[A] married woman is not only utterly incapable of devising land, . . . but also she is incapable of making a testament of chattels, without the license of her husband.”).

38. See *Bartlett v. Lahr* (*In re Bartlett’s Estate*), 190 N.W. 869, 870 (Neb. 1922) (“At common law . . . coverture destroyed [the wife’s] testamentary capacity.”); *Kelly v. Stevenson*, 88 N.W. 739, 739 (Minn. 1902) (“At common law . . . , during coverture . . . a married woman had no testamentary capacity.”).

39. See WILLIAM BLACKSTONE, COMMENTARIES 442 (“By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.”).

40. See Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 LAW & SOC. INQ. 265, 265-66 (2009) (“According to the common law doctrine of coverture, which framed English women’s legal relations until the third quarter of the nineteenth century, a married woman (or feme covert) could not own property (including wages) or make contracts, and she could not sue or be sued without the joinder of her husband.”); Reva B. Siegal, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1994) (“For centuries the common law of coverture gave husbands rights in their wives’ property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.”).

41. See *supra* note 37 and accompanying text.

42. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 841-48 (2004) (describing the “story of coverture’s demise” but arguing that “[i]t overstates the changes that have occurred in family law over time, and excludes and obscures the evidence indicating the persistence of inequality”).

43. See UNIF. PROBATE CODE § 2-501 (1990, as amended 2010) (making no distinction between the testamentary capacity of men and women). Some state statutes explicitly grant married women testamentary capacity. See, e.g., IDAHO CODE ANN. § 15-2-501 (West, Westlaw through emergency effective legislation of the 2014 2d Reg. Sess. of the 62nd Idaho Legislature.) (“A married woman may dispose of her property, whether separate or community, in the same manner as any other person subject to the restrictions imposed by this code.”).

44. See PAGE ON THE LAW OF WILLS § 12.3 (William J. Bowe et al. eds., 2003) (explaining that at one time a felon forfeited his property and therefore “could not

Like the testamentary incapacity of married women, these rules eventually gave way to testamentary capacity rules that generally give all competent individuals the legal capacity to execute wills.<sup>46</sup>

Despite the general elimination of these categorical incapacity rules, one such rule persists – the testamentary incapacity of minors.<sup>47</sup> Under the laws of all states, children of a certain age cannot execute wills, regardless of whether they possess the mental capacity that the law requires of adults.<sup>48</sup> In forty-eight states, the age at which children obtain the legal capacity to execute wills is eighteen.<sup>49</sup> The two exceptions are Georgia, which sets the age

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devise his lands, nor bequeath his chattels” and explaining further that “[w]hether he lost capacity to make a will or testament, or whether he retained capacity in the abstract, but ha[d] no property to devise or bequeath, is not clear” but “[t]he consequences of both theories [are] identical.”). “[M]odified forms of civil death [for convicts] still exist by statute in some jurisdictions. However, the civil death laws of most states do not entail holding a criminal incapable of executing an otherwise valid will . . . .” David Rand, Jr., Annotation, *Convict’s Capacity to Make Will*, 84 A.L.R.3d 479 (1978); see *Legislation, Civil Death Statutes – Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 974 (1937). Occasionally, a state statute explicitly grants convicts testamentary capacity. See, e.g., GA. CODE ANN. § 53-4-10(b) (West, Westlaw through the end of the 2014 Reg. Sess.) (“An individual who has been convicted of a crime shall not be deprived of the power to make a will.”).

45. See Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) (“Lacking contractual capacity, slaves could not hold title to real or personal property, nor transfer any such property, either by inheritance or intestacy . . . .”). In some American jurisdictions, the statute governing testamentary capacity at one time denied testamentary capacity to those who lacked capacity to enter contracts, which operated to exclude both married women and slaves from those who could execute valid wills. See *Rossi v. Fletcher*, 418 F.2d 1169, 1170-71(D.C. Cir. 1969).

46. See GAUBATZ ET AL., *supra* note 17, at 147 (explaining that most “common-law restrictions on who could make a will, such as alienage and felony conviction, are no longer applicable to the will-making process”); see also, e.g., UNIF. PROBATE CODE § 2-501 (1990, as amended 2010).

47. See DUKEMINIER ET AL., *supra* note 2, at 141 n.1.

48. See *id.*

49. See *infra* Table I.

Under the English common law, females of the age of twelve and males of the age of fourteen could dispose of personal property through wills, but only adults of the age of twenty-one could transfer real property through testamentary dispositions. See SAMUEL M. DAVIS, *CHILDREN’S RIGHTS UNDER THE LAW 18-19* (2011) [hereinafter DAVIS, *CHILDREN’S RIGHTS*]. The distinction between the age requirement for the ability to dispose of real property and personal property via wills and the distinction between the testamentary capacity of males and females continued in the United States well into the twentieth century. See Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 172, 177-79 (1928-1929). By the middle part of the twentieth century these distinctions largely had disappeared, and the majority states set the age of testamentary capacity at twenty-one. See John B. Rees, Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613, 653-55 (1960). However, by 1987 all but two states had

of testamentary capacity at fourteen,<sup>50</sup> and Louisiana, which allows those who are sixteen or older to execute wills.<sup>51</sup> Despite the general age requirement for testamentary capacity, some states provide exceptions to this rule and allow certain minors to execute valid wills before reaching the age of eighteen. For example, some jurisdictions allow children who are married to execute wills<sup>52</sup> and others grant testamentary capacity to minors who are members of the armed services.<sup>53</sup>

All in all, those who wish to execute wills must have testamentary capacity; absent such capacity any attempt to execute a will is void. This capacity rule entails two requirements. First, testators must possess a minimum level of mental competency.<sup>54</sup> Second, testators must be of a certain age.<sup>55</sup> In the vast majority of states, the age requirement denies anyone under the age of eighteen the legal capacity to execute a will.<sup>56</sup> As such, the testamentary incapacity of minors represents a categorical rule that prohibits children from executing wills, regardless of how considerate, mature, and responsible they are.

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lowered the age of testamentary capacity to eighteen or younger. See SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 34 (1987) (reporting that only Rhode Island, which set the required age at twenty-one, and Wyoming, which set the required age at nineteen, prevented those over the age of eighteen from executing wills).

50. GA. CODE ANN. § 53-4-10(a) (West, Westlaw through the end of the 2014 Reg. Sess.) ("Every individual 14 years of age or older may make a will, unless under some legal disability arising either from a want of capacity or a want of perfect liberty of action.").

51. LA. CIV. CODE ANN. art. 1476 (West, Westlaw through the 2014 Reg. Sess.) ("A minor who has attained the age of sixteen years has capacity to make a donation, but only *mortis causa*.").

52. See *infra* Table I (identifying fourteen states that provide an exception for married minors); see also, e.g., N.H. REV. STAT. ANN. § 551:1 (West, Westlaw updated with laws current through Chapter 279 (End) of the 2013 Reg. Sess.) ("Every person of the age of eighteen years and married persons under that age, of sane mind, may devise and dispose of their property, real and personal, and of any right or interest they may have in any property, by their last will in writing."). Louisiana allows minors under the age of sixteen to execute wills in favor of their spouses and children. See LA. CIV. CODE ANN. art 1476.

53. See *infra* Table I (identifying seven states the provide an exception for minors in military service); see also, e.g., IND. CODE ANN. § 29-1-5-1 (West, Westlaw current with all legislation of the 2d Reg. Sess. of the 118th General Assembly (2014) with effective dates through May 1, 2014) ("Any person of sound mind who is eighteen (18) years of age or older, or who is younger and a member of the armed forces, or of the merchant marine of the United States, or its allies, may make a will.").

54. See *supra* Part II.A.i.

55. See *supra* notes 47-53 and accompanying text.

56. See *supra* notes 47-53 and accompanying text.

### B. Legal Capacity of Minors in Other Contexts

In addition to testamentary incapacity, children possess a diminished legal capacity in other contexts.<sup>57</sup> An understanding of the mechanics and rationales of the legal capacity rules for minors in these areas, particularly in those contexts that are similar to testamentary gift-giving, can shed light on potential areas for refinement of the capacity rules governing the execution of wills by minors. In this regard, a comparative analysis of the ability of minors to enter contracts, to give inter vivos gifts, and to execute wills can provide a fresh perspective on the structure and policy of the law governing the testamentary capacity of minors.

#### 1. Contracts

Under traditional contract law, children can disaffirm most of the contracts into which they enter.<sup>58</sup> As the Restatement (Second) of Contracts explains, “[A] natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”<sup>59</sup> Pursuant to this rule, a child under the age of eighteen need not fulfill his contractual promises; instead, if the child chooses, he may disaffirm the contract and is thereby released from his obligations under the agreement.<sup>60</sup> The minor’s ability to disavow his contractual responsibilities, however, does not extend indefinitely past the age of majority. Either by some act of affirmation<sup>61</sup> or by failing to disaffirm within a reasonable time after reaching the

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57. See generally Cunningham, *supra* note 3, at 277.

58. See DAVIS, CHILDREN’S RIGHTS, *supra* note 49, at 10-11. One general exception to this rule is that children cannot disaffirm contracts for necessities, such as food or clothing. See Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”*: From Incapacity to Accountability, 21 OHIO N.U. L. REV. 481, 488-90 (1994). The rationale for this necessities exception is that “[t]he law did not want to discourage merchants from selling basic necessities to minors out of fear that the minor would later disaffirm.” Cunningham, *supra* note 3, at 289.

59. RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

60. See Robert G. Edge, *Voidability of Minors’ Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 207 (1967) (“Disaffirmance is any act by which the minor indicates that he does not wish to be bound by the contract made during his minority, *i.e.*, he exercises his option to transform a voidable contract into one which is void.”).

61. See DAVIS, CHILDREN’S RIGHTS, *supra* note 49, at 12 (“[A] child on reaching majority may, by word or conduct, ratify a contract into which he had entered previously.”); see also, *e.g.*, Fletcher v. Marshall, 632 N.E.2d 1105, 1108 (Ill. App. Ct. 1994) (holding that the “defendant’s act of moving into the apartment, living there for 1 ½ months, and making rent payments [after reaching the age of majority] constituted . . . unequivocal ratification of the lease,” which the defendant had entered into as a minor).

age of eighteen,<sup>62</sup> the child loses the ability to void the contracts that he entered into as a minor.

This rule that limits a minor's contractual capacity is founded upon a reasonable policy objective. Specifically, the law enables children to disaffirm their contractual responsibilities in order to protect them from suffering the consequences of their poor decisions.<sup>63</sup> As the Supreme Court of Wisconsin explains, "It was thought that the minor was immature in both mind and experience and that, therefore, he should be protected from his own bad judgments as well as from adults who would take advantage of him."<sup>64</sup> The law therefore provides minors the ability to walk away from their contractual responsibilities in order to implement a protective policy that aims to shield children from improvident contractual obligations.<sup>65</sup>

## 2. Lifetime Gifts

Similar to the ability of minors to enter into only voidable contractual relationships,<sup>66</sup> children under the age of eighteen have a diminished legal capacity to make irrevocable lifetime donative transfers. Indeed, mirroring their contractual legal capacity, minors have the capacity to make only voidable inter vivos gifts.<sup>67</sup> As the Restatement (Third) of Property explains, "Be-

62. See *Grauman, Marx & Cline Co. v. Krienitz*, 126 N.W. 50, 52 (Wis. 1910) ("[T]he contract of a minor, other than for necessities, is either void or voidable at his option, exercised within a reasonable time after his coming of age."); DAVIS, CHILDREN'S RIGHTS, *supra* note 49, at 12 ("[A] child retains the power of disaffirmance for a reasonable period after reaching the age of majority.").

63. See DAVIS, CHILDREN'S RIGHTS, *supra* note 49, at 10-11 ("[T]he law takes a protective view of children when they enter into contractual agreements with others. The vehicle for this protective attitude is the doctrine of disaffirmance."); Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 240-41 (2008) ("The long-accepted rationale for the minor incapacity doctrine has been that children lack the ability to understand and appreciate the consequences of their acts, and thus should not be inextricably bound by the consequences of their youthful follies.").

64. *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290 (Wis. 1968); see also *Byers v. Lemay Bank & Trust Co.*, 282 S.W.2d 512, 514 (Mo. 1955) ("The purpose is to shield minors against their own folly and inexperience and against unscrupulous persons . . .").

65. See *In re O'Leary's Estate*, 42 A.2d 624, 625 (Pa. 1945) ("An infant is not competent to contract. This positive inhibition is the way of the law to protect infants against their own lack of discretion and against the snares of designing persons.").

66. See *supra* Part II.B.1.

67. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2(b) (2003) (adding that "[a] minor does not have capacity to make a gift."); see also *Bankers' Trust Co. v. Bank of Rockville Ctr. Trust Co.*, 168 A. 733, 740 (1933) (stating that it is "the settled and salutary rule of law that an infant's gift is voidable."); *Person v. Chase*, 37 Vt. 647, 649 (1865) ("If an infant cannot trade, nor bind

fore reaching majority, the minor may disaffirm the gift. After reaching majority, the minor may either disaffirm or ratify the gift. The failure to disaffirm within a reasonable time after reaching majority constitutes a ratification of the gift.”<sup>68</sup> Thus, before reaching the age of majority, children can both disaffirm their contractual obligations and revoke their donative transfers.

Scholars and courts have paid little attention to the policy behind the diminished legal capacity of minors in the context of lifetime gifts. However, just as the rules governing the contractual legal capacity of minors mirror the capacity rules in the context of gifts,<sup>69</sup> the ability of a child to revoke donative transfers presumably furthers a protective policy similar to that served by a minor’s ability to disavow a contractual obligation. The diminished legal capacity of minors to give irrevocable lifetime gifts therefore is likely intended to protect children from suffering the consequences of poor donative decisions. As the Supreme Court of Vermont explains, “An infant has no more capacity to dispose of his property by *gift* than he has by *contract*, and it is essential that he should be protected from the consequences of an improvident gift . . . as it is that he should be protected from the consequences of an improvident contract . . . .”<sup>70</sup>

In sum, in addition to their testamentary incapacity, minors have a diminished legal capacity in a variety of other contexts, including in making contracts and lifetime gifts. However, while a will executed by a child is void, meaning that it is inherently invalid, a contract or donative transfer entered into by a minor is merely voidable. As such, a contract or gift made by a minor is not necessarily invalid; instead, such transactions are enforceable unless disaffirmed or revoked by the minor. This distinction between the void status of wills and the voidable status of contracts and gifts has important implications for the analysis of the policy goals of the testamentary incapacity rules. This Article now turns to the evaluation of potential policy rationales for the testamentary age requirement. These rationales include that minor incapacity serves as a protective measure,<sup>71</sup> that

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himself by any contract in relations to trade, – if he can neither purchase, nor sell, nor dispose of property, so as to bind himself, – *a fortiori* he cannot bind himself by a gift of his property . . . .”); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.4(1) (1992) (“A minor does not have the legal capacity to make . . . a valid inter vivos donative transfer.”).

68. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2(b) (2003); *see* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.4(1)(a) (1992) (“[A] purported donative transfer made by a minor may be ratified by the minor when the minor attains majority, and a failure to repudiate the purported donative transfer within a reasonable time after the minor attains majority is deemed a ratification of it . . . .”).

69. *Compare supra* text accompanying notes 58-62, *with supra* text accompanying notes 66-68.

70. *Person v. Chase*, 37 Vt. 647, 649 (1865).

71. *See infra* Part III.

age serves as a proxy for competence,<sup>72</sup> and that mandatory intestacy implements forced parental inheritance.<sup>73</sup>

### III. INCAPACITY AS A PROTECTIVE POLICY

The traditional explanation for the testamentary incapacity of minors is that it implements a protective policy by shielding children from the consequences of making imprudent transfers of property through wills.<sup>74</sup> Under this rationale, minors are portrayed as necessarily lacking the maturity to responsibly exercise testamentary power. As one early twentieth century treatise explains:

While it is perhaps hardly fair to say that all persons who have not attained the age of majority are supposed to be without [the requisite mental capacity to execute a will], yet the lack of discretion characterizing those of tender years would be apt to result in an unwise exercise of such capacity, even assuming in the abstract that it existed. Hence the policy of the law at present is to deny this power to minors.<sup>75</sup>

Likewise, the Supreme Court of North Carolina explains simply that “[t]he common law has wisely fixed on the age of [majority], as the earliest period, when the human mind has attained sufficient maturity to act with discretion” when making testamentary decisions.<sup>76</sup>

While some authorities explicitly endorse the protective policy rationale to explain the testamentary incapacity of minors,<sup>77</sup> others implicitly adopt this rationale by drawing analogies to rules that govern the incapacity of minors in other contexts.<sup>78</sup> Under the common law, some courts reasoned that because children had a diminished legal capacity to make lifetime conveyances of

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72. See *infra* Part IV.

73. See *infra* Part V.

74. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter’s note 3 (2003) (“The age requirement[’s] . . . purpose [is to] assur[e] that only a person of mature judgment can execute a will.”).

75. GEORGE E. GARDNER & WALTER T. DUNMORE, HANDBOOK OF THE LAW OF WILLS 86 (2d ed. 1916); see also JOHN E. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 297, at 391 (1917) (“[A]n infant under a certain age can not make a testamentary disposition of property, not because of unsoundness of mind such as insanity, rather because the law assumes that his mind has not sufficiently matured.”); JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 105, at 62 (1904) (“The law arbitrarily fixes an age before which the infant shall be conclusively deemed not to have enough discretion to make a will.”).

76. *Williams v. Baker*, 4 N.C. 401, 401 (1816).

77. See *supra* notes 74-76 and accompanying text.

78. See *Cunningham*, *supra* note 3, at 320 (“[C]ourts addressing the testamentary capacity of minors made an effort to reconcile their decisions with other rights and responsibilities of children to develop a consistent jurisprudence.”).

property via deeds, minors likewise had a diminished legal capacity to make testamentary transfers of property through wills.<sup>79</sup> Because the restriction on minors' legal capacity to execute deeds was based upon the policy of protecting children from making imprudent conveyances of land,<sup>80</sup> courts that based the testamentary incapacity of minors on their corresponding diminished capacity to execute deeds implicitly recognized a protective policy rationale for minors' inability to execute wills.

Thus, under the traditional rationale, minors lack the discretion to prudently exercise testamentary power and consequently are in need of protection from their own inexperience; therefore, the law denies children the legal capacity to execute wills.<sup>81</sup> This restriction on testamentary power is distinct from the minimum mental capacity that is required of adults. Even if children possess the requisite mental competency to execute wills, the law categorically denies them the ability to give testamentary gifts.<sup>82</sup> By doing so, the law imposes a safeguard against the youthful indiscretion of minors. This safeguard can be seen as protecting both the minor, who is denied testamentary capacity, and the family members whom the child could disinherit if he had the ability to execute a will.

### A. Protecting Minors

At first glance, the prudence of limiting minors' legal capacity to execute wills may seem as intuitive as that of placing restrictions on children's abilities to enter contracts and to give lifetime gifts. If children need protec-

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79. See *id.* ("Minors did not have the capacity to dispose of property by deed, and so it was thought that they should not be able to dispose of real property by will until reaching the age of majority (which, at the time, was 21)."); see, e.g., *Williams*, 4 N.C. at 402 ("We cannot subscribe to the doctrine that a person may have a legal capacity to dispose of property by will, and yet be under a legal incapacity to dispose of that same property by deed.").

80. See *Ferguson v. Houston, E. & W. Tex. Ry. Co.*, 11 S.W. 347, 348 (Tex. 1889) ("The reason for the rule that holds the deed of an infant voidable is to protect the infant against his own imbecility and lack of discretion, and against the craft of others.").

81. Viewing the testamentary incapacity of minors as a way that state law protects children corresponds to the numerous other ways that states aim to protect children. See Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 792-94 (2010).

82. See *Goodell v. Pike*, 40 Vt. 319, 324 (1867) ("This will was absolutely invalid, and its probate was at the least unauthorized. The disability arose not from unsoundness of mind, the question with relation to which, must always be a matter of judgment. It was an absolute disability depending upon an arbitrary fact which is not disputed."); ALEXANDER, *supra* note 75 ("Testamentary power . . . is denied . . . not because of unsoundness of mind, but for reasons of policy once existing, which to a limited extent still exist, and which have colored the law on the subject.").



tion from improvidently transferring property during their lifetimes,<sup>83</sup> then they would seem to need the same protection when planning testamentary transfers of property. However, the context of testamentary gift-giving fundamentally differs in several important respects from the contexts of contractual obligations and inter vivos donative transfers. These differences reduce the dangers that children face when executing wills and ultimately call into question the need to categorically deny minors testamentary capacity. Moreover, to the extent that children need protection, the law of wills already includes a number of safeguards that caution all testators from making unconsidered testamentary decisions.

### 1. Diminished Need for Protection

The first characteristic of testamentary decision-making that suggests minors do not need the protection of incapacity is that wills are inherently ambulatory. Unlike contracts and lifetime gifts,<sup>84</sup> wills can be revoked or amended at the testator's sole discretion any time prior to his death.<sup>85</sup> If a testator changes his mind regarding the substance of his will, he can either alter the will's terms by executing a codicil<sup>86</sup> or revoke the will in its entirety.<sup>87</sup> Thus, by their very nature, wills provide the testator protection from imprudent testamentary transfers. If minors had the ability to execute wills they would not necessarily suffer the consequences of poor testamentary decisions because they would not immediately be bound by those decisions. As they mature and gain discretion and foresight, minor testators could always rethink their testamentary decisions and alter the terms of their wills.

The built-in protection that is provided by a will's inherent revocability becomes apparent when testamentary transfers are compared to contractual obligations and inter vivos donative transfers. Whereas wills are intrinsically voidable,<sup>88</sup> contracts<sup>89</sup> and lifetime gifts are not.<sup>90</sup> One who enters into a

83. See *supra* Part II.B.1.

84. See *supra* Part II.B.1-2.

85. See DUKEMINIER ET AL., *supra* note 2, at 251.

86. See *id.* at 252 ("A codicil supplements a will rather than replacing it.").

87. See *id.* at 251-52 ("All states permit revocation of a will in one of two ways: (1) by a subsequent *writing* executed with testamentary formalities, or (2) by a *physical act* such as destroying, obliterating, or burning the will.").

88. See *id.*

89. See Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 4 n.6 (2010).

90. See *Beaumont v. Beaumont*, 152 F. 55, 59 (3d Cir. 1907) ("Where delivery of the property has once been made and possession transferred, the gift is irrevocable . . . without any retransfer of the ownership by the donee."); *Dudley v. Uptown Nat'l Bank of Moline*, 167 N.E.2d 257, 260 (Ill. App. Ct. 1960) (explaining that one requirement for a legally effective gift is "an absolute and irrevocable delivery of the property to the claimed donee").

contract or gives a gift cannot unilaterally nullify his contractual obligations or recover ownership of donated property.<sup>91</sup> The legally enforceable nature of contracts and gifts is precisely the reason that the law seeks to protect children from imprudent contractual and donative decisions.<sup>92</sup> Without the added protection of minors' diminished legal capacity to make legally enforceable contracts and gifts, children would be bound by potentially devastating contractual and donative decisions. By giving children the option to void contracts and gifts, the law provides minors the ability to reconsider their poor contractual and donative choices, thereby implementing a safeguard against children's inexperience and indiscretion.<sup>93</sup>

This distinction between the legally enforceable nature of contracts and gifts and the voidable nature of wills calls into question the necessity of restricting children's ability to exercise testamentary power. All wills, whether executed by minors or adults, are inherently voidable because the testator can revoke his will prior to death.<sup>94</sup> Therefore, if the law gave minors testamentary capacity, children would have the same protection from imprudent testamentary decisions as the law specifically grants them with respect to imprudent contractual and donative decisions. However, by denying minors the ability to execute wills, the law imposes a more restrictive protective measure in the context of testamentary decision-making. Unlike contracts and lifetime gifts, children cannot execute wills and then reevaluate their testamentary decisions. Instead, the law voids all testamentary decisions made by minors and imposes more extreme protective measures on minors' testamentary freedom than it imposes on minors' contractual and donative freedoms. Because all testators already have the protection that is provided by the inherent revocability of wills, the utility of denying testamentary capacity to minors is questionable.

The second characteristic of testamentary decision-making that suggests that minors do not need the protection of legal incapacity is that testamentary transfers take effect only upon the testator's death.<sup>95</sup> Contracts and gifts take effect during life; consequently, children could hypothetically squander their resources and become destitute as a result of their imprudent contractual and donative decisions. To protect against this possibility, the law gives minors the option to void contracts and gifts.<sup>96</sup> By contrast, because wills direct the distribution of the testator's property upon death, they have no legal effect

91. See *supra* notes 89-90.

92. See *supra* Part II.B.1-2.

93. See *supra* Part II.B.1-2.

94. See *DUKEMINIER ET AL.*, *supra* note 2, at 251.

95. See *In re Fabbri's Will*, 140 N.E.2d 269, 271 (N.Y. 1957) (“[A] will is inoperative and wholly ineffective until the death of the testator . . . .”); Carolyn L. Dessin, *The Troubled Relationship of Will Contracts and Spousal Protection: Time for an Amicable Separation*, 45 CATH. U. L. REV. 435, 437 (1996) (“[W]ills are ambulatory, which means that a will is ineffective until the death of the testator . . . .”).

96. See *supra* Part II.B.1-2.

during the testator's life.<sup>97</sup> Therefore, if minors were granted testamentary capacity, they would not suffer the consequences of their poor testamentary decisions. As a result, the protection of the legal incapacity of minors in the context of wills is of diminished importance.<sup>98</sup>

The reduced importance of protection from economic loss in the context of testamentary decision-making is evident in a comparison of the mental competency thresholds for wills and lifetime gifts. To validly execute a will, a testator must be capable of knowing "the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property."<sup>99</sup> Any mention of the testator's understanding of the economic consequences of testamentary gift-giving is noticeably absent. By contrast, the mental capacity requirement for lifetime gifts entails a higher competency threshold.<sup>100</sup> In addition to possessing the same competency as is required to execute a will, one who wishes to give a lifetime gift "must also be capable of understanding the effect that the gift may have on the future financial security of the donor."<sup>101</sup> This higher competency requirement "has the objective of protecting the incompetent . . . donor from suffering economic loss during life[]" and the consequent potential of "impoverishment."<sup>102</sup> Conversely, the threat of impoverishment is absent from the context of testamentary gift-giving, and the law therefore requires a lower level of competency to execute a will than to make a lifetime donative transfer.

Thus, the second important distinction between testamentary transfers of property through wills and lifetime transfers of property through contracts

97. See *Fabbri*, 140 N.E.2d at 271; Dessin, *supra* note 95, at 437.

98. See *DUKEMINIER ET AL.*, *supra* note 2, at 145 ("Protecting a dead person from economic loss is of course not a consideration.").

99. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (2003).

100. See *id.* § 8.1(c).

101. *Id.*

102. *DUKEMINIER ET AL.*, *supra* note 2, at 145; see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt.d (2003) ("Because an irrevocable gift depletes financial resources that the donor may yet need, the standard for mental capacity to make an irrevocable gift is higher than that for making a will."). Similarly, the greater need for protection in the context of lifetime gift giving as compared to testamentary gift giving is evident in the higher age restriction that Louisiana places on minors' abilities to give lifetime gifts as opposed to testamentary gifts. See LA. CIV. CODE ANN. art. 1476 cmt.(b) (West, Westlaw through the 2014 Reg. Sess.) ("This Article recognizes that there is a significant difference between execution of a will and the making of an *inter vivos* donation, in terms of the considerations that should govern a minor's ability to make such dispositions. The testament . . . does not dispose of the minor's property until a later date, namely the date of his death, in contrast with a donation *inter vivos*, by which the minor presently and irrevocably disposes of property. For that reason, a distinction between the ability to execute a will and the ability to make an *inter vivos* donation is recognized . . .").

and gifts is the extent to which those who enter such transactions experience the consequences of their transfers. Whereas a minor who enters a contract or gives a lifetime gift likely will be alive after the transfer is complete and might squander resources that could be needed at a later date, a minor who executes a will is inevitably dead at the time the testamentary transfer becomes effective. As a result, the minor will not experience the consequences of any financial loss. Because minors will not experience the ramifications of their testamentary decisions, the policy of protecting them from such decisions is of diminished importance.

The final important distinction between testamentary decision-making and contractual and donative decision-making is that, if minors were able to execute wills, they would be less likely to make impulsive testamentary decisions than they would be to make contractual or donative decisions. Minors may make rash contractual or donative decisions because contracts and gifts become effective immediately and, as such, they may feel pressure from the other party to make hasty or imprudent decisions.<sup>103</sup> In contrast, because of the delayed effect of testamentary gifts,<sup>104</sup> minors would experience less pressure to make hurried testamentary decisions.<sup>105</sup> Put differently, because testamentary transfers become effective only upon the death of the testator – which in the case of a minor would likely result in a considerable delay between the execution of a will and the effectiveness of a bequest – the beneficiary of a testamentary gift would have a weaker incentive to exert pressure. Consequently, a minor testator would be less likely to rush to finalize his testamentary decisions.

Moreover, because testamentary decision-making necessarily involves recognition of the testator's mortality, people often put off making testamentary decisions in an effort to avoid the unpleasant experience of acknowledging the inevitability of death.<sup>106</sup> Contractual and donative decision-making, by contrast, do not implicate the same notions of mortality and, as a result, the risk of rash decision-making is greater in these contexts. Both the delayed effect of testamentary transfers and their connection with the death of the testator diminish the concern that minors will impulsively and imprudently

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103. Indeed, part of the rationale behind the minor incapacity rules in the context of contracts and lifetime gifts is that unscrupulous parties may try to take advantage of minors' inexperience and pressure them into making improvident decisions from which they will benefit. See *supra* notes 64-65, 70 and accompanying text.

104. See *supra* note 95 and accompanying text.

105. See Cunningham, *supra* note 3, at 321 (“[I]t could be argued that creating a will is not the type of decision that is likely to result from impulse or peer pressure . . .”).

106. See DUKEMINIER ET AL., *supra* note 2, at 59 (“[A]bout half the population dies intestate, . . . [so why] do many people . . . not seek legal advice and make wills? One reason, of course, is that most people cannot accept and plan for the fact of their own deaths.”); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 34 SEATTLE U. L. REV. 427, 434-38 (2012).

execute wills. This diminished concern stands alongside the inherent revocability of wills and the delayed effectiveness of testamentary dispositions as important distinctions between testamentary decision-making and contractual and donative decision-making. These distinctions minimize the need to protect minors by denying them testamentary capacity.

## 2. Other Protective Measures

In addition to the differences between wills and contracts and lifetime gifts, the need for the protection of the testamentary incapacity of minors is called into question by the various safeguards that are already embedded in the law of wills. Various rules and doctrines within the law of wills that apply to all testators serve the same functions as the testamentary incapacity of minors – namely, to prevent testators from making unconsidered and unreasoned testamentary dispositions. Thus, because the law of wills already includes a variety of protective measures, the protection provided by the testamentary age restriction is of minimal utility.

The first of the safeguards that provides protection from improvident testamentary decision-making is the basic mental capacity requirement. As discussed previously, all testators must possess a minimum level of mental competency to validly execute wills.<sup>107</sup> Although this rule requires that the testator possess a relatively low level of competency,<sup>108</sup> it ensures that a testator executes a will while “sane” and possessing a “rational mind.”<sup>109</sup> By requiring the testator to meet this threshold, the law provides testators some protection from making rash dispositions of their property.<sup>110</sup> Certainly, this requirement does not ensure that testators will make thoughtful and reasoned testamentary decisions; however, it is lower than that required in other contexts because the testator is invariably dead at the time the will becomes effective and therefore less protection is needed in the context of testamentary gift-giving.<sup>111</sup>

The second protective measure that safeguards testators from making imprudent testamentary decisions is the formality associated with will-execution. To validly execute a will, the testator must comply with various

107. See *supra* Part II.A.1.

108. See DUKEMINIER ET AL., *supra* note 2, at 146.

109. See *id.* at 145-46 (explaining that the testamentary mental capacity requirement is lower than the competency requirement for contracts but higher than the competency requirement for marriage).

110. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt.b (2003) (“[T]he requirement that the donor must have mental capacity in order to make or revoke a will, will substitute, or gifts serves a protective function . . . . The law protects a person who lacks mental capacity by providing that such a person is incapable of effectively formulating the requisite donative or testamentary intent.”).

111. See *supra* notes 99-102 and accompanying text.

formalities, including that the will be written, signed by the testator, and attested by at least two witnesses.<sup>112</sup> The primary purpose of these formalities is to ensure that a will accurately and reliably reflects the testator's true intent.<sup>113</sup> In connection with this goal, will formalities serve a cautionary function that encourages the testator to reflect upon the importance and legal significance of his decision to execute a will.<sup>114</sup>

By mandating that the testator write out the terms of his will, sign the testamentary document, and locate witnesses to observe the will-execution process, the law requires the testator to comply with formalities that transform the execution of a will into a ceremony.<sup>115</sup> The ritualistic or ceremonial quality of the execution process reminds the testator of the importance of his testamentary decisions and encourages him to approach the execution of a will with careful planning and adequate consideration.<sup>116</sup> By encouraging the testator to undertake the process with a contemplative state of mind, will formalities discourage testators from hastily and imprudently exercising testamentary power.<sup>117</sup> As such, the formalities of will-execution would provide minor testators some protection from making irresponsible testamentary decisions.<sup>118</sup>

Finally, to the extent that the minor incapacity doctrine is intended to protect against wrongdoers who are intent on taking advantage of minors' inexperience, the law of wills already includes a number of safeguards, in-

112. See *DUKEMINIER ET AL.*, *supra* note 2, at 202 (warning that "these basic requirements for execution of wills vary considerably in detail from state to state").

113. See *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) ("The primary purpose of [will] formalities is to ensure that the document reflects the uncoerced intent of the testator."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975) ("The formalities are designed to perform functions which will assure that [the testator's] estate really is distributed according to his intention.").

114. See Langbein, *supra* note 113, at 494-95; Miller, *supra* note 12, at 261-62.

115. See Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 153-57 (2012).

116. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941) ("Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion.").

117. See Miller, *supra* note 12, at 261-62 ("A secondary aspect of formality is its tendency to induce deliberation and reflection on the part of the testator. Formality thus prevents enforcement of casual statements and unpremeditated action . . .").

118. The role of formality in protecting minors is recognized in Louisiana, which requires that minors be eighteen to give lifetime gifts and sixteen to execute wills. See LA. CIV. CODE ANN. art. 1476 (West, Westlaw through the 2014 Reg. Sess.) ("A minor who has attained the age of sixteen years has capacity to make a donation, but only *mortis causa*"). Part of the rationale behind this age requirement discrepancy is that will-execution "is subject to more strict formalities." *Id.* art. 1476 cmt. (b).

cluding the doctrines of undue influence, duress, and fraud.<sup>119</sup> The undue influence doctrine invalidates testamentary dispositions when a “wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.”<sup>120</sup> Similarly, the doctrine of duress invalidates a will when a wrongdoer’s influence over the testator was “overtly coercive.”<sup>121</sup> Finally, the doctrine of fraud invalidates testamentary dispositions that are made because the testator was deceived by affirmative misrepresentations.<sup>122</sup> Because the law of wills already includes these protective measures, the need to impose the additional safeguard of denying minors the capacity to execute wills is diminished.

In sum, the need to protect minors from their own inexperience is of diminished importance in the context of testamentary decision-making. Three key differences between contractual and donative decision-making and testamentary decision-making reduce the need for a categorical age restriction on testamentary capacity. First, unlike contracts and gifts, wills are inherently revocable, which would allow a minor testator to reconsider his testamentary decisions.<sup>123</sup> Second, unlike contracts and gifts, wills only become effective upon the death of the testator.<sup>124</sup> If minors could execute wills they would not bear the economic ramifications of their improvident testamentary decisions. Finally, because wills only become effective upon death and necessarily involve a confrontation with the testator’s mortality, minors would be less likely to make rash testamentary decisions or be pressured into executing wills.<sup>125</sup>

Moreover, the law of wills already includes a number of safeguards that would protect minors from their immaturity and indiscretion. The first is the general mental capacity requirement.<sup>126</sup> By requiring all testators to possess a minimum level of competency, the law protects testators from making uncon-

119. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (2003).

120. *Id.* § 8.3(b). “The doctrine of undue influence protects against overreaching by a wrongdoer . . . on account of the donor’s age, inexperience, dependence, physical or mental weakness, or other factor.” *Id.* § 8.3 cmt. (e).

121. DUKEMINIER ET AL., *supra* note 2, at 189; *see* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (c) (2003) (“A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.”).

122. *See* DUKEMINIER ET AL., *supra* note 2, at 186 (“Fraud occurs where the testator is deceived by a deliberate misrepresentation and does that which he would not have done had the misrepresentation not been made.”).

123. *See supra* notes 84-94 and accompanying text.

124. *See supra* notes 95-98 and accompanying text.

125. *See supra* notes 103-106 and accompanying text.

126. *See supra* notes 107-111 and accompanying text.

sidered testamentary decisions. The second safeguard is the formality of will-execution.<sup>127</sup> By requiring the testator to complete the formal process of will-execution, the law reminds the testator that a will is an important document that has legal consequences. The testator is therefore cautioned to approach the execution of a will seriously and with adequate consideration. The final safeguard is the collection of doctrines, including fraud, duress, and undue influence, that protect the testator from imposition by wrongdoers.<sup>128</sup> Thus, because the age requirement restricts testamentary freedom, the questionable utility of the testamentary incapacity of minors and the safeguards that are already imbedded in the law of wills suggest that the age requirement should be abolished.

### B. *Protecting Surviving Spouses*

A minor testator would be dead at the time his will becomes effective and therefore would not experience the consequences of his imprudent decisions. However, his will could negatively affect disinherited family members. Specifically, if a minor is married, imprudent testamentary decisions could threaten the financial security of a surviving spouse. Rather than protecting the child from making testamentary decisions that are harmful to himself, the testamentary incapacity of minors could be seen as protection for surviving spouses who experience the ramifications of poor testamentary decisions. Under this rationale, incapacity protects surviving spouses from disinheritance by requiring minors to die without wills, which forces the minor's estate into intestacy and requires the minor to leave a portion of his estate to his surviving spouse.

When a decedent dies without a will, his estate passes according to the default distributive scheme that is set forth in a state's intestacy statute.<sup>129</sup> The intestacy statutes of all states attempt to distribute a decedent's estate in a way that mimics an ordinary person's desired estate plan.<sup>130</sup> For example, if a widower dies without a will, his estate is passed on to his surviving children.<sup>131</sup> By passing the widower's property to his children, the law attempts to distribute his estate in the manner that he likely would have chosen had he executed a will. To serve the goal of fulfilling the testator's probable intent, the intestacy statutes in all states distribute the estate within the decedent's family.<sup>132</sup>

Forcing minors' estates into intestacy protects surviving spouses because, under the intestacy laws of all states, surviving spouses receive a por-

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127. See *supra* notes 112-118 and accompanying text.

128. See *supra* notes 119-122 and accompanying text.

129. See *DUKEMINIER ET AL.*, *supra* note 2, at 60.

130. See *id.* at 62.

131. See *id.* at 73.

132. See *id.* at 78-79.



tion of the deceased spouse's estate.<sup>133</sup> In essence, the age requirement protects the financial stability of surviving spouses by restricting minors' ability to disinherit them. Nonetheless, this type of protective rationale does not adequately explain the testamentary incapacity of minors because the law of wills already provides surviving spouses protection from disinheritance.<sup>134</sup> For example, in many states spouses are already protected from unintentional disinheritance. If a testator executes a will and subsequently marries, the surviving spouse may share in the decedent's estate despite the testator's failure to provide for the spouse in his will.<sup>135</sup> The rationale underlying this rule is that the testator's omission of a spouse from a premarital will likely does not express the intent to disinherit the spouse.<sup>136</sup> Instead, the surviving spouse's omission is likely the result of the testator's inadvertent failure to update an obsolete will to reflect changed familial circumstances.<sup>137</sup>

Additionally, surviving spouses are already protected from intentional disinheritance by the forced spousal share, which provides the surviving spouse a portion of the decedent's estate regardless of the terms of the deceased spouse's will.<sup>138</sup> Thus, even if the decedent expresses an affirmative desire to disinherit a spouse, the survivor still receives a portion of the estate.<sup>139</sup> Because spouses already enjoy protection from both intentional and unintentional disinheritance, testamentary incapacity is not needed to protect the surviving spouses of minor testators.<sup>140</sup> As such, if the testamentary incapacity of minors is intended to protect potentially disinherited surviving spouses, the age requirement for executing wills should be eliminated.

### C. Protecting Surviving Children

Although the testamentary incapacity of minors is not needed to protect minor testators or their surviving spouses, the incapacity rules could be justified as protection for the surviving children of minor testators. Mirroring the protection from unintentional disinheritance that surviving spouses enjoy,<sup>141</sup> pretermitted heir statutes provide a surviving child a portion of the estate

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133. *See id.* at 63.

134. *See infra* Part III.C.

135. *See* UNIF. PROBATE CODE § 2-301 (1990, as amended 2010).

136. *Id.* § 2-301 cmt.

137. *See id.*

138. *See* DUKEMINIER ET AL., *supra* note 2, at 425-38.

139. *See id.*

140. The spousal protection rationale is also undermined by the fact that several states grant married children testamentary capacity despite the general rule that denies children testamentary capacity. *See supra* note 52.

141. *See supra* notes 135-137 and accompanying text.

when the testator executes a will and subsequently has a child.<sup>142</sup> However, unlike surviving spouses,<sup>143</sup> surviving children do not enjoy protection from intentional disinheritance.<sup>144</sup> If a parent wants to disinherit a child, the law honors his desire to do so.<sup>145</sup> As such, surviving children of a minor testator could experience the negative consequences of imprudent testamentary decisions. Indeed, a minor testator could squander resources through the irresponsible exercise of testamentary power that would be better used for the support of his surviving children.

The testamentary incapacity of minors could therefore be seen as protecting a minor's surviving children by foreclosing the possibility that a minor testator might intentionally disinherit them. By mandating that the minor die without a will, the law forces the minor's estate into intestacy. Under the intestacy laws of all states, the estate of a parent is distributed either to his surviving child or to his surviving spouse, or it is divided amongst his surviving spouse and surviving children.<sup>146</sup> As a result, the financial security of a minor's surviving child is protected either directly by a share of the estate or indirectly by the passing of the estate to the decedent's surviving spouse, who presumably provides for the needs of the child.

Despite the role that the testamentary incapacity rules might play in protecting children from disinheritance, this rationale is not a compelling explanation of the indiscriminate testamentary incapacity of all minors. Because the age restriction conflicts with the fundamental policy objective of the law of wills, which is to allow people to freely distribute their property upon death,<sup>147</sup> the incapacity rules should be narrowly tailored. The testamentary incapacity of all minors is an overly broad mechanism by which to implement the policy of protecting children from disinheritance. Only a small fraction of minors have children.<sup>148</sup> Thus, if child protection is the goal of the age re-

142. See Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 417-18 (2009).

143. See *supra* notes 138-139 and accompanying text.

144. See DUKEMINIER ET AL., *supra* note 2, at 466 ("In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent. There is no requirement that a testator leave any property to a child, not even the proverbial one dollar.").

145. See *id.* at 467.

146. See *id.* at 73.

147. See Weisbord, *supra* note 4, at 883-85.

148. Although not a precise representation of the number of minors who are parents, the birth rate for teenage girls suggests that only a small fraction of minors are parents. In 2010, the birth rate for girls ages ten to fourteen was 4 per 1000, and the birth rate for girls ages fifteen to seventeen was 17.3 per 1000. CTRS. FOR DISEASE CONTROL & PREVENTIONS, U.S. DEP'T. OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2010, 61 NAT'L VITAL STATISTICS REPORTS 4-5 (2012), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_01.pdf#table02](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf#table02).

striction, the rule denies all children testamentary capacity to prevent only a small subset of minors from disinheriting their offspring.

A more focused approach to protecting surviving children of deceased minors would be to give those children a forced share of a minor testator's estate. Instead of denying all children the ability to execute wills, the law could grant all minors testamentary capacity and require those minors who are parents to provide for their children after death. This type of protection from disinheritance would operate similarly to the forced spousal share that protects surviving spouses from intentional disinheritance.<sup>149</sup> Under such a scheme, a surviving child of a minor testator would take a portion of the minor's estate regardless of the terms of the will.<sup>150</sup> This forced share for children of minor testators would both protect children from disinheritance and would provide greater testamentary freedom than a categorical age restriction that denies all minors testamentary capacity.

If protection of children from disinheritance were a primary policy goal of the law of wills, the categorical incapacity of minors could be justified as protection for the relatively small group of children who are born to minor parents. However, it is not.<sup>151</sup> As previously mentioned, the law of wills protects children from unintentional disinheritance but if an adult testator wants to disinherit his child, he may do so.<sup>152</sup> That the protection of children from disinheritance is not a primary policy objective of the law of wills is also evidenced by the general mental competency requirement for executing wills. For the purpose of comparison, consider again the mental capacity threshold for lifetime gifts. This competency requirement mandates that the donor "be capable of understanding the effect that the gift may have on the future financial security . . . of anyone who may be dependent on the donor."<sup>153</sup> Conversely, an understanding of the financial dependence of potential beneficiaries is not part of the testamentary mental capacity require-

149. See *supra* notes 138-140 and accompanying text.

150. Some have suggested that the law of wills should provide all children greater protection from disinheritance by implementing a forced share for children of all testators. See, e.g., Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 519-20 (1964).

151. Scholars have heavily criticized the law of wills for not placing more importance on the protection of children from disinheritance. See, e.g., Deborah A. Batts, *I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996).

152. See *supra* notes 144-145 and accompanying text. Louisiana is the only state to provide children a share of a deceased parent's estate, regardless of the intent of the parent. LA. CIV. CODE ANN. art. 1493 (West, Westlaw through the 2014 Reg. Sess.). However, this forced share is available in only limited circumstances. LA. CIV. CODE ANN. art. 1494.

153. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(c) (2003).

ment.<sup>154</sup> A testator can execute a will that disinherits a dependent while unaware of the effect that disinheritance will have on the financial security of the dependent.<sup>155</sup> In contrast to the capacity rules regarding lifetime gifts, the absence of a requirement that the testator understand the financial implications of his will suggests that protection from improvident disinheritance of dependents is not a policy objective that adequately explains the categorical testamentary incapacity of minors.

In sum, the diminished importance of the protections afforded by the minor incapacity doctrine ultimately illuminates the need for reform of the testamentary age requirement. For states basing their minor incapacity rules upon a protective policy rationale that is aimed at protecting the minor, the differences between testamentary decision-making and contractual and donative decision-making suggest that the minor incapacity doctrine is not needed and should be abolished.<sup>156</sup> Similarly, if the testamentary incapacity of minors is aimed at protecting a minor's surviving spouse, the protection that the law already provides surviving spouses suggests that additional protection is not needed and the age restriction should be eliminated.<sup>157</sup> Finally, if the age requirement is intended to protect a minor's children, the requirement's over-inclusiveness – that is, its inclusion of minors who do not have children – suggests that the incapacity rules should be more narrowly tailored.

#### IV. AGE AS A PROXY FOR COMPETENCE

If the traditional protective policy rationale does not adequately justify the categorical testamentary incapacity of minors,<sup>158</sup> alternative rationales may better substantiate the minor incapacity doctrine's place in the law of wills. One such alternative rationale is that the age requirement serves as a proxy for the minimum level of mental competency that all testators must possess to validly execute wills. All testators must surpass a mental capacity threshold in order to validly exercise testamentary power.<sup>159</sup> This mental capacity requirement mandates that, at the time of will-execution,<sup>160</sup> the testator “be capable of knowing and understanding in a general way the nature and extent of his . . . property, the natural objects of his . . . bounty, and the disposition that he . . . is making of that property” and that he “be capable of relat-

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154. *See id.* § 8.1(b).

155. *See id.*

156. *See supra* Part III.A.

157. *See supra* Part III.B.

158. *See supra* Part III.

159. *See supra* Part II.A.1.

160. *See* THOMAS E. ATKINSON, LAW OF WILLS 241 (2d ed. 1953).

ing these [three] elements to one another and forming an orderly desire regarding the disposition of the property.”<sup>161</sup>

### A. Conclusive Presumption of Incompetence

Because the probate process takes place after the testator’s death and frequently long after the will is executed,<sup>162</sup> the court may have difficulty assessing the testator’s competency.<sup>163</sup> As one practitioner explains, “Usually there is not any contemporaneous examination of the testator, nor any documented evaluations in the time period of the will, so it is very difficult to prove, retrospectively, that a testator lacked testamentary capacity at the precise moment when the will was executed.”<sup>164</sup> To overcome some of these evidentiary difficulties, the probate court’s task in determining whether a testator possessed this requisite level of mental capacity is facilitated by a presumption of competency that is triggered when a will is offered that was executed after the testator reached the age of majority.<sup>165</sup> The rationale underlying this presumption is that most adults satisfy the competency requirement, and therefore a contestant of a validly executed will should

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161. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (2003); *see also* DUKEMINIER ET AL., *supra* note 2, at 141.

162. *See* Gulliver & Tilson, *supra* note 116, at 6 (explaining that at the time of probate “the testator will inevitably be dead and therefore unable to testify . . .”). Statutes in a handful of states allow probate proceedings to commence before the death of the testator. *See, e.g.*, ARK. CODE ANN. § 28-40-202 (West, Westlaw through end of 2014 Fiscal Sess.); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West, Westlaw Current through the 2013 Reg. Sess. of the 63rd Legislative Assembly); OHIO REV. CODE ANN. § 2107.081 (West, Westlaw through 2013 File 59 of the 130th GA (2013-2014)). “These statutes authorize a person to institute during life an adversary proceeding to declare the validity of a will and the testamentary capacity and freedom from undue influence of the person executing the will.” DUKEMINIER ET AL., *supra* note 2, at 156.

163. *See* J. Edward Spar, *Attorney’s Guide to Competency and Undue Influence*, 13 NAELA Q. 7, 8 (“Because testamentary capacity is such a low standard, and because prospective evaluation of the impaired testator is still not commonly performed and documented (and when it is, it is almost always at the request of a competent testator, or by his or her anticipated beneficiaries), it is usually very difficult to prove retrospectively that a testator lacked testamentary capacity at the precise moment that the contested will was executed.”).

164. Robert L. Aldridge, *Capacity, Competency, and Other Cans of Worms*, 46 ADVOC. 9, 9 (2003).

165. *See* UNIF. PROBATE CODE § 3-407 (1990, as amended 2010) (“Proponents of a will have the burden of establishing prima facie proof of due execution . . . . Contestants of a will have the burden of establishing lack of . . . capacity . . . .”). In a minority of states the proponent of a will must establish testamentary capacity without the aid of a presumption. *See* DUKEMINIER ET AL., *supra* note 2, at 156.

have the burden of persuading the court that the testator lacked the requisite mental capacity.<sup>166</sup>

The age requirement's role in aiding the court in establishing the testator's competency corresponds to the role that will-execution formalities play in aiding the court in determining testamentary intent. In addition to assessing whether a decedent had the requisite mental capacity to exercise testamentary power, the probate court must determine whether the decedent intended a particular document to be his will.<sup>167</sup> Like the evidentiary difficulties that hinder the court's ability to evaluate the testator's competency,<sup>168</sup> certain characteristics of the probate process obstruct the court's ability to determine testamentary intent. Because the probate process takes place after the decedent's death, the court cannot simply ask the decedent whether he intended a particular document to be testamentary in nature.<sup>169</sup> Likewise, the long lag between the execution of a will and the commencement of the probate process may also hinder the court's ability to determine whether the decedent intended a particular document to be his will. As such, the probate court's task of determining testamentary intent may prove difficult.

These evidentiary difficulties are alleviated in part by the formalities of will-execution, which require that a will be written, signed by the testator, and attested by at least two witnesses.<sup>170</sup> A testator's compliance with these formalities aids the court in determining whether a decedent intended a particular document to constitute a will by serving as a proxy for testamentary intent. By leaving behind a written, signed, and attested document, the testator strongly signals his desire to exercise testamentary power and provides the probate court reliable evidence of testamentary intent.<sup>171</sup> The decedent thus leaves little doubt that he intended to execute a will.<sup>172</sup>

166. See ATKINSON, *supra* note 160, at 547 (“The presumption of sanity is . . . founded merely on mathematical probabilities.”).

167. See EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 115 (7th ed. 2006) (“Probably the most fundamental requisite of a valid will is testamentary intent.”); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 541 (1982) (“A valid will must . . . be executed with testamentary intent.”).

168. See *supra* notes 162-164 and accompanying text.

169. See Gulliver & Tilson, *supra* note 116, at 6.

170. See DUKEMINIER ET AL., *supra* note 2, at 202 (cautioning that “these basic requirements for execution of wills vary considerably in detail from state to state”).

171. See Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. (forthcoming 2014) (manuscript at 17-20, 21-23, on file with author) (describing the evidentiary and signaling functions of will formalities); Langbein, *supra* note 113, at 492-94 (describing the evidentiary and channeling functions of will formalities).

172. See Langbein, *supra* note 113, at 495 (“Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent. It is difficult to complete the ceremony and remain ignorant that one is making a will.”). Although the primary purpose of requiring testator to comply with the for-

Compliance with the prescribed formalities offers such strong evidence of testamentary intent that when a duly executed will is submitted for probate, a presumption of testamentary intent is triggered.<sup>173</sup> Instead of the will's proponent offering independent evidence of testamentary intent, a contestant of the will has the burden of persuading the court that the decedent did not intend a written, signed, and attested document to constitute his will.<sup>174</sup> Similar to the role that will-execution formalities play in aiding the court in determining testamentary intent, the age requirement for testamentary capacity can be viewed as a proxy for the requisite level of mental competency that a testator must possess to execute a will. Because the testamentary capacity threshold is so low, a testator's satisfaction of the age requirement sends a strong signal to the probate court that he possessed the necessary level of mental competency to validly execute a will. In this way, the requirement that a testator be of a certain age serves as a formality of will-execution that facilitates the court's evaluation of the testator's mental capacity.

Mirroring the presumption of competency that applies to adults,<sup>175</sup> the probate court's task of determining the mental capacity of a child may also be facilitated by a presumption of incompetency that is triggered by the child's minority status. Under this view of the testamentary incapacity of minors, if the age requirement is set at the appropriate level, children who do not satisfy the requirement would likely fail to meet the mental competency threshold; therefore, an individual determination of competency is not needed. Put differently, the law may view the age of majority as the tipping point at which those above the specified age should be presumed to have satisfied the mental capacity requirement because most testators of that age would meet the competency requirement. Likewise, testators below the specified age should be presumed to lack the requisite level of mental competency because most testators of that age would fail to meet the competency requirement.<sup>176</sup>

This presumption of incompetency of minors corresponds with the presumption of competency of adults; however, the two presumptions differ in one important respect. Whereas the presumption of competency of adults is

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malities of will execution is to ensure evidence of testamentary intent, the requirement may also serve other purposes. See Glover, *supra* note 142, at 431-40 (arguing that will formalities serve a family protection function).

173. See *Vickery v. Vickery*, 170 So. 745, 746 (Fla. 1936) (explaining that a will "should be presumed to have been made with testamentary intent when appearing to have been executed with required legal formalities . . ."); Langbein, *supra* note 113, at 500 (explaining that the "fundamental requisite[]" of "testamentary intent [is] presumed from due execution . . .").

174. See Langbein & Waggoner, *supra* note 167, at 541-43; see also, e.g., *In re Watkins' Estate*, 198 P. 721 (Wash. 1921).

175. See *supra* notes 165-166 and accompanying text.

176. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559 (2000) ("The designation of a categorical legal age of majority can be understood as reflecting a crude judgment about maturity and competence.").

rebuttable by evidence that suggests that the adult was incompetent at the time of will-execution,<sup>177</sup> the presumption of incompetency of minors is conclusive.<sup>178</sup> No evidence of a minor's competency can overcome the presumption of incompetency.<sup>179</sup>

The conclusiveness of the presumption of incompetency is troublesome because it is undoubtedly over-inclusive. The competency threshold for executing wills is relatively low when compared to the mental capacity requirements for giving lifetime gifts and entering contracts,<sup>180</sup> and scholars recognize that many children satisfy the contractual and donative competency requirements.<sup>181</sup> As such, all minors are denied the ability to execute wills despite that a large portion likely would meet the testamentary mental capacity requirement. The distinction between the rebuttability of the presumption of competency and the conclusiveness of the presumption of incompetency could perhaps reflect the notion that the law should be overly cautious in granting testamentary capacity to minors. However, as discussed previously, the need to deny minors testamentary capacity in furtherance of protecting them from imprudent testamentary decisions is questionable at best.<sup>182</sup>

### B. Rebuttable Presumption of Incompetence

The incongruence between the ability to rebut the presumption of competency of adults and the inability to overcome the presumption of incompetency of minors suggests that the law should be reformed to allow courts to make individual determinations of the competency of children. If a particular state bases the testamentary incapacity of minors upon the rationale that the age requirement serves as a proxy for competency, the categorical age requirement should be abolished and the presumption should be changed from a

177. See UNIF. PROBATE CODE § 3-407 (1990, as amended 2010).

178. See *supra* note 82 and accompanying text.

179. See *supra* note 82 and accompanying text.

180. See DUKEMINIER ET AL., *supra* note 2, at 141; see also, e.g., *Lee v. Lee*, 337 So. 2d 713, 715 (Miss. 1976) (finding that a decedent had the mental capacity required to execute a will but did not have the contractual mental capacity required to execute a deed).

181. See Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 515 (1994) ("The facts bear out that many minors are not the incompetent, lost souls of years past."); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1303 (2000) ("[C]onclusive incapacity belies the reality of adolescent capability and market savvy . . ."); see also Scott, *supra* note 176, at 560 ("[O]ne likely effect of the categorical approach is that minors will sometimes continue to be treated as legal children when they are competent to make decisions or perform adult functions. For this reason, this approach has been challenged, sometimes successfully, on the ground that it deprives competent youths of the ability to exercise rights and privileges that adult citizens enjoy.").

182. See *supra* Part III.



conclusive presumption to a rebuttable presumption. This reform would ultimately further the overarching purpose of the law of wills, which is to effectuate the testator's intent.<sup>183</sup> As the Supreme Court of Illinois explains, "Minor children cannot opt out of intestacy laws that do not accurately effectuate their intent because they lack the legal capacity to execute wills."<sup>184</sup> If the categorical age restriction were removed and the presumption of incapacity were rebuttable by independent evidence of competency, minors would be able to opt out of undesirable intestacy schemes and the law would uphold the testamentary intent of a greater number of decedents.

Reform of this type would correspond nicely with reform in other areas of the law of wills. For instance, recall the connection between the way in which the decedent's age serves as a proxy for competency and the way in which the decedent's formal compliance serves as a proxy for testamentary intent. In addition to the similarities previously discussed, the inconsistency between the rebuttability of the presumption of competency and the conclusiveness of the presumption of incompetency also parallels the way that the presumption of testamentary intent operates. On one hand, a testator who complies with the prescribed formalities of will-execution invokes a presumption of testamentary intent.<sup>185</sup> As such, the challenger of the will must establish that the testator did not intend the document to be his will.<sup>186</sup> On the other hand, a decedent's failure to comply with the prescribed formalities invalidates the will, and the probate court will not entertain independent evidence that suggests the decedent intended the document to constitute a legally effective will.<sup>187</sup>

A law reform movement is underway that advocates allowing probate courts to consider independent evidence of testamentary intent.<sup>188</sup>

183. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989) ("[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy.").

184. Estate of Hicks, 675 N.E.2d 89, 94 n.1 (Ill. 1996). Intestacy laws govern the distribution of property of those who die without a will. See DUKEMINIER ET AL., *supra* note 2, at 60.

185. See *supra* notes 171-174 and accompanying text.

186. See Langbein & Waggoner, *supra* note 167, at 541-43 (discussing the "so-called 'sham will' cases").

187. See *In re Churchill's Estate*, 103 A. 533, 535 (Pa. 1918) ("The decedent may have thought he made a will, but the statute says he had not. The question is not one of his intention, but of what he actually did, or rather what he failed to do."); Langbein, *supra* note 113, at 489 ("[O]nce a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.").

188. See DUKEMINIER ET AL., *supra* note 2, at 233 (explaining the proposed reforms of the substantial compliance doctrine and the harmless error rule); see also, e.g., UNIF. PROBATE CODE § 2-503 (1990, as amended 2010); John H. Langbein, *Ex-*

This would allow the establishment of testamentary intent despite a decedent's failure to comply with the prescribed execution formalities.<sup>189</sup> The reform movement suggests that probate courts should not evaluate a testator's compliance with the prescribed formalities based upon the traditional rule of strict compliance.<sup>190</sup> Under strict compliance, courts are required to invalidate a will for any formal defect, regardless of how much evidence suggests that the testator intended the document to constitute a legally effective will.<sup>191</sup> By operating in this way, the rule creates a conclusive presumption of the lack of testamentary intent, which is triggered by the decedent's failure to strictly comply.

The law reform movement argues that the presumption of the lack of testamentary intent that is triggered by the lack of formal compliance should be changed from a conclusive presumption to a rebuttable presumption.<sup>192</sup> This change would be implemented by the adoption of the harmless error rule, which would allow a proponent of a formally deficient will to establish by independent evidence that the decedent intended the will to be legally effective.<sup>193</sup> In jurisdictions that have adopted the harmless error rule, a rebuttable presumption of testamentary intent is triggered when the testator complies with the prescribed formalities, and a corresponding rebuttable presumption of the lack of testamentary intent is triggered when a decedent does not comply with the prescribed formalities. In both instances, the presumption can be overcome by extrinsic evidence.<sup>194</sup>

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*curring Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 4 (1987) [hereinafter Langbein, *Excusing Harmless Errors*]; Langbein, *supra* note 113.

189. See UNIF. PROBATE CODE § 2-503 (1990, as amended 2010) ("Although a document . . . was not executed in compliance with [the prescribed formalities], the document . . . is treated as if it had been executed in compliance . . . if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will . . .").

190. See *id.* § 2-503 cmt. ("By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing . . . a will.")

191. See *DUKEMINIER ET AL.*, *supra* note 2, at 225 ("The traditional rule is that the formalities required by the Wills Act must be complied with strictly, and almost any mistake in execution will invalidate the will."); Langbein, *supra* note 113, at 489 ("The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.")

192. See, e.g., Langbein, *Excusing Harmless Errors*, *supra* note 188.

193. See UNIF. PROBATE CODE § 2-503 (1990, as amended 2010); see generally Langbein, *Excusing Harmless Errors*, *supra* note 188.

194. Compare *Vickery v. Vickery*, 170 So. 745 (Fla. 1936) (en banc) (allowing the contestant of a formally compliant document to establish that the decedent did not intend the document to constitute a legally effective will), with *In re Estate of Hall*, 51 P.3d 1134 (Mont. 2002) (allowing the proponent of a formally defective

This reform effort is rooted in the idea that implementation of the harmless error rule would increase the law's fulfillment of testamentary intent.<sup>195</sup> The movement points to the overarching goal of the law of wills, which is to effectuate testamentary intent,<sup>196</sup> and the purpose of will formalities, which is to ensure that a will accurately and reliably reflects testamentary intent.<sup>197</sup> With these objectives in mind, proponents of reform argue that invalidating wills for lack of formal compliance contravenes these goals when other evidence strongly suggests that the decedent intended to execute a will.<sup>198</sup> Put simply, proponents of reform suggest that, in circumstances where the decedent clearly intended to execute a will, the requirement of strict compliance undermines both the purpose of will formalities and the overall goal of the law of wills.

Similarly, if the age requirement to execute a will serves as a proxy for competency, the denial of testamentary capacity to all minors is incongruent with both the purpose of the age requirement and the overarching goal of the law of wills. If the age requirement is seen as evidence of mental capacity that aids the court in correctly assessing the competency of the decedent, denying the court the ability to evaluate the competency of minors based upon all available evidence undermines the objective of the requirement. Likewise, categorically denying minors testamentary capacity undermines the law's goal of effectuating testamentary intent because the rule denies all minors the ability to execute wills – including those minors who clearly satisfy the competency requirement. Reforming the testamentary capacity rules to

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document to establish that the decedent intended the document to constitute a legally effective will).

195. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243 (1996) (“The argument for simplifying will formalities and forgiving ‘harmless error’ in execution rests on the premise that effectuating testamentary intent, and thus protecting testamentary freedom, is the primary goal of wills law.”).

196. See *supra* note 183.

197. See *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (“The primary purpose of [will] formalities is to ensure that the document reflects the uncoerced intent of the testator.”); Langbein, *supra* note 113 (“The formalities are designed to perform functions which will assure that [the testator’s] estate really is distributed according to his intention.”).

198. See Langbein, *Excusing Harmless Errors*, *supra* note 188 (“The Wills Act is meant to implement the decedent’s intent; the paradox is that in a case [that applies the rule of strict compliance] is that the Wills Act defeats that intent.”); Langbein, *supra* note 113, at 491-92 (“The first principle of the law of wills is freedom of testation. . . . A tension is apparent between the principle of ‘free testation and the stiff, formal’ requirements of the Wills Act.”); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 457 (2002) (“[F]ormality rules for will execution prevent mistakes about intent and provide a means for expressing intent. At the same time, in significant number of cases they may frustrate not only an individual testator’s intent but also the principal objective of the law of wills.”).

allow proponents of a will to establish that a minor testator possessed the requisite mental capacity would therefore both align with the purpose of the age requirement and bolster the overall goal of the law of wills.

In sum, a testator's age can be seen as a proxy for the requisite mental capacity to execute a will. This view corresponds to the way that the testator's compliance with the formalities of will-execution signals to the probate court that the testator possessed testamentary intent. If a state bases its minor incapacity rule upon this rationale, the categorical prohibition of minors to execute wills should be abolished and the presumption of incompetency that is triggered by a decedent's minority status should be reformed. Because under this rationale the purpose of the age requirement is to aid the court in evaluating the testator's competency, and because the overarching goal of the law of wills is to effectuate testamentary intent, the presumption of incompetency for minors should be rebuttable rather than conclusive. This reform falls in line with trends in other areas of the law of wills and ultimately furthers the overall objective of honoring testamentary intent.

## V. INTESTACY AS FORCED PARENTAL INHERITANCE

Although the traditional explanation for the testamentary incapacity of minors is that the age requirement protects those who have not sufficiently matured from suffering the consequences of their imprudent testamentary decisions,<sup>199</sup> the requirement could be founded upon a different rationale. This possibility stems in part from the inconsistency with which the law deploys this protective policy. While the law protects children by denying them testamentary capacity, it grants disabled adults, who possess the mental capacity of minors, the ability to execute wills.<sup>200</sup>

Consider, for example, the execution of a will by Marvin Teel, who functioned at the level of a ten- to twelve-year-old child as a result of a mental disability.<sup>201</sup> Teel executed a will at the age of fifty-two that gave his entire estate to his half-cousin.<sup>202</sup> Teel's brother challenged the validity of the will by arguing that Teel did not possess the requisite mental competency to validly exercise testamentary power.<sup>203</sup> Although Teel's will would have been invalid had he been only twelve years of age instead of merely possessing the mental capabilities of a twelve year old, the court validated his

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199. See *supra* notes 74-80 and accompanying text.

200. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter's note 3 (2003).

201. *In re Estate of Teel*, 483 P.2d 603, 604 (Ariz. Ct. App. 1971).

202. *Id.*

203. *Id.* at 603-04.

will.<sup>204</sup> The court thus acknowledged that a person with the mental capabilities of a minor can be competent to execute a will.<sup>205</sup>

*In re Estate of Teel* highlights the inconsistency in the law's application of the protective policy that is embedded into the rules of testamentary capacity. If the law protects minors by denying them testamentary capacity, it seems that the law should also protect mentally disabled adults who possess the mental capacity of minors by similarly preventing them from executing wills. The Restatement (Third) of Property recognized this inconsistency when it acknowledged that "[t]he age requirement . . . can be . . . under-inclusive as compared with its purpose that only a person of mature judgment can execute a will."<sup>206</sup> This inconsistency suggests that at least part of the rationale behind the testamentary incapacity of minors does not relate to the traditional protective policy explanation.

Similar inconsistency in the law's testamentary capacity rules suggests that the previously discussed alternative rationale does not adequately explain the age requirement. Although the requirement could be seen as a proxy for mental capacity that assists probate courts in evaluating a testator's competency,<sup>207</sup> the law applies this evidentiary tool inconsistently. Whereas the minimum age requirement might be explained as a cutoff point below which a decedent likely would not possess the requisite mental capacity to execute a will,<sup>208</sup> the law does not place a corresponding ceiling on the age of testators, as adults of any age can execute wills.<sup>209</sup>

Nonetheless, if there is a minimum age below which a child likely does not possess the requisite mental capacity, there would also seem to be a maximum age over which an adult likely would not satisfy the competency requirement. In instances involving both minor testators and elderly testators, a presumption of incapacity could aid the probate court in evaluating mental competency. This inconsistency in the application of the age restriction suggests that, just as the age requirement might not be founded solely on a protective policy,<sup>210</sup> the testamentary incapacity of minors cannot be fully explained as a proxy for competence.

As such, this Article's third and final potential rationale for the testamentary incapacity of minors does not relate to a minor testator's competency

204. *Id.* at 605.

205. *Id.* ("Considering the record and the overall findings, we are of the opinion that the conclusion that the decedent 'functioned at an age level of ten to twelve years old' is not necessarily inconsistent with the finding of competency as a testator.").

206. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter's note 3 (2003).

207. *See supra* Part IV.

208. *See supra* Part IV.

209. *See* UNIF. PROBATE CODE § 2-501 (1990, as amended 2010), *Rose v. Foster*, 288 P.2d 745, 747 (Okla. 1955) ("It has been held many times that advanced age . . . alone does not render one incapable of making a will.").

210. *See supra* Part III.

or maturity. Instead, this third possible justification explains the age requirement as a mechanism for directing a child's estate to his parents. By denying minors testamentary capacity, the age requirement ensures that a minor cannot pick a distributional scheme that reflects his testamentary preferences and thus a child's estate is likely distributed to his parents.<sup>211</sup> In essence, the age requirement implements a scheme of forced parental inheritance,<sup>212</sup> under which most children must direct their estates to their parents.

### A. *The Family as an Economic Unit*

When a person who has not executed a will dies without a surviving spouse or descendants, as most minor decedents likely do, the intestacy laws in most states distribute the bulk of the child's estate to his parents to the exclusion of the decedent's siblings.<sup>213</sup> Intuitively, this type of default estate plan may reflect the desires of most children. However, empirical evidence suggests that most adults without spouses or descendants would prefer that siblings share in the distribution of their estates along with their parents.<sup>214</sup> This suggests that part of the rationale for the default distributional scheme detailed above is not the probable intent of the decedent.

Instead, the intestacy laws can be seen as reflecting an economic reality: parents contribute to their child's ability to accumulate wealth through financial and other types of support, and therefore parents deserve to inherit their child's property when the child leaves behind no spouse or children. In fact, one of the drafters of the Model Probate Code (a precursor to the UPC) explicitly endorsed this rationale when he explained that "[t]he thought behind

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211. See Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 559 (2001) ("Minor children, usually children under eighteen, though they may earn money and own property, do not have the legal capacity to make testamentary gifts. Since default intestate succession schemes provide for the transfer of property to a decedent's parents if the decedent has no surviving spouse or child, minor children's estates are especially likely to go to surviving parents. Thus, minor children do not have the option of dis-inheriting their parents.").

212. See *id.* ("[W]hen the decedent is a minor child, parents may also be the beneficiaries of a form of forced heirship."); Paula A. Monopoli, "Deadbeat Dads": *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259 n.8 (1994) ("Children are forced to leave their estates to their parents because the law bars them from opting out of the intestacy/default system by making a will," and therefore "in the case of inheritance from children, de facto forced heirship exists in this country.").

213. See STERK, LESLIE & DOBRIS, *supra* note 32, at 93.

214. See Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 189 (2006) (citing Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 324, 346).

[distributing an unmarried child's estate exclusively to his parents] is that the estate of a minor is likely to have been derived from his parents or grandparents."<sup>215</sup> This explanation suggests that a child's estate was likely accumulated through gifts from ancestors, but the rationale also holds when the parents' duty to support the child is considered. In either case, the parents' right of inheritance is based upon the notion that children are able to accumulate wealth because of the care and support of their parents. The child's probable intent is irrelevant.

The recognition that parents contribute to their children's accumulation of wealth through economic and other types of support is also found in a parent's right to a child's income during the child's minority. In most states, parents have the right to receive their children's earnings.<sup>216</sup> The underlying rationale is that the parents' right to the child's income mirrors the parents' duty to support the child.<sup>217</sup> The rule recognizes that the child has the ability to earn income because of his parents' support, and therefore the parents have a right to the child's earnings. As one California appellate court explains, "[The parent's] right to [his children's] services . . . rests upon the parental duty of maintenance, and it is said to furnish some compensation to him for his own services rendered to the child."<sup>218</sup>

The age requirement for executing wills can be seen as an extension of the idea that parents should share in their child's income because they helped the child accumulate that income through their duty of support. Whereas the parents' right to their child's earnings allows parents to share in a child's

215. William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1049 n.52 (1966).

216. See Jillian Benbow, *Under My Roof: Parents' Rights to Children's Earnings*, 16 J. CONTEMP. LEGAL ISSUES 71, 71 (2005) ("The earnings of a minor child rarely 'belong' to the child. They belong, instead, to the child's custodial parent who claims them. In most states, as at common law, gainful employment neither guarantees minor children the right to receive their earnings nor provides them with a cause of action to recover the earnings their parents have taken from them."); Erica Siegal, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L.J. 427, 430-31 (2000); see also, e.g., CAL. FAM. CODE § 7500(a) (West, Westlaw current with urgency legislation through Ch. 1 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot) ("The mother of an unemancipated minor child, and the father, if presumed to be the father . . . are equally entitled to the services and earnings of the child.").

217. See Benbow, *supra* note 216, at 74 ("At first blush, all this sounds like slavery. The rationale, however, is that the parent's entitlement to a child's earnings reciprocates the parent's support obligation toward the child."); see also Barrett v. Riley, 42 Ill. App. 258, 261 (Ill. App. Ct. 1891) ("The father is entitled to the wages and ordinary earnings of his minor son, upon the theory that during minority he is under obligations to take care of, clothe and educate the son.").

218. *Wardrobe v. Miller*, 200 P. 77, 79 (Cal. Ct. App. 1921) (quoting *McGarr v. Nat'l & Providence Worsted Mills*, 53 A. 320, 321 (1902)).

wealth during the minor's life,<sup>219</sup> the age requirement for executing wills enables parents to share in a child's wealth upon the minor's death. Intestacy laws ensure that parents reap benefit from their child's estate in the absence of a will,<sup>220</sup> and the age requirement bolsters the parents' benefit by ensuring that the child cannot opt out of this default estate plan. In essence, the law treats minor children as a component of their parents' economic unit and recognizes that, through various forms of support, parents contribute to their children's ability to amass wealth.

The idea that a family is a single economic unit and that family members should therefore share in the distribution of each other's estates is found elsewhere in the law of succession. For example, in all states, when a spouse dies without a will, the surviving spouse receives the bulk of the decedent's estate.<sup>221</sup> This intestate distribution is primarily explained as a reflection of the ordinary decedent's probable intent.<sup>222</sup> However, a secondary consideration underlying this default estate plan is that spouses function as a single economic unit and therefore each contributes to the other's ability to accumulate wealth.<sup>223</sup> Based partially on this economic partnership theory of marriage, the law directs a substantial portion of the predeceasing spouse's intestate estate to the surviving spouse.<sup>224</sup> Thus, the intestate treatment of both spouses and minor children reflects the notion that surviving family members who assist the decedent in amassing wealth should share in the distribution of the decedent's estate.

Moreover, just as the law restricts minor children's testamentary freedom so that parents share in a child's estate regardless of whether the child would prefer otherwise, the law restricts spouses' testamentary freedom. A surviving spouse shares in the deceased spouse's estate regardless of decedent's preferred estate plan. Indeed, in addition to setting a spouse's default estate plan to provide for a surviving spouse, the law also allows a surviving spouse to take a portion of a deceased spouse's estate even when the decedent executed a will and opted out of the default distributional scheme of intestacy.<sup>225</sup>

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219. See *supra* notes 216-218 and accompanying text.

220. See *supra* note 213 and accompanying text.

221. See *DUKEMINIER ET AL.*, *supra* note 2, at 73.

222. See *id.* at 62.

223. See *id.* at 64. ("A secondary policy of the intestacy laws is family protection – preserving the economic health of the family after death. With respect to spouses, a related consideration is the recognition that marriage involves an economic partnership.").

224. See *id.* at 63 ("Under current law [in most states], the surviving spouse usually receives at least a one-half share of the decedent's estate.").

225. See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1245.



This mandatory heirship of surviving spouses is typically referred to as the forced spousal share and is founded upon two rationales.<sup>226</sup> The first is a support theory, which requires a decedent to provide for a surviving spouse based upon the policy that spouses should financially support each other during life as well as after death.<sup>227</sup> Second is the economic partnership theory of marriage.<sup>228</sup> By requiring a deceased spouse to provide for a surviving spouse regardless of whether the decedent dies without a will or has opted out of the default distributional scheme of intestacy, the law reinforces the idea that spouses contribute to each other's ability to accumulate wealth.<sup>229</sup> The forced parental share that the law implements by denying minors the ability to execute wills corresponds to this forced spousal share. Both forced spousal inheritance and forced parental inheritance recognize that families operate as single economic units and that the accumulation of wealth by one member is aided by the support that the other family members provide.

In roughly a third of states, various exceptions to the testamentary incapacity of minors allow children to execute wills under certain circumstances.<sup>230</sup> For example, in some states children who are granted orders of emancipation by a court are authorized to execute wills.<sup>231</sup> In other states, children who are married or who are members of the armed services are granted testamentary capacity.<sup>232</sup> The recognition of these exceptions lends credence to this forced parental inheritance theory because children who qualify for these exceptions are no longer active members of the family economic unit. Indeed, similar exceptions typically apply to a parent's right to a child's income under the rationale that, when a parent's support obligation is terminated by a child's emancipation, the corresponding parental right to a child's income should also terminate.<sup>233</sup> Therefore, in states in which a child is granted testamentary capacity when he is emancipated through court order, marriage, or military service, the general testamentary incapacity rule seems at least partially founded upon the forced parental inheritance rationale.

226. See *DUKEMINIER ET AL.*, *supra* note 2, at 425.

227. *See id.*

228. See UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (1990, as amended 2010) (“[T]he economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage . . .”).

229. See *DUKEMINIER ET AL.*, *supra* note 2, at 425.

230. *See infra* Table I.

231. *See infra* Table I (identifying eight states that provide an exception for emancipated minors); *see also, e.g.*, MICH. COMP. LAWS ANN. § 722.4e(1)(n) (West, Westlaw through P.A.2014, No. 9, of the 2014 Reg. Sess., 97th Legislature) (“A minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an adult . . . for the purposes of . . . [t]he right to make a will.”).

232. *See supra* notes 52-53 and accompanying text.

233. Benbow, *supra* note 216, at 75-76.

### B. Limiting the Parental Share

Although this rationale could underlie the testamentary incapacity of minors, the law need not necessarily deny all minors the ability to execute wills in order to implement forced parental inheritance. Indeed, the exceptions that some states recognize for emancipated minors illustrate that a categorical age restriction on testamentary capacity can be over-inclusive. In states that do not recognize exceptions for emancipated minors,<sup>234</sup> the scheme of forced parental inheritance is over-inclusive because parents who are no longer subject to a duty to support their children benefit from forced inheritance.<sup>235</sup> The recognition of the forced parental inheritance rationale therefore suggests that policymakers in states that do not grant testamentary capacity to emancipated minors should reexamine their testamentary capacity rules. If they justify their denial of testamentary capacity on the forced parental inheritance rationale, exceptions to the rule should be implemented so that children who are not part of their parents' economic unit can execute wills and opt out of intestacy.

Recognizing exceptions for emancipated minors remedies one form of over-inclusiveness, but the implementation of forced parental inheritance though a categorical age restriction on testamentary capacity is over-inclusive in at least two other ways. First, the categorical testamentary incapacity of minors provides all parents with forced inheritance regardless of whether they fulfill their duty to support their children.<sup>236</sup> Because forced parental inheritance is justified as compensation for the parents' duty of support,<sup>237</sup> parents who do not fulfill the duty should not reap the benefits. By implementing forced parental inheritance through funneling the child's estate into intestacy, the law does not account for circumstances in which the parent does not support the child; therefore, the law subjects some children's estates to forced parental inheritance in circumstances that are inappropriate.

Second, the testamentary incapacity of minors is over-inclusive because it provides parents the entirety of their children's estates irrespective of the size of the estate.<sup>238</sup> Most children do not amass large fortunes and their estates are likely smaller than their parents' support obligation. In such situations, forced inheritance of the child's entire estate will not overcompensate

234. See *infra* Table 1.

235. See, e.g., UNIF. PROBATE CODE § 2-501 (1990, as amended 2010) (making no mention of an exception for emancipated minors).

236. Intestacy statutes do not distinguish between parents who fulfill their duty of support and those who do not. See, e.g., UNIF. PROBATE CODE § 2-103(a)(2) (1990, as amended 2010) (providing that "if there is no surviving descendant" the decedent's estate shall flow "to the decedent's parents equally if both survive, or to the surviving parent if only one survives . . .").

237. See *supra* notes 216-220 and accompanying text.

238. Intestacy laws do not place a limit on the amount that parents can receive through intestacy. See, e.g., UNIF. PROBATE CODE § 2-103(a)(2).

parents. Some children, however, do accumulate substantial wealth<sup>239</sup> and their estates can be significantly larger than their parents' support obligations. For these children, the implementation of forced parental inheritance is over-inclusive because parents will reap a benefit that is greater than their reciprocal support obligation.

Although the implementation of forced parental inheritance through the categorical incapacity of minors produces instances of over-inclusiveness, state policymakers could implement such a scheme in a way that remedies these problems. Specifically, lawmakers could allow minors to execute wills but provide parents a forced share of the child's estate. Under this regime of forced parental inheritance, parents who fulfill their support obligations would be provided a specific portion of their children's estates that is sufficient to compensate them for that obligation.<sup>240</sup> Children, however, would be able to leave behind wills that evidence how they would prefer to distribute their property upon death and the law would respect minor testators' preferences to the extent their estates are not consumed by the forced parental share.

Therefore, if state policymakers justify the testamentary incapacity of minors as the implementation of forced parental inheritance, the categorical age restriction should be eliminated and forced parental inheritance should be implemented through a forced parental share of children's estates. Such a regime would provide children greater ability to exercise testamentary freedom. Moreover, it would remedy the over-inclusiveness problems produced by the implementation of forced parental inheritance through a categorical age registration. Only parents who fulfill their duty of support would be eligible for the forced share, and the share would be limited to an amount equal to the parent's support obligation.

## VI. REFORMING THE TESTAMENTARY CAPACITY OF MINORS

As previously discussed, three potential policy rationales could underlie the testamentary incapacity of all minors. However, none adequately justify the categorical age restriction. Regardless upon which policy objective the rule is founded, state legislatures should consider reform of the testamentary capacity rules. If policymakers want to pursue a particular policy objective, they can do so by implementing changes that serve the particular policy and also further the overall goal of the law of wills by narrowly restricting minors' ability to execute wills.

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239. For example, in 2010 at the age of seventeen, Justin Bieber earned \$53 million. See Amanda Massa, *Justin Bieber Leads List of Celebrity 100 Newcomers*, FORBES (May 18, 2011, 10:00 a.m.), <http://www.forbes.com/2011/05/16/celebrity-100-11-newcomers-justin-bieber.html>.

240. This forced parental share would operate similarly to the forced spousal share that is already well established within the law of wills. See *supra* notes 138-139 and accompanying text.

### A. Elimination of the Age Restriction

As discussed throughout this Article, one potential reform that policy-makers should consider is the elimination of the testamentary age requirement. By removing this categorical restriction on testamentary capacity, such a reform would serve the overarching objective of the law of wills, which is to allow people to freely decide how their estates will be distributed. Although this reform would undermine the policy goals of the testamentary age requirement, lawmakers could implement these policies in other ways that place fewer limitations on minors' testamentary freedom.

First, if state policymakers view the testamentary incapacity of minors as protecting children from their own indiscretion,<sup>241</sup> the categorical age restriction should be eliminated outright. Wills are inherently revocable<sup>242</sup> and, as such, children can rethink their testamentary decisions as they mature. The revocability of wills mirrors the protection that the law provides children in the related contexts of contracts and lifetime gifts. To protect minors from the consequences of irresponsible contractual and donative decisions, the law allows children to disaffirm contracts and gifts.<sup>243</sup> If children had the legal capacity to execute wills, the inherent revocability of wills would similarly protect minors from imprudent testamentary decisions. Because the revocability of wills already protects testators from poor testamentary choices, the protection that the testamentary incapacity of minors provides is not needed and the categorical age restrictions should be eliminated.<sup>244</sup>

Second, if state policymakers justify the testamentary incapacity of minors on the rationale that age serves as a proxy for competence,<sup>245</sup> the categorical age restriction should be abolished because a large portion of minors would satisfy the testamentary mental capacity requirement.<sup>246</sup> Instead of categorically denying children the ability to execute wills, the law could treat a child's minority status as triggering a rebuttable presumption of incapacity. Under such a presumption, the probate court would consider evidence that a minor possessed the requisite mental capacity to execute a will. As such, the law would presume that children lack the mental capacity to execute wills, but this presumption could be overcome by extrinsic evidence. This rebuttable presumption of incapacity would maintain the rationale that age serves as

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241. See *supra* Part III.

242. See *DUKEMINIER ET AL.*, *supra* note 2, at 251.

243. See *DAVIS, CHILDREN'S RIGHTS*, *supra* note 49, at 10-11; see also *supra* Part II.B.

244. See *supra* Part III. As discussed previously, if state policymakers view the testamentary incapacity of minors as protecting the children of minors from disinheritance, lawmakers could implement such protection by giving children a forced share of their minor parents' estates. See *supra* notes 147-150 and accompanying text.

245. See *supra* Part IV.

246. See *supra* notes 180-181 and accompanying text.

a proxy for competence, but it would also enable children who possess the requisite level of mental competency to execute wills.

Finally, if state policymakers want to implement a scheme of forced parental inheritance,<sup>247</sup> they should abandon the categorical age restriction and should instead explicitly provide parents a forced share of the child's estate. Forced parental inheritance is justified as compensation for the parents' duty to support the child.<sup>248</sup> The testamentary incapacity of minors implements this policy by forcing the child's estate into intestacy and consequently directing it to the child's parents.<sup>249</sup> However, such a scheme is over-inclusive because it provides parents forced inheritance irrespective of whether they fulfill their parental duty of support and regardless of the size of the child's estate.<sup>250</sup> Instead of denying all children the ability to execute wills, state policymakers could implement forced parental inheritance by allowing children to execute wills but requiring them to give a specified portion of their estates to their parents. Such a scheme would further the overall policy of the law of wills by allowing children to exercise some amount of testamentary freedom, and would also implement forced parental inheritance in a more tailored and transparent manner.

After an examination of its potential policy rationales, it becomes apparent that the categorical age restriction that denies all children testamentary capacity should be abolished. The primary objective of the law of wills is to allow people to freely decide how their property will be distributed upon death.<sup>251</sup> However, the law currently denies all minors this freedom of disposition.<sup>252</sup> Although certain policy objectives could justify some restrictions on children's testamentary freedom, no rationale adequately explains the absolute denial of their ability to execute wills. Moreover, lawmakers can pursue the rule's potential policy goals through other means that are less restrictive on children's ability to exercise testamentary freedom.<sup>253</sup> As such, the categorical age restriction should be eliminated, and children should be granted the legal capacity to execute wills.

### B. Parental Consent

Although the utility of the categorical age restriction is questionable, state policymakers may be reluctant to abolish the testamentary age requirement outright. Indeed, policymakers may overvalue one or more of the aforementioned policy objectives, or they may simply be hesitant to make

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247. See *supra* Part V.

248. See *supra* notes 216-220 and accompanying text.

249. See STERK, LESLIE & DOBRIS, *supra* note 32, at 93.

250. See *supra* notes 236-239 and accompanying text.

251. See Weisbord, *supra* note 4, at 883-85.

252. See Cunningham, *supra* note 3, at 320.

253. See *infra* Part VI.B.

such a drastic change to a longstanding and widely accepted rule. Regardless of the concerns that policymakers might have with the complete elimination of the testamentary age restriction, a less drastic reform is available. This alternative would allow parents to consent to their children's testamentary capacity. Under this proposal, parental consent would authorize the child to execute a will.

Parental consent would provide children a greater opportunity to execute wills but would not undermine the policy objectives of the current rule's three potential rationales. First, parental consent would serve as protection from irresponsible testamentary decisions. Instead of protecting children from their mistakes by denying them the ability to execute wills, parents would evaluate the prudence of their children's wills. Parental review and consent of the will would serve as a check against the minor testator's indiscretion. Children would be protected by their parents' judgment as to the appropriateness of their testamentary decisions, but they would not be categorically denied the ability to execute wills.

Second, parental consent would serve as evidence of the minor's mental competency. As discussed above, one potential rationale of the testamentary incapacity of minors is that age serves as a proxy for competency and that minors of a certain age necessarily lack the requisite mental capacity to exercise testamentary power.<sup>254</sup> Age, however, is a rough proxy for competency. Whatever age is chosen, some children below the specified age likely will satisfy the mental competency requirement. As such, this Article argues that the presumption of incompetency that is triggered by a child's minority status should be rebuttable.<sup>255</sup> Some may argue that giving children the ability to establish testamentary capacity would be an undue administrative burden because the probate court would have to make individual determinations of minor testators' mental competency.<sup>256</sup> A parental consent requirement would diminish this concern because the child's parents would make the individual determination of competency. Under this reform, children would be able to execute wills but the court would bear no additional administrative burden. Parental consent would provide such strong evidence of the minor's mental capacity that no individual determination of the child's competency would be required.

Finally, parental consent would act as a waiver of forced parental inheritance. The forced parental inheritance rationale is based on the idea that parents should share in the minor child's estate because the child's accumula-

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254. *See supra* Part IV.

255. *See supra* Part IV.

256. Similar administrative efficiency concerns have been used to justify the rule of strict compliance, which courts traditionally use to evaluate a testator's compliance with the formalities of will-execution and which prevents courts from considering evidence other than the testator's formal compliance when determining whether the decedent intended the will to be legally effective. *See* Langbein, *supra* note 113, at 493-94 (explaining the "channeling function" of will formalities).

tion of wealth is facilitated by the parents' care and support.<sup>257</sup> The testamentary incapacity of minors implements this forced share because, in the absence of a will, a minor child's estate typically is distributed to the child's parents.<sup>258</sup> Nonetheless, if parents are willing to give up their forced inheritance, they should be able to do so.<sup>259</sup> Allowing parents to voluntarily waive their rights would not undermine the policy objective of the minor incapacity rules because forced parental inheritance would still be in place for those parents who want it. However, under this parental consent reform, minors would have a greater opportunity to execute wills.

In sum, allowing parents to consent to the execution of wills by their minor children would further the overall objective of the law of wills, which is to allow people to freely decide how their estates will be distributed.<sup>260</sup> Moreover, the reform would serve the policy objectives of the testamentary incapacity of minors. First, parental consent would protect minor testators from making poor decisions. Second, it would provide robust evidence of the minor testator's mental capacity. Finally, such a scheme would maintain forced parental inheritance for those parents who do not waive their rights. Therefore, because the parental consent proposal is a less drastic departure from traditional law than the outright elimination of the testamentary age requirement, policymakers may be more amenable to implementing this reform.

## VII. CONCLUSION

Minors lack testamentary capacity.<sup>261</sup> As a result, children cannot dispose of their property through wills, regardless of whether they possess the mental competency that is required of adult testators.<sup>262</sup> Three policy rationales could justify this rule. First, the incapacity of minors could be a protec-

257. See *supra* Part V.

258. See *supra* note 213 and accompanying text.

259. An heir already has the ability to disclaim the right to receive an intestate share. See *DUKEMINIER ET AL.*, *supra* note 2, at 132. Allowing parents to give minor children the option to disinherit them could be seen as simply an extension of their ability to disclaim their intestate share altogether. Moreover, the waiver of the forced parental share would mirror a spouse's ability to elect not to take the forced share. See *id.* at 451. The waiver of the forced parental share would also correspond nicely with parents' ability to relinquish their rights to their children's earnings. See Benbow, *supra* note 216, at 75-76; see also, e.g., CAL. FAM. CODE § 7504 (West, Westlaw current with urgency legislation through Ch. 3 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot) ("The parent, whether solvent or insolvent, may relinquish to the child the right of controlling the child and receiving the child's earnings.").

260. See *supra* note 4.

261. See UNIF. PROBATE CODE § 2-501 (1990, as amended 2010).

262. See *supra* note 3 and accompanying text.

tive measure that shields children from the negative consequences of their inexperience and immaturity.<sup>263</sup> If children cannot execute wills, they cannot make imprudent testamentary decisions. Second, the age requirement could serve as a proxy for competence.<sup>264</sup> Under this rationale, the testator's youth provides evidence of the testator's lack of mental capacity and triggers a conclusive presumption of incompetency. Finally, the testamentary incapacity of minors could be seen as a means by which to implement forced parental inheritance.<sup>265</sup> Under this theory, the age limit requires a minor to die without a will in order to force the child's estate into intestacy, which typically results in the distribution of the child's assets to his parents.

Regardless of which theory is used to justify the testamentary age requirement, the rule conflicts with the cornerstone of the law of wills. The primary objective of this area of law is to provide decedents expansive liberty to dispose of their estates as they want.<sup>266</sup> But by categorically denying children the ability to execute wills, the age requirement represents a broad restriction on this freedom. Because of testamentary freedom's fundamental status, the law should limit this liberty only when compelling and coherent policy considerations require. Moreover, a rule that restricts testamentary freedom should be structured not only to fulfill important policy objectives but also to limit testamentary freedom in the narrowest possible way. Yet, none of the age requirement's potential rationales adequately justify the broad, categorical incapacity of minors.

Indeed, reform of the testamentary age requirement is needed so that it restricts this freedom only when compelling policy considerations mandate. For example, if a state considers its minor incapacity rule as furthering a protective policy, a reevaluation of the rule suggests that the minor incapacity doctrine should be abolished.<sup>267</sup> Whereas children may require protection in the contexts of contracts and lifetime gifts, such a protective policy is not needed under the unique circumstances of testamentary gift-giving. Alternatively, if a state views its minimum age requirement as a proxy for a certain level of mental competency, a closer examination suggests that such a rule should not be applied formalistically. In other words, if age serves as a proxy for competency, all minors should not be precluded from executing wills; instead, age should merely aid courts in exercising their discretion regarding the determination of the testator's mental capacity.<sup>268</sup> Finally, if state policymakers desire a system of forced parental inheritance, they should consider implementing it through a forced share of the minor's estate rather than

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263. See *supra* Part III.

264. See *supra* Part VI.

265. See *supra* Part V.

266. See Weisbord, *supra* note 4, at 883-85.

267. See *supra* Part III.

268. See *supra* Part IV.



through a categorical age limitation on testamentary capacity.<sup>269</sup> The implementation of forced parental inheritance through such a system would provide parents the benefit of forced inheritance but would avoid the over-inclusiveness produced by the categorical age restriction.

Although legal scholars have devoted much attention to the minor incapacity rules in other areas, especially contract law,<sup>270</sup> the need for reform of the minor incapacity doctrine in the law of wills has largely been overlooked.<sup>271</sup> This is true despite that reform in this context fits nicely within the larger reform movement in the law of wills, which over the last several decades has pushed for the relaxation of formalistic rules that undermine testamentary intent.<sup>272</sup> Ultimately, the recognition of the need for reform highlights the prudence of diligently reexamining a variety of formalistic testamentary rules and illustrates that through such a reevaluation new avenues of reform can be identified throughout the law of wills.

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269. See *supra* Part V.

270. See, e.g., DiMatteo, *supra* note 181; Daniel, *supra* note 63; Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967); W.D. Navin, Jr., *The Contracts of Minors Viewed from the Perspective of Fair Exchange*, 50 N.C. L. REV. 517 (1972); Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613 (2011).

271. Occasionally scholars suggest the need to reform the minor incapacity doctrine in the law of wills, which often relates to whether eighteen is the appropriate age at which the law should remove the categorical incapacity of minors. See, e.g., Cunningham, *supra* note 3, at 321.

272. See generally James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994).

TABLE I<sup>273</sup>

State	Code Sections	Age	Exceptions
Ala.	ALA. CODE § 43-8-130	18	-
Alaska	ALASKA STAT. ANN. § 13.12.501	18	-
Ariz.	ARIZ. REV. STAT. ANN. § 14-2501	18	-
Ark.	Ark. Code Ann. § 28-25-101	18	-
Cal.	CAL. PROB. CODE § 6100(a) CAL. FAM. CODE § 7050(e)(6) CAL. FAM. CODE § 7002	18	Emancipation Marriage Military Service
Colo.	COLO. REV. STAT. ANN. § 15-11-501	18	-
Conn.	CONN. GEN. STAT. ANN. § 45a-250	18	-
Del.	DEL. CODE ANN. tit. 12, § 201	18	-
D.C.	D.C. CODE § 18-102	18	-
Fla.	FLA. STAT. ANN. § 732.501 FLA. STAT. ANN. § 743.01	18	Emancipation Marriage
Ga.	GA. CODE ANN. § 53-4-10(a)	14	-
Haw.	HAW. REV. STAT. § 560:2-501	18	-
Idaho	IDAHO CODE ANN. § 15-2-501 IDAHO CODE ANN. § 15-1-201(15)	18	Marriage
Ill.	755 ILL. COMP. STAT. ANN. 5/4-1	18	-
Ind.	IND. CODE ANN. § 29-1-5-1	18	Military Service
Iowa	IOWA CODE ANN. § 633.264 IOWA CODE ANN. § 599.1	18 <sup>†</sup>	Marriage
Kan.	KAN. STAT. ANN. § 59-601 KAN. STAT. ANN. § 38-101 KAN. STAT. ANN. § 38-108	18 <sup>†</sup>	Emancipation Marriage
Ky.	KY. REV. STAT. ANN. § 394.020	18	-
La.	LA. CIV. CODE ANN. art. 1476	16	A minor under 16 may make a will in favor of his spouse or children.
Me.	ME. REV. STAT. ANN. tit. 18-A, § 2-501	18	-
Md.	MD. CODE ANN., EST. & TRUSTS § 4-101	18	-
Mass.	MASS. GEN. LAWS ANN. ch. 190B, § 2-501	18	-
Mich.	MICH. COMP. LAWS ANN. § 700.2501(1) MICH. COMP. LAWS ANN. § 722.4e(1)(n) MICH. COMP. LAWS ANN. § 722.4(1)-(2)	18	Emancipation Marriage Military Service

273. All statutes are current as of March 3, 2014 according to WestlawNEXT online.

Minn.	MINN. STAT. ANN. § 524.2-501	18	-
Miss.	MISS. STAT. ANN. § 91-5-1	18	-
Mo.	MO. REV. STAT. ANN. § 474.310	18	Emancipation Marriage Military Service
Mont.	MONT. CODE ANN. § 72-2-521	18	-
Neb.	NEB. REV. STAT. ANN. § 30-2326 NEB. REV. STAT. ANN. § 30-2209(26)	18	Marriage
Nev.	NEV. REV. STAT. ANN. § 133.085(2) NEV. REV. STAT. ANN. § 133.090(2)	18	-
N.H.	N.H. REV. STAT. ANN. § 551:1	18	Marriage
N.J.	N.J. STAT. ANN. § 3B:3-1	18	-
N.M.	N.M. STAT. ANN. § 45-2-501 N.M. STAT. ANN. § 45-1-201(14)	18	Emancipation Marriage Military Service
N.Y.	N.Y. EST. POWERS & TRUSTS § 3-1.1	18	-
N.C.	N.C. GEN. STAT. ANN. § 31-1	18	-
N.D.	N.D. CENT. CODE ANN. § 30.1-08-01 N.D. CENT. CODE ANN. § 14-10-02	18 <sup>†</sup>	-
Ohio	OHIO REV. CODE ANN. § 2107.02	18	-
Okla.	OKLA. STAT. tit. ANN. 84, § 41(A)	18	-
Or.	OR. REV. STAT. ANN. § 112.225	18	Marriage
Pa.	PA. CONS. STAT. ANN. § 2501	18	-
R.I.	R.I. GEN. LAWS ANN. § 33-5-2	18	-
S.C.	S.C. CODE ANN. § 62-2-501 S.C. CODE ANN. § 62-1-201(24)	18 <sup>†</sup>	Emancipation Marriage
S.D.	S.D. CODIFIED LAWS § 29A-2-501	18	-
Tenn.	TENN. CODE ANN. § 32-1-102	18	-
Tex.	TEX. PROB. CODE ANN. § 57	18	Marriage Military Service
Utah	UTAH CODE ANN. § 75-2-501	18	-
Vt.	VT. STAT. ANN. tit. 14, § 1 VT. STAT. ANN. tit. 1, § 173	18 <sup>†</sup>	-
Va.	VA. CODE ANN. § 64.1-47 VA. CODE ANN. § 16.1-333	18	Emancipation Marriage Military Service
Wash.	WASH. REV. CODE ANN. § 11.12.010	18	-
W. Va.	W. VA. CODE ANN. § 41-1-2	18	-
Wis.	WIS. STAT. ANN. § 853.01	18	-
Wyo.	WYO. STAT. ANN. § 2-6-101 WYO. STAT. ANN. § 14-1-101	18 <sup>†</sup>	-

† Indicates that the age requirement is not explicit but is instead tied to the age of majority.