



2006

## Expertise and Instinct in the Assessment of Testamentary Capacity

Pamela Champine

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### Recommended Citation

Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 Vill. L. Rev. 25 (2006).

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## Articles

### EXPERTISE AND INSTINCT IN THE ASSESSMENT OF TESTAMENTARY CAPACITY

PAMELA CHAMPINE\*

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I. INTRODUCTION

THE heart-wrenching story of Terry Schiavo, a young woman whose husband and parents fought bitterly about the utility of continuing Terry’s life support, pitted a mountain of medical evidence against the intuitive knowledge parents have of their children.<sup>1</sup> Eventually, the legal fight ended, with the medical evidence carrying the day.<sup>2</sup> For the many who believe that the result was too long coming, pause to recall the stories of individuals who receive a diagnosis of terminal illness after earlier complaints to physicians about symptoms of that illness were misdiagnosed. In these cases, unlike the Schiavo case, the individual’s common sense intuition surpassed the expertise of the doctor who misdiagnosed him or her.

The fallibility of medical expertise requires individuals to exercise judgment about when to trust their own instincts and when to rely on professional medical advice. There is no objective standard to guide every question that arises. Yet, most individuals manage to make decisions about when to trust medical advice and when to follow instinct in some reasonable way.

This same issue confronts courts in will contests where an objectant alleges that the testator lacked the mental capacity to make a will. In such cases, the legal standard requires a testator to know the nature and extent of his or her property, the natural objects of his or her bounty and the contents of his or her estate plan.<sup>3</sup> Proof that a testator met or fell short

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1. See Wikipedia.org, Terri Schiavo, [http://en.wikipedia.org/wiki/Terri\\_Schiavo](http://en.wikipedia.org/wiki/Terri_Schiavo) (last visited Oct. 19, 2005) (presenting summary of stages in Schiavo battle).

2. See *id.* (describing autopsy results confirming extensive damage to decedent’s nervous system).

3. See, e.g., *In re Estate of Tolin*, 622 So. 2d 988, 990 (Fla. 1993); *Kelley v. Nielson*, 745 N.E.2d 952, 960 (Mass. 2001); *Weissiger v. Simpson*, 861 So. 2d 984, 987 (Miss. 2003); *In re Estate of Kuralt*, 15 P.3d 931, 934 (Mont. 2000); *In re Estates of Covert*, 761 N.E.2d 571, 573 (N.Y. 2001); *In re DiBiasio*, 705 A.2d 972, 973 (R.I. 1998); *Kemp v. Rawlings*, 594 S.E.2d 845, 849 (S.C. 2004); *Estate of Vincent*, 98 S.W.3d 146, 150 (Tenn. 2003); *Turner v. Reed*, 518 S.E.2d 832, 833 (Va. 1999).

of this standard typically includes expert evidence that conflicts with non-expert evidence given by those who knew the testator best.<sup>4</sup> One might assume that two centuries of experience adjudicating will contests would have produced a well-accepted standard to determine the relative roles of expert evidence as compared to non-expert evidence. It has not.

At one time, this problem was understood in exclusively evidentiary terms. Will contests occur when the will is offered for probate, which traditionally occurs after the testator's death. At that time, it is impossible to examine the testator. To determine testamentary capacity the court must rely on other evidence, such as: observations of the testator's behavior reported by neighbors and friends, medical evidence remote in time from the will execution and the content of the will itself. A probate procedure that offered individuals the opportunity to confirm their testamentary capacity during life would eliminate the evidentiary obstacle, and that, in turn, would improve the coherence of the body of testamentary capacity decisions. For nearly a century, reformers offered different designs for such a procedure,<sup>5</sup> but few made the transition from idea to statute. Of those that did make the transition to statute, none had any effect on the testamentary capacity decisional law.<sup>6</sup>

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4. See, e.g., *Forehand v. Sawyer*, 136 S.E. 683, 689 (Va. 1927) (presenting testamentary capacity dispute between non-experts, testator's wife and son, and expert).

5. The first serious interest in this type of reform surfaced in the nineteenth century when Michigan enacted a statute for the probate of wills of living testators. See Act of 1883, 1883 Mich. Pub. Stat. 17 (repealed in 1885) (setting forth procedure for pre-death probate). The statute was declared unconstitutional three years later on grounds that it enabled the testator to circumvent the inchoate rights of the surviving spouse and child as well as its failure to ensure finality of the probate judgment. See *Lloyd v. Wayne Circuit Judge*, 23 N.W. 28, 29 (Mich. 1885) (invalidating statute); see also Daniel A. Friedlander, Note, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives*, 32 CASE W. RES. L. REV. 823, 826-34 (1982) (detailing history of Michigan living probate statute). The issue of pre-death probate resurfaced and received significant attention in the 1930s. See David F. Cavers, *Ante-Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 444 (1934) (analyzing flaws in statute's construction); Harold S. Hulbert, *Probate Psychiatry: A Neuro-Psychiatric Examination of Testator from the Psychiatric Viewpoint*, 25 U. ILL. L. REV. 288, 288-89 (1930) (describing ideal testamentary process including psychiatric profiling of testator); Samuel J. Stephens, *Probate Psychiatry: Examination of Testamentary Capacity by a Psychiatrist as a Subscribing Witness*, 25 U. ILL. L. REV. 276, 279-80 (1930) (proposing mental examination to establish competency at time of will drafting). Finally, several decades later, the issue resurfaced once more. See Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 96-111 (1979) (noting due process limitations on probate process); Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264, 268-83 (1976) (examining judicial decisions regarding Michigan testamentary statute); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978) (describing flaws in current probate system while emphasizing need for change).

6. See Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 663 (1999) (identifying Ohio, Arkansas and North Dakota as only states with ante-mortem probate statutes); see also Aloysius A. Leopold & Gerry

During a hiatus in the discussions of procedural reform, a comprehensive study of testamentary capacity, conducted by Dean Milton Green, concluded that judgments about testamentary capacity correlated poorly with expert and other evidence of testators' cognitive abilities because the contents of the will guided decisions.<sup>7</sup> Specifically, wills treating family members fairly tended to be admitted to probate, but wills treating family members unfairly tended to be denied probate.<sup>8</sup> This approach to determining testamentary capacity conflicts with the doctrinal standard because it evaluates the end product of the testator's decision making process rather than the testator's ability to engage in that process.<sup>9</sup>

Rather than mobilizing efforts for procedural reform, Green's study triggered debate about the policy support for the doctrinal standard. The debate pitted the policy of testator autonomy, which was consistent with the cognitive standard articulated in the testamentary capacity doctrine, against the policy of family protection, which was consistent with the decisions in will contests.<sup>10</sup> Meanwhile, the procedural reform proposals continued to emerge, but the policy impasse effectively stymied the reform efforts.<sup>11</sup>

The next advance in the quest to reform the law of testamentary capacity must recognize the legitimacy and limits of both policies in the law of testamentary capacity. The doctrinal component of any future proposal must articulate the nature of each interest and how the two policies fit together so that the doctrine provides a predicate for procedural reform by defining the level of protection that particular interests require. At the same time, doctrinal reform must be the product of the procedural structure that implements it because the doctrine will be workable only if it

W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 169-75 (1990) (reporting paucity of use of ante-mortem procedures).

7. See generally Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 278-79 (1944) [hereinafter *Green, Proof*] (analyzing cases in which court upheld will's validity when testator may have lacked testamentary capacity because will's contents were deemed reasonable).

8. For a further discussion of the reasoning for judicial decisions denying probate where the family appears to be treated unfairly, see *infra* notes 90-102 and accompanying text.

9. For a brief description of the doctrinal standard, see *supra* note 3 and accompanying text.

10. Compare Alexander & Pearson, *supra* note 5, at 93-96 (reflecting concern for testator autonomy in critique of contest model), with Mary L. Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1095-109 (1980) (concluding that living probate would be inconsistent with family protection).

11. See Greene, *supra* note 6, at 663 (noting lack of reform efforts). Despite the problems encountered in the attempt to implement reform, the basic policy dilemma continues to receive attention. See, e.g., Josef Athanas, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 554 (1990) (advocating enactment of legislation to preclude unfair results); Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 187 (1999) (advocating use of standard of fairness to determine validity of wills).

acknowledges evidentiary limitations that the procedural structure imposes. The central aim of this Article is to begin the next chapter in the dialogue on testamentary capacity reform by presenting a reformulation of the testamentary capacity doctrine that fits these criteria.

To lay a foundation for the reformulation of the testamentary capacity doctrine advocated here, Part II describes the need for change in this area.<sup>12</sup> An examination of reported cases adjudicating testamentary capacity in a recent five-year period reveals an important similarity as well as an important difference from the cases examined in Green's study.<sup>13</sup> Cases now suggest that courts rely heavily on contemporaneous expert assessment of testamentary capacity, a phenomenon not present in the earlier study.<sup>14</sup> At the same time, modern cases show a continuing reluctance to vest other expert evidence with too much weight.<sup>15</sup> The very small number of cases involving contemporaneous expert assessment of testamentary capacity establishes that the problem of relying on an evaluation of the content of the will to determine testamentary capacity still plagues the decisional law.<sup>16</sup>

Beneath this evidentiary surface, the policy tension between protecting testators' autonomy and protecting testators' families festers. Part III analyzes these competing interests by using three criteria that any successful reform must satisfy.<sup>17</sup> The first criterion requires a logical connection between the policy interest at stake and the testamentary capacity doctrine.<sup>18</sup> This criterion tests the controversial contention that a bias favoring dispositions to family should play a role in the testamentary capacity doctrine. Relying on a combination of doctrinal argument and empirical evidence, the analysis concludes that, while autonomy must hold the dominant position in testamentary capacity doctrine, family protection may

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12. For a further discussion on the necessity for legal reform, see *infra* notes 27-112 and accompanying text.

13. For a discussion on the cases studied within the examined five-year period, see *infra* notes 37-41.

14. See *infra* notes 51-77 and accompanying text. See generally Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 *LAW & PSYCHOL. REV.* 71, 85 (2004) (recognizing that although contemporaneous evaluations of testamentary capacity are desirable, they do not represent majority of forensic evaluations).

15. For a discussion of doctrinal justification for giving contemporaneous expert assessment evidence more weight than non-expert evidence, see *infra* notes 78-83 and accompanying text.

16. For a further discussion of the disincentive to secure a contemporaneous expert assessment and the consequent role of will content in determining testamentary capacity in the absence of an expert assessment, see *infra* notes 84-112 and accompanying text.

17. For a further discussion of the three criteria needed for a successful reformulation of testamentary capacity procedures, see *infra* notes 113-225 and accompanying text.

18. For a further discussion of the logical connection between a policy of family protection and the testamentary capacity doctrine, see *infra* notes 128-46 and accompanying text.

hold a legitimate role as well.<sup>19</sup> The second criterion is that the policy be workable—i.e., implementation of the policy must not require that which existing knowledge cannot produce.<sup>20</sup> This criterion tests the contentious assertion that the policy of testator autonomy is unworkable because it is impossible to measure the cognitive functioning of testators in any meaningful way. After reviewing the bases for this assertion, the analysis concludes that it has validity for truly marginal cases but that it is unpersuasive in relation to the large number of cases that involve testators with insignificant cognitive limitations.<sup>21</sup> The final criterion is political feasibility. This requires an evaluation of the viability of abolishing the testamentary capacity doctrine altogether, either with or without the introduction of an accompanying doctrine to assure that the testator's family receives a fair portion of the estate.<sup>22</sup> Consistent with the other two criteria, the criterion of political viability strongly suggests that an attempt to achieve reform more radical than reformatting the testamentary capacity doctrine would be futile.<sup>23</sup>

Finally, Part IV articulates a reformulation of the testamentary capacity doctrine that explicitly incorporates a balance of the family protection and testator autonomy policies.<sup>24</sup> To reflect the policy of family protection, the reformulation of the testamentary capacity doctrine proposed here incorporates a strong and explicit presumption of testamentary capacity for wills that favor the family.<sup>25</sup> To reflect the policy of testator autonomy, the reformulation proposed here offers an alternative means of establishing testamentary capacity, which is lifetime validation of capacity to make a will through successful performance on a standardized psychological test, known as a forensic assessment instrument, designed specifically to measure testamentary capacity.<sup>26</sup> Consistent with the conclusion that measurement of cognition alone cannot determine testamentary capacity in close cases, the procedure for lifetime capacity assessment is re-

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19. For a further discussion on the logical limits of family protection policy in testamentary doctrine, see *infra* notes 147-57 and accompanying text.

20. For a further discussion on the workability of the testator autonomy policy, see *infra* notes 158-76 and accompanying text.

21. *Id.*

22. For a discussion of the political constraints on abolishing the testamentary capacity doctrine without alternative family protection, see *infra* notes 177-224 and accompanying text.

23. For a further discussion of the political infeasibility of enacting direct family protection, see *infra* notes 200-225 and accompanying text.

24. For a further discussion on the reformulation of the testamentary capacity doctrine, see *infra* notes 226-305 and accompanying text.

25. For a further discussion of the goal of promoting family protection in construing testamentary capacity, see *infra* notes 226-30 and accompanying text.

26. For a further discussion on the use of a forensic assessment instrument to establish testamentary capacity, see *infra* notes 257-75 and accompanying text. See generally THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 31-53 (2d ed. 2003) (surveying development of forensic assessment instruments and promoting their use in competency assessments).

served for testators who clearly possess the cognitive skills that the testamentary capacity standard, as reformulated, would require.

## II. THE NEED FOR REFORM: EVIDENTIARY EXTREMES IN THE LAW OF TESTAMENTARY CAPACITY

The sole certainty in testamentary capacity case law is unpredictability.<sup>27</sup> Untold numbers of disappointed heirs have challenged testamentary capacity to induce devisees to settle will contests rather than face the uncertainty of litigation. Yet, decisions probating wills executed by testators in extraordinarily weakened or altered states are not difficult to find.<sup>28</sup>

Proof of testamentary capacity, in many jurisdictions, begins with a presumption favoring the testator.<sup>29</sup> To successfully challenge a will, the objectants must rebut this presumption with evidence that the testator fell short of the legal standard for testamentary capacity—the testator failed to understand the nature and extent of his or her property, the natural objects of his or her bounty or the disposition embodied in his or her will.<sup>30</sup>

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27. See Green, *Proof, supra* note 7, at 297 (referring to testamentary capacity and undue influence as “Gold Dust Twins”); see also Langbein, *supra* note 5, at 66 (noting that unpublished pretrial settlements create difficulty for tracking capacity litigation outcomes). This skeleton of wills law shocks many beneficiaries named in wills as well as lawyers who have not previously experienced the vagaries of testamentary capacity litigation, particularly if they remember the oft-repeated dictum that wills require less capacity than the execution of any other legal document. See THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 240 (2d ed. 1953) (discussing accuracies and misleading aspects of this statement).

28. See, e.g., *Ex parte Helms*, 873 So. 2d 1139, 1147 (Ala. 2003) (stating that although testators may be under immediate influence of intoxicating liquor or drugs at time they perform testamentary act, will is not invalidated on grounds of incapacity); *In re Willmott’s Estate*, 66 So. 2d 465, 467-68 (Fla. 1953) (finding that testator who ingested narcotics and received delivery of “inordinate quantity” of those narcotics at his home on day of will execution possessed testamentary capacity); *In re Succession of Miller*, 803 So. 2d 1021, 1026-27 (La. Ct. App. 2001) (finding testator possessed testamentary capacity despite detailed testimony from physician describing debilitating effects of anti-psychotic medication that decedent had ingested and nurse’s observation of decedent as semi-comatose, disoriented, agitated, nonverbal and lethargic within hours of will execution); see also D.E. Buckner, Annotation, *Testamentary Capacity as Affected by Use of Intoxicating Liquor or Drugs*, 9 A.L.R.3d §§ 15-26 (1966) (analyzing effect of drugs or medication taken for therapeutic purposes).

29. See ATKINSON, *supra* note 27, at 545-48 (explaining burden of proof of testamentary capacity). In approximately half of the jurisdictions, the contestant in a will contest bears the burden of proof regarding a testator’s mental capacity. See *id.* at 546. This is based either on a statutory presumption of the validity of wills or upon a presumption of sanity. See *id.* at 546-47. In the other jurisdictions, the proponent bears the burden of proof, but evidence necessary to make out a prima facie case is slight. See *id.* at 548 (noting ease with which proponent presents prima facie case for mental capacity).

30. For a brief description of the testamentary capacity standard, see *supra* note 3 and accompanying text.



This is a task-specific standard that requires proof bearing directly on cognitive abilities as they relate to estate planning.<sup>31</sup>

The individualistic focus of the testamentary capacity standard, by its very nature, involves adjudicatory discretion to consider all relevant facts and circumstances in reaching a legal conclusion about testamentary capacity.<sup>32</sup> This element of discretion reduces predictability about the outcome of any given case and limits the ability to reconcile results of different cases.<sup>33</sup> On the other hand, the existence of a standard to guide the exercise of discretion should produce general patterns in the case law that amplify the meaning of the standard.

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31. See *In re Conservatorship of Groves*, 109 S.W.3d 317, 333-35 (Tenn. Ct. App. 2003) (explaining that capacity is task-specific standard because testator may be incapacitated in one regard, while retaining capacity in another); see also Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L.J. 75, 100-01 (1997) (concluding that determination of capacity is task-specific, requiring fact finder to take into account context of testator's decision making ability); Marshall B. Kapp & Douglas Mossman, *Measuring Decisional Capacity: Cautions on the Construction of a "Capacimeter"*, 2 PSYCHOL. PUB. POL'Y & L. 73, 87-88 (1996) (explaining that cognitive capacity is not all-or-nothing determination). Kapp and Mossman illustrate the concept that determining capacity is task-specific through their discussion of Alzheimer patients. See *id.* at 88. While Alzheimer patients have decisional capacity in some respects, they lack it in others because the nature of the capacity required is different in each situation. See *id.* (differentiating between levels of capacity required for Alzheimer patient to perform certain tasks). "Assuming that cognitively impaired persons must fall into this or that bin may be the wrong way to conceptualize their limitations." *Id.* A person may have the capacity to draft a will while simultaneously lacking capacity to stand trial; therefore, the standard for determining capacity in each must be tailored to the specific task. See *id.*

32. See, e.g., *Brummett v. King*, 251 P.2d 1062, 1066-67 (Okla. 1953) (affirming principle that court is not limited to particular test to determine testamentary capacity, but may look to any facts or circumstances surrounding will execution); *In re Estate of Yoss*, 947 P.2d 607, 608-09 (Okla. Civ. App. 1997) (holding that testamentary capacity should be determined by examining all facts and circumstances surrounding will execution—testator's mental state before and after execution, testator's appearance, conduct, acts, habits and conversation); *In re Bond's Estate*, 143 P.2d 244, 249 (Or. 1943) (concluding that trial court properly admitted evidence of testator's mental status, appearance, conduct, acts, habits and conversations for purpose of determining testamentary capacity); *Chrisman v. Chrisman*, 18 P. 6, 8 (Or. 1888) (explaining that determination of testamentary capacity is question of fact, which must be determined by consideration of all facts and circumstances surrounding execution of will).

33. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992) (contrasting rule-oriented approach with standard-oriented approach, which "tends to collapse decision making back into the direct application of the background principle or policy to a fact situation"); see also RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 21-49 (1995) (giving overview of attributes of rules versus standards); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE BASED DECISION MAKING IN LAW AND IN LIFE* 135-66 (1991) (same); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571-608 (1992) (same); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-713 (1976) (same); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-85 (1989) (same).

The testamentary capacity standard's focus on the testator's cognitive abilities suggests that medical, psychological and other evidence bearing directly on the testator's thought processes ought to carry significant weight. Yet in the most comprehensive study of testamentary capacity ever conducted,<sup>34</sup> Dean Milton Green concluded that the "moral aspect" of the will, specifically its fairness to family, carries more weight than evidence of cognition per se.<sup>35</sup> This disconnection between the doctrinal standard and the decisional results is the problem that reform proposals (including this one) seek to rectify.

A new era in testamentary capacity reform must begin with assessment of the nature of the problem in contemporary cases. A survey of the body of reported testamentary capacity decisions for the five-year period from 2000 to 2004 presents a picture that differs in some important respects from the picture painted by Green's earlier study.<sup>36</sup>

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34. See Milton D. Green, *Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts*, 43 COLUM. L. REV. 176, 196-205 (1943) [hereinafter Green, *Related Concepts*] (addressing inter-relationships between fraud, capacity and undue influence); Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 554-57 (1943) (discussing effect of incompetency on wills and agreements); Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 152-60 (1941) [hereinafter Green, *Judicial Tests*] (discussing inconsistencies in judicial tests used to discern contractual and testamentary capacity); Green, *Proof*, *supra* note 7, at 306-10 (analyzing actual application of judicial tests to facts in will contests and contract disputes); Milton D. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189, 1202-05 (1940) [hereinafter Green, *Public Policies*] (tracing public policies underlying capacity doctrine within law of wills and contracts).

35. See Green, *Proof*, *supra* note 7, at 293-306 (opining that moral aspect of will carried more weight in probating will than testator's cognitive abilities). To establish this point, Green categorized the evidentiary facts of mental incompetency under four headings: (1) symptomatic conduct of the alleged incompetent (which is the only way that mental disorder can manifest itself); (2) opinion testimony of incompetency (with expert opinion possessing a very high degree of probative value because conduct without interpretation is meaningless and medical experts are in a position to furnish the most valid interpretations); (3) organic condition and habits of the alleged incompetent (i.e., age, bodily infirmity and disease, the use of drugs and alcohol and illiteracy); and (4) moral aspects of the transaction and its consequences (including the presence or absence of independent advice, a confidential or fiduciary relationship, undue influence, fraud, secrecy and abnormality of the transaction with abnormality of the transaction asserting controlling importance). See *id.* at 276-93 (categorizing evidentiary facts of mental incapacity). If the basis of an incompetency determination is the testator's understanding, then the categories of evidence are listed in descending order of importance. See *id.* at 275 (illustrating evidentiary weight of each fact where testator lacks understanding of will). Conversely, if the basis for incompetency determination is the moral propriety of the disposition, then the categories of evidence are listed in ascending order of importance. See *id.* (illustrating evidentiary weight of each fact where incompetency of testator based on moral propriety of dispositions). Through examination of case law, Green concluded that the results of decisions require the conclusion that the evidentiary categories are listed in ascending order of importance. See *id.*

36. Cases reviewed include all of those reported within the topic of "Wills" under the following Westlaw key numbers and topics from 2000-2004: (1) Testa-

A. *The Role of Expertise*

One possible reason for the weak correlation between the outcome of a testamentary capacity challenge and the testator's cognitive capabilities that Green's study documented is that probative evidence of the testator's cognitive capabilities historically was not available in a will contest.<sup>37</sup> It is this understanding of the problem that prompted the effort to facilitate lifetime testamentary capacity assessment.<sup>38</sup> The opportunity to bring the testator before the court or its legal designee would allow for a neutral party to directly assess the testator's cognitive capabilities, producing more accurate decisions about testamentary capacity. The more accurate decisions, in turn, would increase the coherence of the decisional law as a whole.

When these proposals first arose at the beginning of the twentieth century, the body of knowledge about cognition was far less developed than it is today. Psychology, for example, was still struggling for recognition as a legitimate field of study.<sup>39</sup> Today, psychology influences the law in a wide range of ways.<sup>40</sup> In addition, the number of individuals who presently receive mental health treatment is much greater than it was a century ago.<sup>41</sup> Advancements in mental health expertise and related medical developments, together with the expanded role of mental health services in individuals' lives, suggest the possibility that evidence of cognitive capacity is available and utilized in contemporary testamentary capacity cases. If true, the premise of the early reforms is no longer accurate. Tes-

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mentary Capacity (key numbers 21-55); (2) Probate Contest, Evidence, Presumptions and Burden of Proof (key number 287); (3) Probate Contest, Evidence, Weight and Sufficiency (key number 299); (4) Probate Contest, Hearing or Trial, Issues to Jury (key number 315); and (5) Probate Contest, Hearing or Trial, Questions for Jury in General (key number 324). The search yielded a total of 104 decisions involving the issue of whether the testator's mental state satisfied the standard for testamentary capacity.

37. See Stephens, *supra* note 5, at 281 (illustrating previous difficulty courts faced in determining will validity). Stephens stated that courts, in determining the validity of a will, "have had to read between the lines, infer, guess, rationalize and assume, to their evident distress and to the distress of the parties litigant." *Id.*

38. See, e.g., Cavers, *supra* note 5, at 446 (describing testamentary procedure involving capacity assessment); Stephens, *supra* note 5, at 277 (listing possible proposals to ascertain mental capacity of testators at time of drafting).

39. See WILLIAM R. UTTAL, *THE WAR BETWEEN MENTALISM AND BEHAVIORISM* 6-8 (2000) (detailing early nineteenth century emergence of scientific psychology from philosophical roots).

40. For a further discussion on the use of therapeutic jurisprudence as an appropriate means for analyzing the psychological impact of the law, see *infra* note 287 and accompanying text.

41. See Am. Psychological Ass'n (APA), APA Help Center—Facts and Statistics, <http://www.helping.apa.org/articles/topic.php?id=6> (last visited Oct. 17, 2005) (listing statistics for individuals suffering from mental health disorders). According to the APA ninety-one percent of Americans are likely to consult or recommend that a family member consult a mental health professional. See *id.* (noting societal norm of consulting mental health professionals).

tamentary capacity law might still be problematic, but the nature of the problem and the appropriate remedy will be different.

1. *Dichotomies in the Treatment of Expert Testimony*

Contemporary testamentary capacity cases draw a stark distinction in evidence of cognition. Cases involving an expert assessment of testamentary capacity administered for the purpose of establishing the validity of the will (referred to in this Article as “contemporaneous expert assessment”) produced outcomes consistent with the expert assessment in every instance.<sup>42</sup> In the remaining cases, the determination about testamentary capacity may be consistent with the weight of the mental health or medical evidence,<sup>43</sup> but just as often it is not.<sup>44</sup>

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42. See *In re Estate of Garrett*, 100 S.W.3d 72, 74 (Ark. App. 2003) (supporting determination of testamentary capacity based on mini-mental status exam performed by treating physician to confirm testator’s capacity to execute will immediately prior to execution ceremony); *Estate of Jenssen v. Quayle*, No. A097670, 2003 WL 1889983, at \*2 (Cal. Ct. App. Apr. 17, 2003) (depublished) (denying probate in accordance with determination of testamentary capacity made by psychiatrist after testator’s lawyer requested psychiatrist assess testator/conservatee’s testamentary capacity); *Singelmann v. Singelmann*, 548 S.E.2d 343, 344 (Ga. 2001) (stating that social worker confirmed testator’s capacity to execute will one day prior to will execution); *In re Schott Estate*, 58 Pa. D. & C.4th 533, 541-42 (Ct. Com. Pl. 2001) (indicating testator requested and received mental examination from physician within two weeks of executing will); *Baun v. Estate of Kramlich*, 667 N.W.2d 672, 675-66 (S.D. 2003) (highlighting that hospital social worker present at will execution determined no consultation with psychiatrist was necessary, which hospital policy would require if question of competency existed). Excluded are cases in which an assessment occurred in close proximity to the will execution but not for purposes of establishing testamentary capacity. See, e.g., *In re Estate of Pigg*, 877 So. 2d 406, 410 (Miss. Ct. App. 2003) (finding physical assessment of testator both before and after execution of will offered no information on testator’s mental state), *cert. denied sub nom.*, *McClendon v. McClendon*, 878 So. 2d 66 (Miss. 2004); *In re Estate of Persha*, 649 N.W.2d 661, 670 (Wis. Ct. App. 2002) (recounting that hospitalized testator was seen by physicians daily, including day of will execution).

43. See, e.g., *Estate of Verdi v. Toland*, 733 N.E.2d 25, 29 (Ind. Ct. App. 2000) (reversing summary judgment granting probate because of allegations that testator suffered from Alzheimer’s disease, appointment of guardian for testator during her lifetime and unfavorable psychiatric opinion rendered two months prior to will execution); *In re Succession of Brantley*, 789 So. 2d 1, 6-7 (La. Ct. App. 2000) (finding expert testimony based upon examination of testator years before will execution, combined with other evidence, established testamentary incapacity despite contrary proof).

44. See, e.g., *In re Succession of Chauffepied*, 775 So. 2d 555, 556-57 (La. Ct. App. 2000) (agreeing that testamentary capacity was established despite contrary opinions of three physicians who treated or examined testator within two weeks of will execution); *In re Estate of Ellis*, 616 N.W.2d 59, 65-66 (Neb. Ct. App. 2000) (affirming summary judgment granting probate despite testimony of psychiatrist indicating testator suffered from schizotypal personality disorder throughout adult years, which makes individual prone to deluded thought, eccentric convictions and susceptible to making false or baseless conclusions); *Fisher v. Jewell*, No. 01CA9, 2002 WL 110440, at \*4-5 (Ohio Ct. App. Jan. 8, 2002) (validating summary judgment granting probate despite contrary opinion of physician who examined testator day before will was executed and three days afterward); *accord Warren F.*

Outcomes of cases that do not involve contemporaneous expert assessment defy explication based on the particular type of medical evidence involved or any other evidentiary criteria. For example, expert testimony based upon examination of medical records as opposed to examination of the testator is often said to be so negligible as to fall short of raising a question of fact.<sup>45</sup> Nevertheless, that type of expert testimony does occasionally preclude summary judgment for the opposing party or constitute a principal source of support for the conclusion about testamentary capacity.<sup>46</sup> Similarly, standard doctrine holds that proof of a particular illness or condition, such as schizophrenia, Alzheimer's disease or drug addiction, does not preclude the existence of testamentary capacity,<sup>47</sup> yet cases rely on diagnoses of such conditions to support a determination that the testator lacked capacity.<sup>48</sup> Consequently, expert testimony and medical proof become just another part of the totality of the testator's circumstances, all of which bear upon the determination of testamentary capacity, and none of which directly address the issue.

The perfect correlation between contemporaneous expert assessment and the outcome of will contests by no means assures that testamentary

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Gorman M.D., *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L.J. 225, 225 (1996) ("The few courts addressing the issue have consistently held that testators with mild or mild to moderate Alzheimer's disease are competent to execute wills based upon testimony of those who interacted with the testator on the day the will was executed, often contrary to a physician's opinion."); see also SAMUEL JAN BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 439-41 (3d ed. 1985) (surveying law of testamentary capacity).

45. See, e.g., *In re Clapper*, 718 N.Y.S.2d 468, 470 (N.Y. App. Div. 2001) (agreeing with lower court's finding of testamentary capacity despite contradictory opinion of psychiatrist who had never met testator); see also *In re Succession of Miller*, 803 So. 2d 1021, 1026 (La. Ct. App. 2002) (basing competency finding on succession expert and witnesses to will signing, despite doctor's determination of incompetency based on hospital records); *Collins v. Smith*, 53 S.W.3d 832, 842-43 (Tex. App. 2001) (affirming trial court's decision that objectants pursued will contest, including allegations of testamentary incapacity, without good faith or just cause).

46. See, e.g., *In re Succession of Burguieres*, 802 So. 2d 660, 666-67 (La. Ct. App. 2000) (affirming trial court's decision to place more weight on proffered expert testimony than decedent's doctor's testimony regarding mental capacity); *In re Estate of Dokken*, 604 N.W.2d 487, 499 (S.D. 2000) (accepting proposition that psychiatrist's testimony can generate question of testamentary capacity for jury).

47. See, e.g., *In re Herman*, 734 N.Y.S.2d 194, 195-96 (N.Y. App. Div. 2001) (noting evidence of testator's heavy drinking insufficient to establish lack of testamentary capacity); *In re Sechrest*, 537 S.E.2d 511, 518 (N.C. Ct. App. 2000) (affirming directed verdict for probate of will despite evidence that testator was "almost always" drunk); *In re Estate of Schlueter*, 994 P.2d 937, 940 (Wyo. 2000) (explaining diagnosis of senile dementia not inconsistent with testamentary capacity).

48. See, e.g., *Toland*, 733 N.E.2d at 29 (reversing summary judgment for proponent based upon evidence objectant offered, including diagnosis of Alzheimer's disease); *Schindler v. Schindler*, 119 S.W.3d 923, 931-32 (Tex. App. 2003) (affirming trial court's judgment of testamentary incapacity based on evidence of physical impediments, senile dementia and Alzheimer's, despite testimony of five attesting witnesses opining that testator had capacity).

capacity decisions now incorporate evidence of cognition in a legitimate and meaningful way. In the five-year period considered here only five cases involved contemporary expert assessment.<sup>49</sup> This finding raises the possibility that a larger number of these cases would not produce the same correlation. If a strong correlation does indeed exist, there is a question about its propriety. If contemporary expert assessment is an appropriate means of resolving or influencing determinations of testamentary capacity, it is important to consider why this apparently highly effective estate planning strategy is used so infrequently.

There are both empirical and doctrinal aspects to these questions. The doctrinal analysis that follows suggests a range of likely answers to these questions and illuminates the context in which they arise, an important predicate to any future empirical work in this area.<sup>50</sup>

## 2. *The Power of Contemporaneous Expert Assessment*

The question of whether there would be a perfect correlation between contemporary expert assessment and the outcome of will contests in a larger survey of will contest cases is entirely empirical. An understanding of the facts of the cases that involved contemporary expert assessment does suggest, however, that this type of evidence carries extraordinary power.

In *Bawn v. Estate of Kramlich*,<sup>51</sup> for example, the testator suffered from severe dementia, which was diagnosed approximately five weeks after her will was executed.<sup>52</sup> She also suffered from a stroke approximately six weeks before the will execution and myriad other health problems, including diabetes, for which she was hospitalized at the time of the will execution.<sup>53</sup> Prior to will execution, a social worker at the medical facility had assessed the testator to determine whether a psychiatric consultation should be sought.<sup>54</sup> This examination was required by institutional policy whenever a question of competency arose with respect to a power of attorney.<sup>55</sup> The social worker concluded no psychiatric consultation was necessary.<sup>56</sup> A neuropsychologist who examined the testator testified for the objectants, but his testimony did not prevail.<sup>57</sup> As a result, the testator

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49. For a description of the cases studied in the five-year period relevant to this examination, see *supra* note 36.

50. For a doctrinal analysis of contemporaneous expert assessment, see *infra* notes 51-112 and accompanying text.

51. 667 N.W.2d 672 (S.D. 2003).

52. *See id.* at 676 (describing decedent's medical history).

53. *See id.* at 675-76 (stating facts of decedent's background).

54. *See id.* at 676 (noting that testator was examined by social worker for mental capacity).

55. *See id.* (describing medical facility's policy).

56. *See id.* (noting social worker's belief that decedent understood situation).

57. *See id.* at 678-79 (noting that trial court did not abuse its discretion in accepting estate's expert opinion).

realized her wish to exclude from her estate a sister with whom she had strained relations for most of her life.<sup>58</sup>

In another case, *In re Schott Estate*,<sup>59</sup> the testator had a serious medical condition and a highly suspicious estate plan.<sup>60</sup> Under the plan, the testator bequeathed a substantial portion of her estate to the assisted living facility where she resided.<sup>61</sup> This bequest adversely affected a nephew who had a close relationship with the testator and was the sole beneficiary under her prior will.<sup>62</sup> The testator was elderly, nearly blind, suffering from dementia and heavily (perhaps overly) medicated.<sup>63</sup> Additionally, she was adjudicated to be an incapacitated person ten months after the will execution.<sup>64</sup> The court received extensive contradictory testimony from both expert and lay witnesses.<sup>65</sup> The change from the prior estate plan, the decision to benefit the living facility and her general physical condition could have created serious concern about her true mental state at the time of the will execution. Instead, the court resolved doubts in accordance with the expert assessment conducted in connection with the execution of the will.<sup>66</sup>

In cases where the dispositive plan is highly unusual or suspect, objectants often pair a capacity challenge with an allegation of undue influence.<sup>67</sup> In *Singelmann v. Singelmann*,<sup>68</sup> the will in question gave a substantially greater share of the estate to one of the decedent's four children.<sup>69</sup> In response, the decedent's three other children challenged the

58. *See id.* at 674, 679-80.

59. 58 Pa. D. & C.4th 533 (Ct. Com. Pl. 2001).

60. *See id.* at 534-36.

61. *See id.*

62. *See id.* at 534-35.

63. *See id.* at 535-46.

64. *See id.* at 545.

65. *See id.* at 539-46.

66. *See id.* at 553-56 (aligning with expert evidence, although evidence was "equivocal").

67. *See, e.g., In re Will of Walther*, 159 N.E.2d 665, 668 (N.Y. 1959) (defining undue influence as "coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear"); *see also* 1 WILLIAM HERBERT PAGE, PAGE ON THE LAW OF WILLS § 15.1 (Anderson Publishing rev. ed. 2003). The doctrine of undue influence complements the testamentary capacity doctrine by covering cases that lack concrete evidence of incapacity but leave the impression that a right-minded testator would not have adopted the challenged will. *See generally* Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?*, 24 INT'L. J.L. & PSYCHIATRY 253, 258-66 (2001) (collecting cases discussing undue influence and examining undue influence as grounds for challenging validity of will).

68. 548 S.E.2d 343 (Ga. 2001).

69. *See id.* at 345 (stating that "the purported self-proving will would give [the favored child] a life estate in all of his father's assets, and after Singelmann's death, the assets would distribute equally to the decedent's four other children").

will on grounds of incapacity and undue influence.<sup>70</sup> The probate court concluded that the favored child failed to carry his burden of proof on testamentary capacity; he did not call attesting witnesses to testify at trial and otherwise offered none of the standard proof typically relied upon to establish testamentary capacity.<sup>71</sup> The Supreme Court of Georgia reversed, indicating that the favored child, who propounded the will, carried his burden of proof.<sup>72</sup> Likewise, in *In re Estate of Garrett*,<sup>73</sup> the contemporaneous expert assessment of testamentary capacity substantiated the capacity of a testator who, six days before his death, executed an estate plan that disinherited children from a prior marriage in favor of children of his wife, his brother and others.<sup>74</sup>

A contemporaneous assessment of capacity may also establish incapacity to execute a will. This occurred in *Estate of Jenssen v. Quayle*,<sup>75</sup> where a lawyer appointed for the testator in a guardianship proceeding procured a psychiatric assessment of the testator's testamentary capacity.<sup>76</sup> The expert's conclusion of incapacity was critical to the subsequent invalidation of a will procured by decedent's caregiver.<sup>77</sup>

### 3. *The Propriety of Contemporaneous Expert Assessment*

The extraordinarily predictive value of contemporary forensic assessment in testamentary capacity cases seems to be at odds with the testamentary capacity standard in the sense that the standard contains no hint of the type of proof that suffices to establish testamentary capacity or incapacity.<sup>78</sup> It also seems inconsistent with the very limited role that other types of medical evidence play in testamentary capacity assessments.<sup>79</sup>

These apparent discrepancies are attributable to the "lucid interval" doctrine, which holds that testamentary capacity may exist at a moment in time even though the testator's general state would be inconsistent with the conclusion that she possessed testamentary capacity.<sup>80</sup> The lucid in-

70. See *id.* at 345 (describing allegations that decedent was subject to mental and physical abuse prior to signing will).

71. See *id.*

72. See *id.* at 346-47.

73. 100 S.W.3d 72 (Ark. Ct. App. 2003).

74. See *id.* at 75.

75. No. A097670, 2003 WL 1889983 (Cal. Ct. App. Apr. 17, 2003) (depublished).

76. See *id.* at \*2.

77. See *id.* (discussing role that expert testimony played in rendering will invalid based upon testator's incapacity).

78. For a listing of cases discussing the standard required to establish the mental capacity to make a will, see *supra* note 3 and accompanying text.

79. For a further discussion of the limited role played by non-contemporaneous medical evidence in determining the testator's testamentary capacity, see *supra* notes 44-45.

80. See, e.g., *In re Estate of Ellis*, 616 N.W.2d 59, 65 (Neb. Ct. App. 2000) (holding that although psychiatrist concluded that woman suffered from condition that made her prone to "deluded thought and eccentric convictions . . . [the] evidence



terval doctrine assures that the testimony of witnesses who observed the testator at or near the time of the will execution carries special weight.<sup>81</sup> Under this doctrine, the testimony of lay witnesses who observed the testator at the moment of the will execution may negate assessments of experts who were not present at the will's execution.<sup>82</sup> By combining temporal proximity and expertise in a single witness, the evidentiary value of such testimony carries uniquely persuasive weight.

Despite the doctrinal justification for according special weight to the contemporaneous expert assessment, the perfect correlation between that evidence and the outcome of the will contest is troubling because it suggests the possibility that when this type of evidence is present it will determine the outcome of the case. One problem with that result is that it would not account for factors such as the substantive content of the expert assessment, the conditions under which it occurred and the relationship between the expert and the testator, each of which affects the accuracy and reliability of the assessment.<sup>83</sup> Even if courts did scrutinize the content and administration of the contemporaneous capacity assessment, complete deference would be inappropriate because it would effectively transform a legal question into a psychological one.

#### 4. *The Disincentives to Obtain a Contemporaneous Expert Assessment*

The unique weight accorded to contemporaneous forensic assessments of testamentary capacity suggests that astute estate planning lawyers who anticipated a will contest would secure this type of assessment as a preemptive measure. Yet the rarity of reported cases involving this type of examination suggests they do not.<sup>84</sup> It is possible, of course, that preemptive testing appears so rarely in the cases because of its extraordinary success in fending off will contests. This explanation is highly unlikely,

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fail[ed] to raise an issue as to [the woman's] testamentary capacity *at the time she made her will*").

81. See, e.g., *In re Angle*, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) ("A doctor's opinion on medical incompetence is not given particular weight especially when other disinterested witnesses establish that a person with Alzheimer's disease was competent and not suffering from a weakened intellect at the relevant time.").

82. See *Pyle v. Sayers*, 39 S.W.3d 774, 778 (Ark. 2001), *aff'd*, 39 S.W.2d 774 (Ark. 2001) ("This court has frequently observed that the relevant inquiry is not the mental capacity of the testator before or after a challenged will is signed, but rather the level of capacity at the time the will was signed."); *In re Succession of Chauffepied*, 775 So. 2d 555, 556-57 (La. Ct. App. 2000) (deciding to uphold will revocation because contestants lacked evidence showing decedent was "incapable of understanding the nature and consequences of her actions on the day she revoked her will").

83. See *In re Schott*, 58 Pa. D. & C.4th 533, 541-46 (Ct. Com. Pl. 2001) (providing conflicting expert interpretations of mini-mental status exam results); *Landmark Trust v. Goodhue*, 782 A.2d 1219, 1226-27 (Vt. 2001) (describing deficiencies of mini-mental status exam).

84. For a listing of the cases reviewed in the five-year period relevant to this examination, see *supra* note 36.

however, because the risks of preemptive testing are readily apparent while the rewards are not.

On the reward side, testators and their lawyers would have to be aware of the benefit that preemptive testing could offer. Earlier work has not attempted to analyze the prevalence or effect of preemptive testing of testamentary capacity, and so there would be no published resource that would have alerted lawyers to the high correlation between preemptive testing and the outcome of reported will contest cases. The economics of estate planning would not generally justify this kind of research.<sup>85</sup> In the rare cases where it would justify the research, the estate planning lawyer would have to be aware that the wills of testators whose capacity was never questioned during life could be the target of spurious yet difficult to resolve allegations of incapacity in order to pursue the information.<sup>86</sup> Standard treatises would not readily supply this information. The only real source—apart from a comprehensive study of the case law—would be prior experience litigating testamentary capacity issues or familiarity with scholarly literature. Thus, the rewards of securing contemporary assessment of testamentary capacity are likely to be known to only a small number of testators, and they may not be the same testators who would actually benefit from such an assessment.

Unlike the rewards of preemptive testing, the risks are fairly apparent. A major risk of contemporaneous assessment for any testator of questionable capacity is that the expert will conclude that the testator lacks capacity.

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85. See Gerald P. Johnson, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521, 528 (1987) (describing “loss leader” approach, where attorney prepares will “at a price well below what an attorney generally would charge for comparable work in other fields of law”).

86. Several reported decisions within the examined time period suggest that there was no real evidentiary basis for a testamentary capacity challenge. See *In re Estate of Stephens*, 608 N.W.2d 201, 208 (Neb. Ct. App. 2000) (“No testimony exists that raises a question regarding . . . testamentary capacity.”); *In re Estate of Fairbairn*, 780 N.Y.S.2d 40, 42 (N.Y. App. Div. 2004) (“Respondent’s argument that decedent lacked testamentary capacity is meritless.”); *In re Estate of Levenson*, 735 N.Y.S.2d 186, 187 (N.Y. App. Div. 2001) (dismissing objections to probate of will based on lack of testamentary capacity because “affidavit of merit” submitted by objectants contained only “hearsay, speculation, and surmise”); *In re Estate of Sweetland*, 710 N.Y.S.2d 668, 670 (N.Y. App. Div. 2000) (“We . . . reject respondent’s contention that there exists a genuine issue of fact as to decedent’s competency.”); *In re Estate of Dion*, 623 N.W.2d 720, 730 (N.D. 2001) (discussing “substantial evidence” of testamentary capacity, but not mentioning evidence of lack of testamentary capacity); *In re Estate of Graham*, 69 S.W.3d 598, 607 (Tex. App. 2002) (“[W]ill contestants did not submit a scintilla of evidence raising a fact issue on the question of whether [the decedent] possessed testamentary capacity at the time he executed his will.”). Challenges by surviving spouses in the midst of divorce proceedings are another category of cases where the legitimacy of the capacity challenge appears questionable. See *In re Succession of Miller*, 803 So. 2d 1021, 1026 (La. Ct. App. 2002) (holding that wife presented insufficient evidence to establish husband’s testamentary incapacity); *Fisher v. Jewell*, No. 01CA9, 2002 WL 110440, at \*4 (Ohio Ct. App. Jan. 8, 2002) (determining that wife “failed to present any evidence that [her husband] lacked testamentary capacity at the time he executed his will”).

Even if the expert issues a favorable opinion, there is still a risk that the expert will record or recall deficits that could inure to the benefit of the objectants to the will. Finally, there is a risk that the court would disregard the expert's assessment, as nothing compels the court to accord definitive, or even significant, weight to an assessment wholly within the control of the testator and her agents.

If none of those considerations dissuades the lawyer, self-interest may. Inquiring about a client's testamentary capacity may raise questions about whether the lawyer is fulfilling his or her legal and ethical duties to that client. Avoiding the inquiry, on the other hand, carries with it no risk of malpractice liability because there is no duty to ascertain a client's testamentary capacity before drafting a will.<sup>87</sup> Ethical guidance purports to establish obligations about capacity, but it is too vague to have real meaning or effect.<sup>88</sup> As a result, the most conservative approach for the lawyer as well as the client is to avoid preemptive testing of testamentary capacity.

### B. *The Role of Will Content in Assessing Testamentary Capacity*

When a reliable contemporaneous expert assessment of testamentary capacity is not a part of the evidence in a will contest, the capacity judgment must turn on a non-expert interpretation of the testator's behavior.<sup>89</sup> This is a challenge because courts and juries have no expertise in evaluating cognition based on behavior. Moreover, the evidence received by the jury to evaluate cognition based on the testator's behavior often would be too inconclusive for an expert to reach an opinion. The following examples of behavioral evidence interpretations are illustrative: different actions of the testator may support opposite conclusions about the testator's capacity; a single behavior of the testator may be susceptible to

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87. See *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 135 Cal. Rptr. 2d 888, 895 (Cal. Ct. App. 2003) (holding that attorney preparing will for client owes no duty to beneficiary of will or to beneficiary under prior will to ascertain and document testamentary capacity of client); *Gonsalves v. Picardo*, 24 Cal. Rptr. 2d 52, 55-56 (Cal. Ct. App. 1993) (depublished) (stating that attorney who fails to investigate testamentary capacity of his client is not liable in tort or in contract to former beneficiary who is disinherited by will drawn by attorney); *Logotheti v. Gordon*, 607 N.E.2d 1015, 1018 (Mass. 1993) (noting that attorney owed heir no duty to be reasonably alert to indications client was incompetent or was subject to undue influence); *Mills v. Burrage*, No. 40536-5-I, 1998 WL 549384, at \*2-3 (Wash. Ct. App. Aug. 31, 1998) (explaining that beneficiaries under prior will lacked standing to sue attorney who drafted subsequent will for malpractice on grounds that attorney failed to adequately investigate testator's testamentary capacity).

88. For a further discussion of the vagaries of ethical standards as they relate to testamentary capacity, see *infra* note 299-305 and accompanying text.

89. Generally, the finder of fact must interpret the testator's behavior, although will witnesses are permitted to offer an opinion about the testator's capacity. See Maury R. Olicker, *Special Topics in the Law of Evidence: The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831, 863-64 (1988) (discussing role of expert witnesses in aiding jury's finding on mental capacity).

conflicting interpretations; a behavior that is relevant to testamentary capacity may happen long before or long after the execution of the will; or other factors may cloud the issue. The lack of expertise and the inconclusive nature of the proof of testamentary capacity in these cases make it unrealistic to expect that the results in these cases could be anything but arbitrary when evaluated in relation to the testamentary capacity doctrine's cognitive standard.

The ultimate criterion that non-experts can capably apply to assess testamentary capacity is their own sense of the will's fairness. In every case, the finder of fact will learn the content of the will and something about the competing claimants. This sense of fairness will color perceptions of the facts, and in that sense, fairness will be the determinative factor that can reconcile the results of the cases that appear to be decided arbitrarily. Whether the fact finder's sense of fairness ought to determine the results in testamentary capacity cases is a different question.

### 1. *Fairness to Family as the Determinative Criterion of Testamentary Capacity*

Since the time Green's study appeared, scholarly literature has accepted his conclusion that the content of the will differentiates acceptable and unacceptable testamentary dispositions.<sup>90</sup> In addition to Green's work, studies of other doctrines that govern the validity of wills provide independent analysis to support the proposition that the content of the will factors heavily into the adjudication of will disputes.<sup>91</sup> Exactly what

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90. While aspects of Green's views about the cause and the implications of this finding occasionally have been questioned, the conclusion that testamentary dispositive plans largely control resolution of testamentary capacity disputes remains widely, if not universally, accepted. Compare Jane B. Baron, *Empathy, Subjectivity and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1050-52 (1987) (dismissing importance of substantive fairness of will in favor of relying upon common values), and Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 CASE W. RES. L. REV. 307, 320-23 (1988) (explaining that "Green recognizes but overstates the relevance of substantive fairness to the issue of capacity"), with Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 626 (1988) ("[C]ourts should ignore the possible implications of the will exception and interpret best interest to mean adoption of an estate plan that reflects what the property owner probably would have intended if competent.").

91. See generally Joseph W. deFuria, *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence*, 64 NOTRE DAME L. REV. 200, 202 (1989) (arguing that "where a testator has willed a significant portion of his property to someone with whom he has had a meretricious relationship, the fact of the relationship . . . should . . . be able to serve . . . as proof that the beneficiary was indeed a natural object of the testator's bounty"); Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do with It?*, 57 U. PITT. L. REV. 841, 858 (1996) (discussing way in which contents of will, particularly where there is inconsistency between two wills, constitutes evidence regarding undue influence); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 237 (1996) (suggesting that courts are more likely to require strict compliance with formalities when contents of will are at odds with traditional notions of fairness to family as means of arriving at just result); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 589 (1977) (noting that "unnaturalness" of disposition

content separates acceptable and unacceptable testamentary dispositions, however, differs depending upon perspective.

Green, as noted, concluded that the outcome of testamentary capacity challenges often hinged on whether the court or jury found the will's treatment of the testator's family to be morally acceptable.<sup>92</sup> This conclusion, viewed as a negative rather than a positive, has been identified as "bias" against atypical testators, such as those who choose to leave their estates to same sex partners, unorthodox religious organizations or others not routinely recognized as a natural object of testators' bounty.<sup>93</sup>

A more modern characterization of Green's conclusion is that testamentary capacity cases reflect a norm of reciprocity. Under this norm, implicit understandings between testators and beneficiaries involving reciprocal exchanges should be enforced. A bequest to someone outside the family that would be inexplicable or unwarranted in terms of familial relationship could be worthy of enforcement under this norm.<sup>94</sup> The norm of reciprocity is consistent with Green's view to the extent that both center on fairness. The difference between the two views lies in different conceptions of family and fairness to family. Specifically, Green's view implicitly assumes that "family" is readily identifiable, and that the testator's obligations to family flow from those familial relationships absent extraordinary circumstances. The norm of reciprocity, in contrast, looks to the testator's interactions with individuals rather than the familial relationship per se to define fairness.

The difference between the assumptions underlying Green's view and those underlying the reciprocity norm stem, at least in part, from societal changes in the concepts of family and fairness to family.<sup>95</sup> At the time of Green's study, which was conducted in the World War II era, the concept

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often raises inference of undue influence); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 231 (1981) (stating that courts' are more likely to find existence of undue influence when will disinherits close family members rather than collateral relative); Peter J. Van Emery, *Undue Influence—Judicial Implementation of Social Policy*, 23 WIS. L. REV. 569, 571 (1968) (explaining that will becomes suspect when disposition is considered "unnatural" by virtue of fact that it deviates from societies expectations under circumstances).

92. See Green, *Proof*, *supra* note 7, at 280 (stating that finding of delusion or incompetence is possible where testator displayed unexplained hostility towards family member).

93. See E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 307 (1999) (highlighting need to involve those with understanding of testator's culture in adjudicating will to ensure that testator's intentions are respected despite unconventional character).

94. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity and Relational Contract*, 77 N.C. L. REV. 551, 564-70 (1999) (presenting view that will contests turn on judicial assessments of reciprocity rather than formalities).

95. See deFuria, *supra* note 91, at 212 (discussing changing notions of "family" and arguing that laws must evolve to reflect these changes).

of fairness to family was a more contained concept than it is today.<sup>96</sup> In the sixty years that have passed, the concept of “family” has expanded to the point that it defies singular definition.<sup>97</sup>

Similarly, the task of defining what is fair to family is exponentially more complex today than it was in Green’s day.<sup>98</sup> The dramatic increase in married women in the workforce,<sup>99</sup> changes in the nature and timing of wealth transfers from parent to children<sup>100</sup> and the importance of

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96. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 909-12 (noting transformation in scope of “nuclear family”).

97. See generally *Lawrence v. Texas*, 539 U.S. 558, 573-78 (2003) (indicating that traditional notions of family are not all encompassing); see also *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (considering nature of marriage); *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 54 (N.Y. 1989) (holding definition of family extends to adult lifetime partners sharing emotional commitment and interdependence, not only those related through law or blood); *Baker v. Vermont*, 744 A.2d 864, 882 (Vt. 1999) (recognizing that many children are currently being raised by same-sex couples). A copious amount of literature exists that discusses the importance of addressing the conception of family and the difficulties associated with that task. See, e.g., Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 788 (2003) (discussing cultural norms related to notions of family); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 389 (suggesting view that law defines “family” with specific reference to nuclear family despite fact that, in reality, people live in variety of arrangements); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 530 (2001) (“[The] judiciary limits the definition of family, and, thus, limits the extension of privacy protection to those groups with relational ties that are grounded in marriage and, where there is no marriage, in consanguinity.”). Storrow further states: “This emphasis on relationships associated with traditional nuclear family arrangements is anomalous.” *Id.*

98. According to census records, family households (defined as households that include at least two members related by blood, marriage or adoption) comprised more than 89% of all households in 1950, as compared to 67.1% in 2000. See U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 141 (2003), <http://www.census.gov/prod/2002pubs/censr-4.pdf> (illustrating drop in family households); see also U.S. Census Bureau, Current Population Survey (CPS)—Definitions and Explanations, <http://www.census.gov/population/www/cps/cp-sdef.html> (last visited Nov. 19, 2005) (defining “family household”). The same census report notes that 5.2% of all households in the United States, representing 5.5 million households, include unmarried partners. See U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000 1 (2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf> (presenting information on number of unmarried households in United States).

99. See U.S. DEP’T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, REPORT 985, WOMEN IN THE LABOR FORCE: A DATABOOK 1-3 (2005), <http://www.bls.gov/cps/wlf-databook-2005.pdf> (summarizing changes in workforce from 1970s to present).

100. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (“Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will.”).

caregivers and friends in testamentary planning<sup>101</sup> combine to create countless variations in arrangements and expectations that preclude any objective content for the concept of “fairness.”<sup>102</sup>

Whether the content that separates acceptable and unacceptable wills is characterized as bias or fairness, pro-family or pro-reciprocity, it ultimately is a part of the context in which the will contest arises. Context, and the fact finder’s assessment of that context, is a critical component in the process of comprehending, interpreting and ultimately reaching conclusions about facts in legal proceedings. In that sense, use of the will’s content is not only unsurprising but also inevitable in cases where more probative evidence of the testator’s cognitive capabilities is inconclusive. Accordingly, the conclusion that contemporary cases infrequently present determinative evidence of cognition requires the corresponding conclusion that the content of the will continues to be important in testamentary capacity determinations.

## 2. *The Rhetoric of the Case Law*

The inevitability of relying on will content to determine testamentary capacity under present law is not itself a justification for according will content the significant weight it now carries in so many cases. Whether, as a matter of doctrine, the reliance is appropriate is unclear.

Judicial opinions send conflicting signals about the relevance of a will’s content in determining the testamentary capacity of the testator. In some cases, courts highlight the role of will content in the reasoning about testamentary capacity. For example, where the provisions of the challenged will comport with earlier wills or other evidence of the testator’s wishes, concerns about evidence of mental capacity at the moment of will execution that otherwise would be potentially problematic recede.<sup>103</sup> In

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101. See generally JEFFREY P. ROSENFELD, *THE LEGACY OF AGING* 38-50 (1979) (exploring roles of caregivers and friends in testamentary planning).

102. Although it is not possible to define what constitutes fairness in any objective way, there are occasionally clear examples of unfairness. The example of unfairness that has received the most literary attention is the disparate treatment of married and unmarried couples. See deFuria, *supra* note 91, at 209-12 (discussing need for statutes addressing testamentary gifts to provide flexibility in order to meet needs of society with progressive family structures); Sherman, *supra* note 91, at 246 (arguing that “the lover-legatee of a homosexual testator faces a more difficult task at probate than does his heterosexual counterpart”); Spitzko, *supra* note 93, at 281 (noting express preference for legal spouse in intestacy statutes).

103. See, e.g., *Breeden v. Stone*, 992 P.2d 1167, 1173-74 (Colo. 2000) (noting that although testator prepared holographic will in connection with suicide that occurred when he was under influence of alcohol, capacity existed, in part, because of consistency of holographic will with prior wills); *Cupples v. Pruitt*, 754 So. 2d 328, 334 (La. Ct. App. 2000) (finding that, although medical records painted “dim picture” of capacity and treating physician opined testator lacked capacity, consistency of will with testator’s previously expressed wishes influenced conclusion that testator possessed capacity). *But see* *Listman v. Listman*, No. H021975, 2002 WL 194248, at \*5 (Cal. Ct. App. 2002) (framing issue as not whether testator had long-standing desire to dispose of property in particular way, but rather her

other cases, there is no explicit focus on the role of the will's content.<sup>104</sup> Still others affirmatively disavow consideration of the content of the will in the outcome of the case, underscoring the right to make an "unreasonable, unjust, injudicious will."<sup>105</sup> Thus, wills disinheriting spouses and children are admitted to probate,<sup>106</sup> as are wills that treat children unequally.<sup>107</sup> Unrelated caregivers may succeed in probating a will that inures to their benefit,<sup>108</sup> but related caregivers may be disinherited.<sup>109</sup>

The doctrinal standard itself offers very little basis for interpreting these results.<sup>110</sup> The standard requires the testator to understand, among other things, the identity of the "natural objects of [his or her] bounty,"

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mental condition at time of will execution); *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571, 579 (Minn. Ct. App. 2003) (listing reasonableness of proposed disposition as first of four factors to be considered in determining testamentary capacity).

104. *See, e.g., Strong v. O'Neil*, 554 S.E.2d 152, 153 (Ga. 2001) ("Propounder established a prima facie case by proving due and voluntary execution and presence of testamentary capacity.") (internal citations omitted).

105. *See, e.g., Milum v. Marsh ex rel. Lacey*, 53 S.W.3d 234, 240 (Mo. Ct. App. 2001); *see also In re Estate of Ellis*, 616 N.W.2d 59, 65-66 (Neb. Ct. App. 2000) (holding that decedent did not lack testamentary capacity despite her express disinheritance of her son).

106. *See, e.g., Strong*, 554 S.E.2d at 464 (admitting will to probate though it disinherited daughter and despite disposition of 100% of estate to two different individuals, one of whom had died five years before will was executed); *In re Succession of Linder*, 824 So. 2d 523, 528-29 (La. Ct. App. 2002) (admitting will that disinherited daughter to probate despite physician's testimony that testator, who had suffered stroke and other physical problems, lacked capacity one year prior to will execution); *In re Estate of Schnell*, 683 N.W.2d 415, 422 (S.D. 2004) (admitting will disinheriting testator's children to probate because "[u]nfortunately, . . . the court system has no power to right [the] wrongs [committed by testator against his family] by giving surviving children a forced share of the estate . . ."); *see also Hays v. Harmon*, 809 N.E.2d 460, 466 (Ind. Ct. App. 2004); *In re Estate of Flores*, 76 S.W.3d 624, 630 (Tex. App. 2002).

107. *See, e.g., In re Estate of Clapper*, 718 N.Y.S.2d 468, 470 (N.Y. App. Div. 2001) (finding testamentary capacity although decedent left "1000 loose pennies" to his son and remainder of his estate to his daughter); *In re Estate of Sweetland*, 710 N.Y.S.2d 668, 669-70 (N.Y. App. Div. 2000) (finding testamentary capacity although decedent left entire estate to one of her six children); *In re Angle*, 777 A.2d 114, 125 (Pa. Super. Ct. 2001) (finding testamentary capacity even though will made "favored dispositions" to certain of decedent's children).

108. *See, e.g., Burns v. Marshall*, 767 So. 2d 347, 353 (Ala. 2000) (rejecting challenge brought by testator's son to will that benefited step-son's daughter who served as testator's caregiver); *In re Estate of Kottke*, 6 P.3d 243, 247 (Alaska 2000) (probating will that provided for caregiver-companion to detriment of testator's children).

109. *See, e.g., In re Estate of Dion*, 623 N.W.2d 720, 730 (N.D. 2001) (concluding testator had testamentary capacity although he disinherited sister who had cared for him).

110. *See In re Will of Jarvis*, 430 S.E.2d 922, 925 (N.C. 1993) ("A person has the mental capacity to make a will if he (1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate.").



but it is unclear who is covered by the quoted phrase or what exactly the testator must understand about them.<sup>111</sup> The testator's family would qualify, at least in ordinary cases, as natural objects of the testator's bounty.<sup>112</sup> Nonetheless, the existence or nonexistence of provisions for the family within a will does not alone prove or disprove testamentary capacity. It is this doctrinal vagary that allows for unpredictable results in testamentary capacity disputes.

### III. BALANCING THE POLICY VALUES AT STAKE: TESTATOR AUTONOMY AND FAMILY PROTECTION

The malleability of the testamentary capacity standard together with the unpredictable results that it produces raises the question of what purpose, if any, the testamentary capacity doctrine serves. History offers no definitive explanation as to why execution of a will requires mental capacity.<sup>113</sup> From a policy perspective, doctrines that define what constitutes a valid will, including the doctrine of testamentary capacity, must be intended to support the premise that recognition of wills is a legitimate alternative to mandated intestacy for all decedents, judicial decision making about optimal allocation of property or some other scheme.<sup>114</sup> The testa-

111. See *supra* note 3.

112. See *Norris v. Bristow*, 219 S.W.2d 367, 370 (Mo. 1949) (holding that facts and circumstances determine who qualifies as natural object of bounty, but that ordinarily "the natural objects of a testator's bounty are those who unless a will exists will inherit his property").

113. The refusal to recognize wills of those of "unsound mind" emerged as a component of the earliest principles governing recognition of wills. American statutes of wills have, since their inception, included a capacity requirement based upon the inclusion of that requirement in England's Statute of Wills. See Percy Bordwell, *The Statute Law of Wills: Form and Integration of Wills*, 14 IOWA L. REV. 172, 177-79 (1928) (highlighting preferences in American jurisdictions regarding testamentary capacity). The English Statute of Wills, in turn, adopted the capacity requirement based upon its inclusion in the ecclesiastical law which governed wills of personal property beginning with the Conquest of England by William I in 1066. See III SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 541-44 (5th ed. 1966) (noting that English Statute of Wills adopted capacity requirement). The ecclesiastical law, in turn, derived its capacity requirement from Roman law. See *id.* at 544 (suggesting development of testamentary capacity requirement found in ecclesiastical law to have derived from Roman law). What purpose the capacity requirement served, however, has no specific explanation. See MICHAEL M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* 255 (1963) (citing lack of sound explanation for capacity requirement); see also ALISON REPPY & LESLIE J. TOMPKINS, *HISTORY OF WILLS* 18-20 (1928) (positing that development of testamentary capacity requirement lacks explanatory basis).

114. It is well accepted that the right to determine succession to property is not a necessary attribute of private property ownership or otherwise mandated by the Constitution. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 8 (1977-1978) (stating that right to dispose of property at death is traditionally considered to be within legislative control); Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741, 742 (1984) (considering extent to which right to inheritance can be considered fundamental and thus protected by federal constitution). *But see* Ronald

mentary capacity doctrine provides support for the recognition of wills by invalidating wills of testators who do not have the capability of exercising reasonably sound judgment about the disposition of property upon death.<sup>115</sup> This, in conjunction with the judicially-imposed prohibition on wills (or will provisions) that violate public policy, buttresses the implicit presumption that wills produce a distribution of property that is reasonable enough to be just.<sup>116</sup> Accordingly, the testamentary capacity doctrine is a component of the logical justification necessary to support the recognition of wills.

To this point, most presumably would agree. Views diverge, however, on the question of how to identify whether the testator had the capability of exercising the requisite judgment to make a will. One 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.<sup>117</sup> This view is associated with the policy of protecting the testator's family rather than fairness *per se*, because it is the closest family members who most typically will benefit from a successful will contest. The alternative view, which is associated with the policy of preserving testator autonomy, holds that the testamentary capacity doctrine should serve society's interest in assuring reasoned dispositions of estates by reviewing the testator's capability of exercising judgment rather than the judgment itself.<sup>118</sup>

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Chester, *Is the Right to Devise Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 Sw. U. L. REV. 1195, 1211 (1995) (arguing that courts in future might decide that there are limits to legislatures' power to abrogate right to disposition of property). Consequently, the recognition of wills must be grounded in policy considerations. Cf. OLIVER WENDELL HOLMES, *THE COMMON LAW* 35 (Mark D. Howe ed., 1963) (1881) (describing policy as "the secret root from which law draws all juices of life" in explaining development of common law).

115. See, e.g., *Ashford v. Van Horne*, 580 S.E.2d 201, 203 (Ga. 2003) (requiring that will contain "intelligent scheme of disposition" to be probated).

116. A classic example of a disposition that violates public policy is one that destroys or wastes property. See *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (invalidating provision of will directing house to be razed); *In re Estate of Pace*, 400 N.Y.S.2d 488, 493-94 (N.Y. Sur. Ct. 1977) (invalidating trust direction to demolish houses on lots owned by trust because direction was wasteful and against public policy).

117. Green, an early advocate of family protection policy, argued forcefully that will validity doctrines, including testamentary capacity, restrict testamentary freedom in order to protect the family as a social institution, just as direct restraints such as the elective share do. See Green, *Public Policies*, *supra* note 34, at 1212 (arguing that restrictions on testamentary freedom are permissible because it is policy of law to protect family of deceased). For a discussion of the elective share, see *infra* notes 200-09 and accompanying text. Discounting the policy of testator protection, Green noted that a will becomes effective only upon a testator's death, when the testator is "beyond the possibility of the law's protection." See *id.* at 1216 (choosing to ignore importance of upholding testator's wishes post-death).

118. See RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 8.1 cmt. b (1999) (describing rationale of testamentary capacity doctrine in terms of testator protection).

The essential difference between the two views is that the first focuses on the end result, whereas the second focuses on whether the testator had the means (i.e., the cognitive skills) to make a reasonable judgment.<sup>119</sup> The testator autonomy policy enjoys intuitive appeal because of the close relationship between autonomy and freedom of will.<sup>120</sup> This consistency may account, at least in part, for the early reformers' supposition that the problem with testamentary capacity law was a problem of securing evidence of cognition rather than a problem of defining the purpose of the capacity inquiry.<sup>121</sup> As the later discussions made clear, however, the family protection policy has deep roots.<sup>122</sup>

Some proponents of the family protection policy would readily agree that capacity doctrine may not be the ideal way to achieve fairness to family. They would never agree to abolish or change the law of testamentary capacity, however, unless they secured a compensating change in the law of succession that would create direct rights for the family (defined in a

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119. If the policy alternatives are framed in terms of what interest the policy protects rather than how the protection is provided, then the list of alternative policies could be longer. For example, a leading text identifies seven explanations for the requirement of testamentary capacity, including: (1) a will should be given effect only if it represents the testator's "true" desires; (2) a mentally incompetent man or woman is not defined as a "person"; (3) the requirement of testamentary capacity protects decedent's family; (4) public acceptance of law requires the law to be legitimate and the law cannot be legitimate if decisions are unreasoned; (5) the requirement of testamentary capacity assures a competent person that the disposition he or she desires will be carried out even though he or she later becomes incompetent and purports to change the disposition; (6) requiring testamentary capacity protects society at large from irrational acts; and (7) the requirement of testamentary capacity may protect an incompetent testator from "exploitation" from others. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS & ESTATES* 146-48 (7th ed. 2005) (listing reasons for requiring testamentary capacity). Any identifiable interest, however, necessarily derives from society's need for a justifiable system of law (which is the basis for justifications 4 and 6 above), testator autonomy (which is the basis for justifications 1, 2, 5 and 7 above), or family protection (which is the justification for 3 above).

120. Although autonomy is sometimes equated with freedom of will, the term is amorphous enough to embrace other meanings. See GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 5-6 (1988) (cataloguing uses of "autonomy" in moral and political philosophy). There are several additional expositions of autonomy. See, e.g., Joel Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution*, 58 *NOTRE DAME L. REV.* 445, 483-92 (1983) (equating constitutional right to privacy with autonomy and suggesting approach for application of concept); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 7-13 (1989) (discussing modifications to liberal conceptions of autonomy that would reflect feminist values); Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 *S. CAL. L. REV.* 1097, 1100 (1989) (explicating conception of autonomy espoused by liberal philosopher Joseph Raz and contrasting that view of autonomy with views of other liberal philosophers).

121. See Cavers, *supra* note 5, at 444-45 (noting difficulty of "post-mortem squabbling" concerning mental condition of testator (quoting Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 30 (1885) (Campbell, J.))); Stephens, *supra* note 5, at 227 (considering ways to improve procedure by which courts inquire into mental or testamentary capacity of testators).

122. See Green, *Public Policies*, *supra* note 34, at 1275.

way that served the reformers' policy objectives) in the testator's property.<sup>123</sup> Consequently, the analysis of the purpose of testamentary capacity policy must occur in the context of the larger scheme of the law of succession in which both testators and family members hold central roles.<sup>124</sup>

For a policy to support a successful effort to reform the law of testamentary capacity, it must meet three criteria. First, the policy must bear a logical relationship to the essence of the concept of a capacity doctrine.<sup>125</sup> Second, the policy must be capable of implementation so that it can be expected to produce a coherent body of case law.<sup>126</sup> Finally, the policy must be politically viable.<sup>127</sup> Applying these criteria, neither of the policies alone can define the testamentary capacity doctrine, but together they establish a workable framework.

A. *The Logical Connection of the Policy of Family Protection to a Capacity Doctrine*

The policy of family protection, and the corollary use of will content to determine testamentary capacity, rests on the assumption that most testators wish for their property to pass to close family members.<sup>128</sup> The validity of this assumption depends, in large part, on the definition of "family." Nevertheless, the policy of family protection finds significant support in the law of wills as well as empirical work. This support justifies use of the family protection policy to define the testamentary capacity doctrine, but only if it is used in conjunction with the testator autonomy policy.

1. *The Logic*

The presumption that individuals will want to transfer their property at death to family members permeates the law of succession.<sup>129</sup> The law of intestacy, which applies to the estates of those who leave no valid will, mandates division of the estate to specified family members in specified

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123. See Fellows, *supra* note 10, at 1073. For those who value the ends-oriented analysis more in terms of fairness than in terms of family, an acceptable alternative to the testamentary capacity doctrine might be the adoption of limitations on testamentary freedom that directly serve society's distributive goals. See, e.g., Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do? Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101, 1163-71 (1994).

124. See generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 *N.C. L. REV.* 199, 205 (2001).

125. See *infra* notes 128-57 and accompanying text.

126. See *infra* notes 158-76 and accompanying text.

127. See *infra* notes 177-225 and accompanying text.

128. See Sherman, *supra* note 91, at 231 (stating that courts are more likely to find existence of undue influence when will disinherits close family members).

129. See, e.g., UNIF. PROBATE CODE §§ 2-102 to 2-103, 8 U.L.A. 81-84 (1998) (providing scheme for distributing property to family members of intestate decedent).

shares.<sup>130</sup> This may create the impression that wills exist for those who wish to disinherit their families. As introductory texts on wills explain, however, there are reasons to make a will even if the beneficiaries would be those identified in the intestacy statute.<sup>131</sup>

In order to reflect the presumption that testators as well as intestates wish to benefit family members, the panoply of statutes and common law authority that governs interpretation and construction of wills heavily favor close family members.<sup>132</sup> This constructional preference favoring family is secondary to the first principle of wills law, which demands respect for the wishes expressed by the testator.<sup>133</sup> The law of will construction thus balances the policies of testator autonomy and family protection

130. The statutory default scheme of intestacy traditionally benefited the family of the testator, and identified with precision which members of the family shared in the estate as well as the proportions of each. *See id.* (setting forth intestate share of decedent's surviving spouse). A few jurisdictions, however, permit designation of heirs. ARK. CODE ANN. § 28-8-102 (1987) (permitting reciprocal designation only); HAW. REV. STAT. ANN. §§ 560:2-102, -201 to -214 (LexisNexis 1998) (same); OHIO REV. CODE ANN. §§ 2105-2115 (LexisNexis 2001) (same); *see also* Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577, 583 (2003) (examining merits and limitations of intestate heir designation).

131. *See, e.g.*, DUKEMINIER, *supra* note 119, at 38 (emphasizing need for execution of will to carry out testator's true wishes despite default intestacy statutes).

132. Statutory and common law principles of construction effectuate this principle. *See, e.g.*, UNIF. PROBATE CODE § 2-301 (amended 1993), 8 U.L.A. 133 (1998) (providing surviving spouse who married testator after execution of his or her will with share of estate in absence of specified forms of evidence that testator intended to disinherit surviving spouse); *id.* § 2-302 (amended 1993), 8 U.L.A. 135 (1998) (providing children born after execution of testator's will with share of estate in absence of specified forms of evidence that testator intended to disinherit such children); *id.* § 2-605 (1969), 8 U.L.A. 174 (1998) (providing devise to predeceased lineal descendant of testator's grandparent passes to devisee's issue); *cf. id.* § 2-804 (amended 1997), 8 U.L.A. 217 (1998) (revoking probate and non-probate revocable transfers made to spouse whom decedent subsequently divorces and relatives of such spouses). Several judicial rules of construction favor family as well. *See, e.g.*, *Perdue v. Roberts*, 314 So. 2d 280, 283 (Ala. 1975) (construing will based upon natural inclination and purpose of testator to favor his or her spouse over remote heirs who are not lineal descendants); *In re Estate of Lindsey*, 832 S.W.2d 808, 812 (Ark. 1992) (applying constructional principle that favors heirs at law in preference to persons not so closely related to testator); *Garrett v. Morton*, 458 S.E.2d 618, 618 (Ga. 1995) (invoking constructional principle that assumes testator would rather have his or her property pass within his or her blood line unless contrary intent is made clear); *In re Estate of McAfee*, 344 A.2d 817, 819 (Pa. 1975) (noting that where doubt exists about testator's intent, interpretation which gives perfect equality and which most nearly conforms to intestate laws is preferred).

133. *See, e.g.*, *In re Matter of Kitchen*, 220 P. 301, 302 (Cal. 1923) ("It is a cardinal rule of construction that the intent of [the testator], as manifested by the terms of the will, must be given effect."); *Jenkins v. Shuften*, 57 S.E.2d 283, 286 (Ga. 1950) ("No precedent need be invoked to establish the cardinal rule that, in a construction of a will, the intent of the testator as disclosed in the will, when not in opposition to the law, should be given full effect."); *Winter v. Am. Parkinson's Disease Ass'n*, 651 N.E.2d 1251, 1253 (N.Y. 1995) ("Analysis begins with the general rules of will construction which provide that a court is to determine and effectuate the intent of the testator.").

by respecting autonomy when the will clearly expresses the testator's wishes while applying constructional principles that favor family in less clear cases.<sup>134</sup>

Just as the law of will construction must balance the tension between testator protection and family protection, so must the doctrines that speak to the validity of wills.<sup>135</sup> These will validity doctrines enhance testator autonomy by assuring that a will is not probated if it was executed when the testator was incapable of making an autonomous decision.<sup>136</sup> At the same time, will validity doctrines impose barriers to probate of a purported will, which, in turn, create the possibility that the law of intestacy, which dictates distribution of the decedent's property to her closest relatives as defined by the intestacy statute, will dispose of the property.<sup>137</sup>

The tension between testator autonomy and family protection is more apparent in the testamentary capacity doctrine than it is in the other doctrines governing validity of wills because all of the other doctrines address situations in which the interests of the testator and the family in effectuating the testator's intent align against the interests of third parties who intentionally or unintentionally interfere with the testator's will. For example, "fraud" purports to protect against intentional misrepresentation by a third party;<sup>138</sup> "undue influence," a species of fraud, purports to protect against coercion by a third party;<sup>139</sup> and "due execution"<sup>140</sup> pur-

134. See *Lindsey*, 832 S.W.2d at 812 (stating that in face of ambiguity court should construe will as favorable to family members).

135. See Green, *Related Concepts*, *supra* note 34, at 182 (discussing need for balance between testator protection and family protection when assessing validity of wills).

136. See DUKEMINIER, *supra* note 119, at 162 (6th ed. 2000). Professor Dukeminier states:

[T]he requirement of mental capacity assures a sane person that the disposition the person desires will be carried out even though the person becomes insane . . . . This gives a person of sound mind the advantage of being able, while in a rational mind, to choose what will happen to his or her property in the future and to have confidence that this choice will be carried out.

*Id.*

137. See *id.* at 71 (characterizing intestacy as "estate plan by default").

138. See, e.g., *Bohlen v. Spears*, 509 S.E.2d 628, 630 (Ga. 1998) (defining fraud in inducement as procurement of will by misrepresentation made to testator); *In re Estate of Dabney*, 740 So. 2d 915, 923 (Miss. 1999) (defining fraud in execution of will as existing when there has been misrepresentation to testator about nature or content of will); see also PAGE, *supra* note 67, § 14.3 (discussing fraud in execution of wills generally).

139. For a further discussion of undue influence in testamentary capacity determinations, see *supra* note 67.

140. The requirements for due execution are established by the Statute of Wills. States vary significantly in the particular formalities required, although they generally track one of three models: the highly formalistic Wills Act, 1837, 7 Will. & 1 Vict. c. 26, § 9 (Eng.); the less formalistic Statute of Frauds, 1677, 29 Car. 2, c. 3, § 5 (Eng.); or the streamlined UNIF. PROBATE CODE § 2-502, 8 U.L.A. 144 (1998). See also RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS §§ 3.1, 3.2 (1999) (summarizing variations in execution formalities).

ports to protect against misapprehension by a court or other third parties as to whether a document was intended to constitute a will.<sup>141</sup> The effect of each doctrine, to the extent it accomplishes its intended purpose,<sup>142</sup> is to deny probate to instruments offered or procured by intentional or inadvertent third party wrongdoers, to effectuate the testator's wishes and to protect the financial interests of those who would benefit in the absence of the will, usually the testator's family.<sup>143</sup>

For will validity doctrines other than testamentary capacity, the certainty of third party interference with the testator's duly expressed wishes obviates the question of divergence between the interests of the testator and the testator's family. For testamentary capacity, in contrast, the testator is both the "wrongdoer" as well as the wronged party. This makes it seem as though there is a greater conflict between the testator and the family in a capacity dispute than in the case of disputes based on other doctrines, but in fact the conflict is essentially the same because the family's interest, in all cases, derives from the testator's presumed intention to benefit them.

If the testator's actual intentions accord with this presumption, then the family serves the testator's interest by challenging the will regardless of whether the testator or someone else was responsible for the execution of the will that violated these actual intentions. If testamentary capacity doctrine is to be consistent with the law of wills as a whole, it too must incorporate a preference for distributions to family.<sup>144</sup>

In addition to consistency with other aspects of wills law, the inclusion of a family preference in the interpretation of testamentary capacity doc-

141. See generally Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 7-10 (1941) (describing execution formalities as serving to protect testators from fraud, evidence substance of testamentary wishes and caution testators of gravity of testamentary act); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492-93 (1975) (adding "ritual function" to list of previously identified purposes of will execution formalities, which allows probate court personnel to distinguish wills from other writings with ease).

142. The extent to which will validity doctrines serve their intended purpose is the subject of much skepticism. An important expansion upon Green's work occurred in the last quarter of the twentieth century, when a host of scholars examined the decisional law of testamentary capacity's close corollary, undue influence. Like Green's study of testamentary capacity cases, the studies of undue influence decisions reveal the primacy of the dispositive plan in determining the outcome of will challenges. For a further discussion of undue influence in determining the outcome of will disputes, see *supra* note 67 and accompanying text.

143. Subject to few exceptions, the default intestacy scheme always benefits the family of the testator, see *supra* note 130. A successful will contest could have the effect of benefiting recipients other than family members if a testamentary writing executed earlier than the one that was challenged successfully was admitted to probate and provided for non-family members.

144. See Green, *Related Concepts*, *supra* note 34, at 182.

trine finds support in empirical studies.<sup>145</sup> These studies validate the assumption that testators typically devise their property to family members. The empirical studies do not purport to offer any unitary definition of family or familial obligation. In the context of wills, however, there is no need for the same definitional certainty that the law of intestacy demands because wills, unlike intestacy, depend upon the subjective wishes of the testator.<sup>146</sup> Accordingly, a preference for “family” as defined by the testator whose will is in question, however idiosyncratic the definition might be, is entirely consistent with the law of wills.

## 2. *The Limits*

As important as the family preference is, it takes second place to the overriding policy of wills law, which is effectuating the testator’s intent.<sup>147</sup> Proponents of family protection have argued, however, that this policy deserves the primary role in the interpretation of the testamentary capacity doctrine.<sup>148</sup> The basis for this position could be either: (1) that mandated minimum provisions for family best satisfy society’s interest in securing a sensible distribution of property; or (2) that the content of the will is the best proxy for evidence of the testator’s intent in wills contests.<sup>149</sup> Both of these positions are logically flawed.

A policy requiring minimum provisions for family would be valid in a system, like that used in each U.S. jurisdiction, which confers testamentary

145. See MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 83-120 (1970) (offering empirical study of Cuyahoga County, Ohio estates to establish that location of testator in kin network is most important factor in pattern of distribution chosen); Olin L. Browder, *Patterns of Testate Succession*, 67 MICH. L. REV. 1303, 1307-09 (1969) (presenting empirical study of Washtenaw County, Michigan estates to show significant overlap between intestacy provisions and testamentary dispositions by testators who were survived by spouse or issue); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 251-55 (1963) (reporting empirical study of Cook County, Illinois estates to demonstrate that, although many wills deviated from strict compliance with intestate succession law, wills overwhelmingly provided for testators’ spouses and issue); Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 351-62 (1978) (concluding that location of testator in kin network is most important factor in testator’s choice of estate plan, based on empirical study covering Alabama, California, Massachusetts, Ohio and Texas); Edward H. Ward & J.H. Bauscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 392, 413 (describing empirical study of Dane County, Wisconsin estates in which only three, of 172 estates examined, disinherited relatives completely).

146. See DUKEMINIER, *supra* note 119, at 31.

147. For a further discussion on the overriding policy of the law of wills to effectuate the testator’s intent, see *supra* note 133.

148. See Green, *Public Policies*, *supra* note 34, at 1212 (advocating family protection policy in testamentary capacity doctrine).

149. See DUKEMINIER, *supra* note 119, at 31 (noting that wills are carried out to further testator’s intended distribution of property).



freedom by legislative grace as opposed to constitutional right.<sup>150</sup> The difficulty is that the policy of mandatory minimum provisions is not logically connected to the mental abilities of cognition and judgment inherent in a capacity doctrine. Enforcing a policy that mandates how testators should dispose of their property by making judgments about their capacity illogically disconnects the doctrinal means from the policy end.

A doctrine this illogical violates the most basic axiom of law.<sup>151</sup> An illogical rule imposes unwarranted discrimination. The discrimination may be unintentional, but it will be unjustified discrimination nevertheless.

Consider, for example, a rule of succession providing that the estates of those who die on a weekday will pass to the decedent's nearest relatives as specified by statute, and that the estates of those who die on the weekend will pass in accordance with the decedent's wishes as expressed in writing. There is no possible justification for determining whether an individual can control disposition of her property based on the day of the week that death strikes, and so the statute will discriminate against those who have the misfortune to expire on a weekday. The fact that this discrimination does not intentionally target individuals who are identifiable in advance in no way lessens or excuses the discrimination.

In the context of an illogical standard for testamentary capacity, the discrimination adversely affects those susceptible to allegations of incapacity because it is those testators, and only those testators, who are subject to the dispositional constraints that an outcome-oriented testamentary capacity doctrine imposes. The elevation of will content over probative evidence about the testator's cognitive abilities forces reliance on stereotypes, myths, stigma and other badges of mental disability that identify testators targeted for capacity challenges.<sup>152</sup> This reliance amounts to a form of discrimination, termed "sanism" in mental disability scholarship, which is akin to sexism, racism and other irrational prejudices that are built upon pretexts.<sup>153</sup>

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150. See, e.g., Katz, *supra* note 114, at 11-14 (analyzing law of inheritance during American Revolution as foundation for modern laws of inheritance); Kornstein, *supra* note 114, at 747-49 (discussing inheritance as fundamental liberty and examining whether Constitution guarantees right of inheritance).

151. In the words of Lord Coke: "How long soever it hath continued, if it be against reason, it is of no force in law." See OXFORD DICTIONARY OF PHRASE, SAYING AND QUOTATION 243 (1997).

152. See Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality and Why and How Mental Disability Law Developed as It Did, 10 J. CONTEMP. LEGAL ISSUES 3, 5 (1999) (summarizing sanism and pretextuality that permeates American jurisprudence).

153. Although sanism is not widely discussed outside the context of mental disability law, scholars in that area posit that sanism pervades virtually all aspects of law and they support this assertion by identifying historical, emotional and practical reasons for the phenomenon of sanism that pervade virtually all aspects of law. See Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547, 549-50 (2002) (citing historical, practical and emotional reasons for sanism phenomenon); Adam

The target of discrimination in this context, if discrimination in any pejorative sense exists, is the atypical testator whose will deviates from family protection or other norms that society would impose through the probate system. Yet, neither absence of motivation to discriminate against those bearing badges of mental disability nor presence of motivation to discriminate on a different basis lessens the sanist discrimination.

The affected group is the same whether the source of the discrimination is insistence on particular family values or sanism. The difference is that the sanism analysis focuses on the traits that give rise to the capacity challenge while the traditional wills analysis focuses on the content of the will. The distinction is important because sanist discrimination inherent in a purely outcome-oriented test to measure compliance with a mental process-oriented standard is irrational regardless of whom the testamentary capacity doctrine is designed to protect.<sup>154</sup> In contrast, discrimination based on will content is irrational only if protection of the family is an improper goal of the testamentary capacity doctrine. This begs the question of what policy the testamentary capacity doctrine should actually serve. As a consequence, it is the sanism analysis rather than the traditional wills analysis that establishes family protection as intolerably discriminatory.

In an attempt to justify the use of a process-oriented doctrine like capacity to achieve an outcome-oriented policy like family protection, advocates of family protection generally treat the will's dispositional outcome as a proxy for mental process.<sup>155</sup> Reasoning in reverse, they assert that deviation from the norm of providing for family is indicative of a defect in the testator's mental processes. Under this view, the will content is not dispositive in theory because it would not trump definitive evidence about cognition. It is dispositive in practice, however, because necessity ensures that the will content holds a central role in capacity evaluation.<sup>156</sup> Thus,

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J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1058-59 (1996) (discussing tendency to analyze legal issues without reference to treatment of similar issues that have arisen in other areas of law in absence of overlapping nomenclature).

154. It also conceivably raises a constitutional question. Sanism in law is not itself indicative of a fourteenth Amendment equal protection violation. If, however, the methods of identifying testators of questionable capacity are irrational in light of the state's interests in the administration of decedents' estates, an equal protection argument could be made. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982) (determining that governmental procedures that deprive individual's property interests raise equal protection claims); cf. Trudi Kirk & Donald N. Bersoff, *How Many Procedural Safeguards Does It Take to Get a Psychiatrist to Leave the Lightbulb Unchanged? A Due Process Analysis of the MacArthur Treatment Competence Study*, 2 PSYCHOL. PUB. POL'Y & L. 45, 60-61 (1996) (arguing that differential legal standards for those who accept mental health treatment and those who refuse such treatment may constitute equal protection violation).

155. Green, *Proof, supra* note 7, at 281-87 (discussing evidentiary facts significant in proving mental incompetency).

156. For a further discussion on will content as it is used in evaluating capacity, see *supra* notes 88-112.

in the end, the will content is the basis of evaluation and for that reason this argument for the dominance of the family protection policy fails the test of logic.

An alternative argument, more sophisticated but equally illogical, is that sanist discrimination offers special protection for the families of testators whose capacity is marginal. Families of these testators require special protection to guard against the possibility of inadvertent or unintended disinheritance. A more stringent capacity standard for testators with marginal capacity who disinherit family members is not only tolerable but desirable.

The fallacy of this argument is that it assumes that challenges to testamentary capacity will be brought against the estates of those testators whose capacity was marginal. This assumption is ill-founded because objectants to the will, who stand to gain from alleging incapacity, do not necessarily, and many times cannot, verify their allegations before objecting to the will. They must seek out evidence through the discovery process and then evaluate that evidence before they can reach a conclusion about the validity of their claims.<sup>157</sup>

An even more serious problem with the argument that sanist discrimination provides protection in cases involving testators of marginal capacity is that it is internally inconsistent. As just noted, the argument assumes that litigators target wills of testators whose capacity is marginal. On the other hand, the only reason to use will content to guide determinations of testamentary capacity is the assumption that courts and juries are incapable of ascertaining the cognitive skills of the testator based on evidence that bears directly on those skills. Both assumptions cannot be true. If evidence of cognitive skills apart from will content is insufficient to adjudicate cases after the evidence is fully developed, it is equally unsuitable to sort cases at a preliminary stage. If there were an effective means of sorting clear cases from close cases, it would be appropriate to accord extra judicial weight to will content in close cases. Without an effective sorting mechanism, however, use of will content to determine testamentary capacity is unjustifiably discriminatory.

#### B. *The Workability of the Testator Autonomy Policy*

The policy of testator autonomy coalesces with the doctrine of testamentary capacity because the purpose of the law of wills is to afford individuals autonomy in determining disposition of their property at their deaths.<sup>158</sup> This logical link between capacity and autonomy assures a role for the policy of testator autonomy in the testamentary capacity doctrine,

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157. Some jurisdictions permit beneficiaries to conduct limited discovery before deciding whether or not to file objections to a will. *See, e.g.*, N.Y. SURR. CT. PROC. ACT § 1404 (McKinney 2005) (allowing intestate heirs and others to depose key witnesses before deciding whether to object to probate).

158. For a further discussion on the policy of testator autonomy, see *supra* notes 119-120, 136 and accompanying text.

unless, as some opponents of the policy have asserted, it is impossible to implement that policy in a way that produces coherent decisions about testamentary capacity in individual cases.<sup>159</sup> The testator autonomy policy does have its limits, but it has significant value as well.

### 1. *The Limits*

At the margins, the policy of autonomy cannot alone determine testamentary capacity because the evaluation of testamentary capacity in marginal cases requires reference to policies underlying law as opposed to psychological principles of cognition.<sup>160</sup> In the marginal cases, the context in which the testator made decisions about the will are relevant to the interpretation of the facts, including who qualifies as family of the testator, what familial obligations the testator incurred and what range of dispositions would be reasonable in those circumstances.

In the future, the concept of family may be more settled than it is today.<sup>161</sup> Even then, however, questions about moral entitlement of specific individuals in particular situations will remain because these moral judgments are part and parcel of the fact-finding process in testamentary capacity cases.<sup>162</sup>

Adjudication is never, or at least never ought to be, devoid of the context in which the dispute arose. Accordingly, “family” protection should and must remain an integral part of testamentary capacity law for marginal cases, with the critical caveat that the definition of “family” be sufficiently malleable to reflect the diversity of contemporary society.

### 2. *The Utility*

In contrast to the marginal cases, the policy of family protection has a negligible role to play in clear cases. For clear cases, evidence of cognition based upon medical, psychological or other mental health assessment, if available, should suffice to establish the presence or absence of the cognitive skills that the capacity standard requires.

The argument for relying on the content of a will to ascertain capacity rests, in part, on a distrust of mental health expertise, particularly psychology. Green, in his study of testamentary capacity, framed the distrust in

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159. See Rein, *supra* note 123, at 1102 (expressing concern that methods other than capacity inquiries should be used to determine when and how to interfere with individual choice, but recognizing that capacity inquiries are sometimes unavoidable); see also Baron, *supra* note 90, at 1079-80 (expressing concerns about ability to truly assess capacity, but supporting present cognitive standard on grounds that testamentary capacity inquiries advance communitarian ideals).

160. See Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 951 (1991) (noting that competency criteria do not purport to justify values underlying competency or capacity doctrines).

161. For a discussion on the development of the concept of family, see *supra* notes 95-97 and accompanying text.

162. See GRISSE, *supra* note 26, at 19 (exploring importance of specific individual's “moral virtues” in determining legal entitlements).

terms of psychology's debate about whether it is possible to access mental processes.<sup>163</sup>

Green adopted the behaviorist perspective on the issue,<sup>164</sup> which holds that mental processes are mostly inaccessible and thus the pursuit of psychology ought to be the prediction and control of behavior.<sup>165</sup> Green equated use of contents of the will to evaluate capacity with the behaviorist approach of considering individual behavior in assessing the mind of that individual.<sup>166</sup> In psychology, behavior is the outcome that cognitive processes produce and behaviorists rely on it to draw inferences about cognition because of cognition's inaccessibility.<sup>167</sup> In testamentary capacity, Green argued, the will content is the outcome that cognitive processes produce.<sup>168</sup> Thus, the content of the will is the best available basis from which to draw inferences about cognition.

Green derogated the testator autonomy policy as a remnant of a mentalist viewpoint,<sup>169</sup> designated as dualism, in which the mind is a manifestation of the soul that is separate from the body.<sup>170</sup> Dualism underlies the testator autonomy policy, in Green's view, because it makes plausible a purely subjective test for capacity that distinguishes minds capable of manifesting themselves by voluntary action from those without that capability.<sup>171</sup> Noting that psychology and psychiatry had rejected dualism, Green

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163. See Green, *Proof*, *supra* note 7, at 306 (weighing various evidentiary facts and assessing how these facts impact conclusions on whether it is possible to access mental processes).

164. See *id.* at 276 ("The only way that mental disorder can manifest itself is through the behavior of the individual: conduct, speech, gestures, attitudes, and activities."); *id.* at 305-06 ("In large measure, men are judged by law and by society . . . by their observable behavior . . . the transaction is viewed in the light of the social environment of the party making . . . the will[,] . . . the same technique employed by the psychiatrist in diagnosing mental disorder.").

165. The most famous behaviorist, B.F. Skinner, espoused a radical theory of behaviorism that differed from mainstream behaviorism in its view that behaviorism does not ignore mental life. See JOHN STADDON, *THE NEW BEHAVIORISM: MIND, MECHANISM AND SOCIETY* 99-123 (2001) (summarizing and critiquing Skinner's views).

166. For a further discussion on the difficulties in evaluating testamentary capacity through examining the behavior of the testator, see *supra* note 89 and accompanying text.

167. See STADDON, *supra* note 165, at 128-33.

168. See Green, *Proof*, *supra* note 7, at 298-99.

169. In Green's view, focusing on the testator rather than the family amounts to a legalistic approach in which the law questions whether the testator has a mind "capable of manifesting itself by voluntary or purposive action." See Green, *Public Policies*, *supra* note 34, at 1193 (citing 2 WILLIAM BLACKSTONE, *COMMENTARIES* 499 (1756)) (discussing prerequisite mental capacity for formation of legal relation).

170. See *id.* at 1205 ("The legalistic approach, which denies validity to a contract where one 'mind' is lacking, or denies validity to a will where the testator has not 'enough mind' is more in accord with an earlier era in our law, when mind was considered a separate and distinct entity.").

171. See *id.* at 1199-200.

rejected the testator protection justification for the doctrine of testamentary capacity.<sup>172</sup>

At the time Green wrote, the debate about accessibility of mental processes was not generally recognized as an insoluble philosophical question. With several decades of additional history, it is now apparent that the debate will have no definitive answer anytime soon.<sup>173</sup> The existence of this philosophical question has no bearing, however, on whether psychological expertise can contribute anything to assessments of capacity because the debate is not about whether psychologists understand the workings of the mind but rather only whether it is possible to do so.<sup>174</sup> So long as the inner workings of the mind remain beyond our reach, which they clearly now are, behavior must be the basis for assessing capacity.<sup>175</sup>

Contrary to Green's assertion, however, the law need not define the relevant behavior as the outcome of the testator's decision making process. Instead, it may define the relevant behavior as the decision making process itself and evaluate the behavioral components associated with that process, namely the testator's statements and other behavior that evidences her understanding of the facts relevant to estate planning decisions.<sup>176</sup> Thus, the analogy between the behaviorist-mentalist debate in psychology and the will content-psychological evidence of cognition debate in testamentary capacity law is a false one.

In clear cases, probative psychological evidence may unequivocally establish a testator's capacity: knowledge of relevant facts, reasoning skills and ability to appreciate consequences of decisions. In those cases, the content of the will has no place in testamentary capacity assessment.

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172. *See id.* As in Green's time, modern psychology and psychiatry reject dualism. *See* KEITH E. STANOVICH, *THE ROBOT'S REBELLION: FINDING MEANING IN THE AGE OF DARWIN* 3-30 (2004).

173. Today, cognitivism, a view based on the mentalism that was out of vogue when Green wrote, has supplanted behaviorism as the predominant view. Behaviorism, however, is beginning to wage an effort at a comeback. *See generally* STADON, *supra* note 165, at 137-46 (exploring contemporary behaviorism); UTTAL, *supra* note 39, at 1-63 (comparing mentalism and behaviorism).

174. *See* Willis J. Spaulding, *Testamentary Competency: Reconciling Doctrine with the Role of the Expert Witness*, 9 *LAW & HUM. BEHAV.* 113, 135 (1985) (noting that Green's use of term behaviorism was not coextensive with use of term in psychology).

175. *See* William M. Altman et al., *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 *VILL. L. REV.* 1671, 1691 (1992) ("Those involved in assessing the competence of an individual must make judgments about the individual's capacity to function within certain environmental and social constraints. . . . Usually, these judgments focus on specific behavioral capacities.").

176. A substantial body of scholarship in the psychology of rationality and decision making generally attests to the viability of this approach. *See* STANOVICH, *supra* note 172, at 243-47 (offering overview of scholarship).

### C. *The Political Infeasibility of Eliminating the Testamentary Capacity Doctrine*

The analysis thus far establishes that both testator autonomy and family protection must play a role in a well-grounded testamentary capacity doctrine.<sup>177</sup> The remaining question is whether the testamentary capacity doctrine is necessary at all.<sup>178</sup> In theory, it would be possible to simply eliminate the doctrine and rely on other aspects of the law of wills to uphold the policy of family protection. Alternatively, it would be possible to enact legislation that would give family members a direct interest in the testator's estate as an adjunct to abolishing the doctrine of testamentary capacity. As the political history of the law of wills demonstrates, however, neither of these extreme alternatives would be viable.

#### 1. *Without Alternative Family Protection*

Elimination of the testamentary capacity doctrine without the introduction of substitute provisions for the family would deprive testators' families of the opportunity they now have to assert a claim to the testator's estate. The political viability of this change depends upon how strongly the policy of family protection is associated with the right to make a will. A brief look at three very different points in history demonstrates the strong and stable influence of the family protection policy in the law of wills: (1) the inception of Anglo-American donative transfer law (which dates back to 449 A.D. when Anglo-Saxons dominated England); (2) the Norman Conquest (in 1066); and (3) the transition from the twentieth to the twenty-first century.

At its inception, Anglo-American donative transfer law, like that of all indigenous societies, followed a scheme of intestacy rather than recognizing wills.<sup>179</sup> Over time, complete distribution to the family gave way to a right or practice of recognizing the decedent's power to dispose of a portion of property at his or her death.<sup>180</sup> The introduction of Christianity prompted this change, with its emphasis on the afterlife and the importance of giving alms as part of the preparation for the afterlife.<sup>181</sup> The desire to give alms, coupled with the impracticality of parting with signifi-

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177. For a further discussion on the importance of family protection in the testamentary capacity doctrine, see *supra* notes 128-57 and accompanying text. For a further discussion on the importance of testator autonomy in the testamentary capacity doctrine, see *supra* notes 158-76 and accompanying text.

178. For a discussion on the political infeasibility of eliminating the testamentary capacity doctrine, see *infra* notes 179-225 and accompanying text.

179. See HENRY S. MAINE, *ANCIENT LAW* 176-77 (5th ed. 1873) (stating that generally, indigenous societies first follow fixed distribution scheme and then evolve to permit wills).

180. See SHEEHAN, *supra* note 113, at 8-9 (suggesting that process of change began in sixth century when Christianity was introduced to England).

181. See *id.* at 17-18 (citing significance of Christianity in changing altering testamentary distribution); see also Carole Shamma, *English Inheritance Law and Its Transfer to the Colonies*, 31 *AM. J. LEGAL HIST.* 145, 146 (1987) (noting that "the Church encouraged testamentary freedom").

cant amounts of property during life, caused the claim of the family to a decedent's property to yield to the extent that decedents would have the ability to give alms at death.<sup>182</sup> The decedent's estate, in this period, may be viewed as remaining in the service of the family after the decedent's death, except to the extent of the portion reserved for the decedent's preparations for the afterlife.<sup>183</sup> Thus, the dispositive control acquired by decedents in this period hardly signifies a lessening of the importance of the family's claim, much less an endorsement of testamentary freedom.<sup>184</sup>

King William I's conquest of England in 1066 marks an important point in the law of wills because William I introduced feudalism to England, which serves as the foundation for the American law of real property.<sup>185</sup> The importance of land in the feudal system led William I to wrest jurisdiction of real property from the ecclesiastical courts of the Church and place it under the control of his common law courts.<sup>186</sup> Gradually,

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182. See SHEEHAN, *supra* note 113, at 17 ("The notion that man continued to live and to have needs after death was the most important force in Germanic society, impelling towards the assertion of the rights of the individual against the rights of the family."). The control of the decedent and the claims of his family coalesced into a system, in some localities recognized by custom and in others by legislation, which divided the decedent's property into thirds: 1/3 for the decedent's wife, 1/3 for the decedent's children and 1/3 for the decedent to distribute as desired (referred to as his "legitim"). See *id.* at 76 (illustrating distribution system); see also THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 729-31 (5th ed. 1956) (following intestacy scheme of English from thirteenth and fourteenth centuries); II POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 349 (2d ed. 1905) (tracing scheme to twelfth and thirteenth centuries but expressing doubt about its earlier existence).

183. See SHEEHAN, *supra* note 113, at 76 (exploring role of Christianity in shaping testamentary distributions).

184. At this stage of history, the legal acts and instruments used by decedents to dispose of the portion of the estate they controlled bore little resemblance to the modern Anglo-American will. The legal acts used to effectuate distribution of the portion of the estate controlled by the decedent included: the gift by *verba novissima*, a deathbed gift; the post obit gift, a lifetime gift disposing of property to a single donee; and the *cwive*, a lifetime gift disposing of property to multiple donees. See *id.* at 24-47 (describing instruments of distribution).

185. See A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 49 (2d ed. 1986) (discussing development of cognizable heritable rights in fee).

186. As Pollock and Maitland note, this change was important not so much in and of itself, but rather because it served as a catalyst for a complicated set of interdependent changes that gradually formed the framework for testamentary dispositions. These four changes were:

- (1) The King's court condemns the post obit gift of land and every dealing with land that is of a testamentary character; but it spares the customs of the boroughs and allows certain novel interests in land to be treated as chattels.
- (2) By evolving a rigorously primogenitary scheme for the inheritance of land, it destroys all such unity as there has ever been in the law of succession. Henceforth the "heir" as such will have nothing to do with the chattels of the dead man, and these become a prey for the ecclesiastical tribunals.
- (3) The church asserts a right to protect and execute the last will of the dead man. In her hands this last will (which now can only deal with



the common law courts moved away from recognition of devises of land and instead imposed a system of primogeniture in which the eldest son succeeded to realty.<sup>187</sup> Primogeniture served the King's political and economic interests in retaining control over the distribution of land by limiting the number of landowners holding a place in the feudal system.<sup>188</sup> Primogeniture harmed the interest of land owners, however, because the principal form of wealth, realty, could not be transferred to either surviving spouses or younger sons.<sup>189</sup> Consequently, property owners attempted to evade primogeniture and courts did their best to thwart those efforts.<sup>190</sup> After several centuries, property owners prevailed, securing the right to devise property by will with the enactment of the Statute of Wills in 1540.<sup>191</sup> Accordingly, the Statute of Wills appears to rest on a policy of

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chattels) gradually assumes under foreign influence a truly testamentary character, and the executor of it gradually becomes the "personal representative" of the dead man, but has nothing to do with freehold estates.

- (4) The horror of intestacy increases. The church asserts a right (it is also a duty) of administering the dead man's goods for the repose of his soul. The old law which would have given the intestate's goods to his kinsfolk, being now weakened by the development of the rule which gives all the land to the eldest son, disappears, or holds but a precarious position at the will of the church.

POLLOCK & MAITLAND, *supra* note 182, at 325-26.

187. *See id.* at 250 (discussing early intestate succession law). The establishment of primogeniture occurred over time for different types of land, but by the time of Edward I (1272-1307), primogeniture had become the law of all tenures. *See* SIMPSON, *supra* note 185, at 51 (discussing heritability of fee in light of fee's alienability); *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 304 (2d ed. 1979) (noting that custom of primogeniture took on status of law in twelfth and thirteenth centuries).

188. *See* POLLOCK & MAITLAND, *supra* note 182, at 362 ("Primogeniture reflects not family interest but rather the interests of a stranger to the inheritance—some king or lord whose interests demand that the land shall not be partitioned. . . . The great fief, which is both property and office must, if it be inherited at all, descend as an integral whole."). As Plucknett observes:

The main preoccupation of William's reign was to keep his faithful followers on a war footing. His concern was knight service, and the molding of feudal institutions to suit his purpose. There could never have been any thought of the devisability of military land in his day—indeed, his tenants were none too sure that even their sons would succeed them. A sharp struggle eventually ended by the Crown acknowledging the heritability of military fiefs and much later, their free alienability; but it was too late to entertain thoughts of their devisability, for the memory of the time when they were merely precarious life interests was too recent.

PLUCKNETT, *supra* note 182, at 736.

189. *See* SHEEHAN, *supra* note 113, at 273 (noting land owner difficulty in transferring property).

190. *See id.* (stating that desire to limit acquisition of land in mortmain as well as protecting rights of heir and lord contributed to courts' hostility to devise of land).

191. *See* SIMPSON, *supra* note 185, at 188 (noting that Wills Act was passed in response to political pressure in favor of power of devise). The Statute of Wills authorized a devise of only 2/3 of land held in "knight service" (land subject to an

enhancing decedents' ability to provide for their families as opposed to a determination that decedents ought to have the power to disinherit them.<sup>192</sup>

Just as the expansion of testamentary freedom created by the Statute of Wills was motivated by a desire to afford testators the opportunity to provide for family members better than an intestacy system would allow, the motivating force behind today's expansions in testamentary freedom lie in the desire to facilitate testators' efforts to provide for family.<sup>193</sup> The two most significant changes at the turn of the twentieth century, the 2001 "repeal" of the federal estate tax and the disappearance of the Rule Against Perpetuities, are motivated by family protection concerns.

The 2001 estate tax "repeal"<sup>194</sup> derived, at least in political rhetoric, from a desire to preserve testators' property, most notably the "family

obligation to provide a specified number of knights to the King on a periodic basis), with the balance of such land continuing to pass by primogeniture. *See id.* at 199. Land held in knight service became devisable in its entirety with the enactment of the Tenures Abolition Act of 1660. *See id.* at 199.

192. In the uneven progression from a system of family inheritance to complete testamentary freedom, the family's risk of disinheritance did not pass unnoticed. *See* Shammas, *supra* note 181, at 149-50 (citing H. SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS 105-06 (1590)) (indicating that at close of sixteenth century, controversy raged over legitimacy of such restraints under common law). "Substantial bequests outside of the nuclear family by men with children were infrequent[;] . . . [t]he main way the lineage may have broadened testamentary freedom was in more generous dispersal of realty among sons and greater encumbrances placed on the eldest son's patrimony for the benefit of all the children." *Id.* at 151.

193. As one mental disability scholar from an earlier era summarizes:

[A]lthough the law leaves to a person much freedom in the disposition of his property, it has been rightly observed that "a moral responsibility of no ordinary importance attaches to the exercise of the right thus given." The instincts and affections of mankind, in the majority of instances, will lead men to make provision for those who are the nearest to them in kindred and for those who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of those of a man's kindred who survive him, that upon his death, his property shall become theirs instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of relatives is to shock the common sentiments of mankind and to violate what all men concur in regarding as a moral obligation. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed without regard to these considerations . . . .

WILLIAM G.H. COOK, *INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY: A STUDY IN PSYCHOLOGICAL JURISPRUDENCE* 128 (1921) (internal citations omitted).

194. *See* Economic Growth & Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.).

farm," for their offspring.<sup>195</sup> Congress could have addressed this concern by broadening the previous deduction for family owned businesses, increasing the existing benefits for family farms, creating a deduction for bequests to children or myriad other approaches tailored to the expressed concern. Instead, Congress repealed the estate tax altogether, benefiting those who would have no difficulty passing the family farm or business to offspring while bearing estate tax as well as those who have no desire to devise property to offspring. The estate tax repeal of 2001 is a crude means by which to achieve the goal of family protection, but the crudity simply reflects the related difficulties of tailoring legislation to produce the desired consequences, on the one hand, and accommodating discrepancies in the details of the precise consequences that are desired, on the other.<sup>196</sup>

The repeal of the Rule Against Perpetuities is an even clearer example of an expansion of testamentary freedom that benefits family.<sup>197</sup> Charitable dispositions never were subject to the Rule, and thus only individuals benefit from donors' ability to retain property in trust beyond the

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195. See, e.g., 148 CONG. REC. S5398 (daily ed. June 12, 2002) (statement of Senator Kyl).

196. Why the estate tax, which impacts a small minority of the population, is so unpopular has been the subject of scholarly speculation. Professor Graetz, for example, discussed public support for the reduction of California's state death taxes some years ago as follows: "In California, at least 64 percent of the people must believe that they will be in the wealthiest five to ten percent when they die." Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 285 (1983) (illustrating public support for California's stated death taxes); accord Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 75 (1990) (suggesting that Americans remain optimistic with respect to their own wealth and noting that "[i]nheritance does seem to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance"). The American attitude about estate taxes could simply reflect a pocketbook voting sentiment held by many who mistakenly believe that their own estates may incur taxes, either because they underestimate the threshold level of wealth that triggers estate tax or overestimate their own probability of achieving the level of wealth that does trigger the tax. A related alternative explanation is that the public accurately perceives the incidence of the estate tax and the improbability of being affected by it but nevertheless abhors it on the ground that it is inimical to the "American Dream" of accumulating property through industry and passing it to the next generation.

197. See, e.g., Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 646 (2000) (detailing decline of Rule Against Perpetuities and noting that people desire perpetual trusts in order to provide for their loved ones); Angela M. Vallerio, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141, 148-53 (1999) (reviewing reform initiatives aimed at abolishing Rule Against Perpetuities and highlighting that repeal would allow dynasty trusts). Nonetheless, the Rule Against Perpetuities remains in existence in several jurisdictions. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2004) (codifying common law Rule Against Perpetuities and constructional rules designed to save dispositions that involve classic perpetuities violations); UNIF. PROBATE CODE §§ 2-901 to 2-907, 8 U.L.A. 223 (1998) (setting forth Uniform Statutory Rule Against Perpetuities).

Rule's measurement period of twenty-one years plus a life in being.<sup>198</sup> Beneficiaries of dispositions vesting beyond the Rule's outside measurement date, by definition, will be unknown to the donor and unborn when the dispositive instrument takes effect.<sup>199</sup> Thus, both the "descendants" that benefit from the repeal of the Rule Against Perpetuities and the descendants that would have benefited from a dispositive instrument are almost always the descendants of the donor.

The twin repeals of the Rule Against Perpetuities and the federal estate tax speak powerfully about the contemporary view of the importance of family protection in the law of wills. Eliminating the doctrine of testamentary capacity without providing alternate protections for testators' families would signal a devaluation of the family protection policy that is at odds with its political force.

## 2. *With Alternative Family Protection*

Legislation creating an entitlement for family members is consistent with the recognition of wills.<sup>200</sup> Presently, the vast majority of states offer three different types of protection: the elective share for surviving spouses, family exemptions and family maintenance provisions.<sup>201</sup> None of these protections, however, signify a political comfort level with direct entitlements for family because the first, if properly conceived, is not a part of the testator's property at all, and both the second and third types of protection are meager.

The elective share provisions create a statutory right for the testator's surviving spouse to claim a portion of the testator's estate.<sup>202</sup> As presently conceived, however, the elective share does not represent a limitation on the testator's power to devise his or her own property as he or she wishes. Instead, the elective share represents a claim of original ownership to as-

198. See JOHN CHIPMAN GRAY, *RULE AGAINST PERPETUITIES* 166, 450-58 (2d ed. 2000) (discussing relationship between trusts and Rule Against Perpetuities).

199. See *id.* at 455-58 (outlining limitations of Rule Against Perpetuities).

200. Presently, constraints on testamentary freedom carve out certain types of dispositions as impermissible rather than mandating dispositions to particular recipients, but distributional mandates for the family (or others) could be imposed with logical integrity. See LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 21 (1955) (proposing possible distribution methods for family entitlements). This flows from the historical view that the right to devise property at death exists by legislative grace rather than constitutional mandate. See Katz, *supra* note 114, at 8 (explaining that private right to devise property at death exists through legislative action rather than Constitution).

201. In community property jurisdictions, protection is afforded during the lifetime of the spouse through the community property system. See DUKEMINIER, *supra* note 119, at 417-19 (discussing statutory protection of spouse in community property jurisdictions). Of the title based jurisdictions, only Georgia fails to provide elective share rights for a surviving spouse. See *id.* at 425 n.1 (discussing spousal rights in title-based jurisdictions).

202. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 99-101 (1994) (detailing mechanics of elective share provisions).

sets earned and owned by the surviving spouse that ostensibly constitute a portion of the decedent's estate merely because of the couple's decision to hold title to the property of both individuals in the name of the decedent.<sup>203</sup>

Elective share statutes entitle the surviving spouse to a fixed fraction<sup>204</sup> of the testator's estate rather than an indeterminate amount based on equitable distribution principles.<sup>205</sup> The purpose of this statutory design is not to assure that the surviving spouse receives a significant financial distribution but rather to accommodate the need for certainty and simplicity in the administration of estates.<sup>206</sup>

At one time, assurance of support did represent the prevailing rationale for the elective share. Under that view, income earned by a spouse outside the home belonged entirely to that spouse in the absence of a mandate dictating otherwise.<sup>207</sup>

As appreciation for non-economic contributions to the family unit grew, the illogic of viewing the elective share as a mandate to make a gratuitous transfer of the decedent's own property to the surviving spouse became apparent. The true nature of the elective share, as the partnership theory of marriage recognizes, is an obligation to return to the surviv-

203. See UNIF. PROBATE CODE art. II prefatory note, 8 U.L.A. 138 (1997) (noting that 1990 Uniform Probate Code (UPC) revisions address "the advent of the multiple-marriage society"); Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. OF MICH. J.L. REFORM 1, 13-25 (2003) (elaborating on policies and empirical assumptions underlying 1990 Uniform Probate Code elective share provisions and offering revisions).

204. One-third is typical. See, e.g., UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 cmt. (1998) (noting that "pre-1990 provisions granted the surviving spouse a one-third share of the augmented estate").

205. Traditionally, elective share statutes based the surviving spouse's entitlement on the probate estate. With the rise in the use of will substitutes, such as revocable trusts and payable on death accounts, some states have revised the traditional elective share base so that it includes specified testamentary substitutes as well as the probate estate. Compare N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 1999) (exemplifying modernized elective share), with 755 ILL. COMP. STAT. ANN. 5/2-8 (West Supp. 2003) (illustrating traditional approach). See generally Angela M. Vallerio, *Spousal Elections: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519 (2003) (presenting additional examples and explication of modern and traditional elective share statutes). The advance in equality does not necessarily translate into economic advancement. Under elective share statutes premised on a partnership theory of marriage, a sliding scale based upon the length of marriage determines the portion of the estate subject to the elective share, with a floor amount imposed to assure minimal support for surviving spouses of short marriages. See UNIF. PROBATE CODE § 2-202, 8 U.L.A. 102 (1998) (outlining statutory limitations on marriages based on partnership).

206. See Brashier, *supra* note 202, at 105-06.

207. Elective share statutes were conceived when husbands commonly were the primary source of family income, as a consequence, they provided for widows only. After the equal protection problem became evident, the elective share became "unisixed." See John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 321 (1987) (recognizing development of law after equal protection was resolved).

ing spouse his or her contributions and the earnings attributable to that individual upon the dissolution of the partnership.<sup>208</sup> The testator has no legitimate claim to the property that the elective share represents and, for that reason, the elective share cannot be viewed as a limitation on the testator's control over his or her own property.<sup>209</sup> Accordingly, the acceptance of elective share statutes signals little, if anything, about the acceptability of direct allocations to family of property that truly belongs to the testator.

Apart from the elective share, the only sources of the family's entitlement are the family exemption and the family allowance statutes.<sup>210</sup> Family exemption statutes reserve specific assets for the immediate family, many of which are of no commercial value, such as the family Bible and others of which are subject to a modest dollar ceiling.<sup>211</sup> Family allowance statutes, on the other hand, authorize the court to award the surviving spouse and minor children a modest dollar amount to maintain the family during the course of the estate administration.<sup>212</sup> The total value of these entitlements is virtually unnoticeable in all but the very smallest of estates.

These meager provisions, unlike the elective share, offer some evidence of the extent of society's willingness to mandate testamentary provisions for family. The sharp contrast between these provisions and the more generous protections afforded to families by other countries reveals a strong preference for relying on the testator to determine what family members should receive.<sup>213</sup>

208. See Vallerio, *supra* note 205, at 557-58 (noting that elective share method is consistent with partnership approach to marriage).

209. See *id.* at 532 ("Partnership-based statutes recognize that a surviving spouse deserves a portion of the decedent's estate as compensation for his or her non-monetary contributions to the marriage.")

210. While the law of wills includes a panoply of constructional statutes employing a presumption that testators intend to provide for family members, these constructional statutes do not offer true protection for the family in the sense that the testator's intent, if clearly expressed, may override the family's claim. See, e.g., UNIF. PROBATE CODE § 2-301, 8 U.L.A. 133 (1998) (affording entitlement to surviving spouse omitted from will executed by decedent spouse prior to marriage based on presumption that decedent would have decided for surviving spouse if decedent had remembered to revise his or her estate plan); *id.* § 2-302, 8 U.L.A. 135 (1998) (creating entitlement for children born or adopted after will executed by decedent based on presumption that decedent would have provided for children if decedent had remembered to revise his or her estate plan).

211. See, e.g., *id.* § 2-403, 8 U.L.A. 141 (1998) (authorizing family exemption of up to \$10,000 in value of household furniture, automobiles, furnishing, appliances and personal effects).

212. See, e.g., *id.* §§ 2-404, 2-405, 8 U.L.A. 141 (1998) (authorizing "reasonable allowance" up to \$1500 per month for one year, subject to increase upon application to court).

213. See Frederick R. Schneider, *Recommendations for Improving Kentucky's Inheritance Laws*, 22 N. Ky. L. REV. 317, 325-26 (1995) (criticizing current state of family allowance law and proposing change).

In most of the common law countries, family maintenance statutes afford courts the discretion to modify an otherwise valid will by setting aside a portion of the testator's probate estate for the benefit of members of the testator's family where the circumstances warrant.<sup>214</sup> Details vary among individual statutory schemes, but the hallmark of a family maintenance statute is the significant discretion afforded to the court to determine whether a set aside is appropriate and if so, the amount of that set aside.<sup>215</sup> Civil law countries adopt a different approach, generally providing a fixed share or amount for surviving family members, leaving the testator free to dispose of the balance of his or her estate as he or she wishes.<sup>216</sup> Each of these systems offer greater rights to families, and correspondingly less testamentary freedom, than the system followed in U.S. jurisdictions.

Calls for the adoption of family maintenance legislation, paralleling the common law approach, or fixed share legislation, paralleling the civil law approach, have gone unheeded.<sup>217</sup> The common law approach of family maintenance has been criticized as too discretionary for the American system of probate, which traditionally favors fixed rules to ensure expeditious distribution of estates.<sup>218</sup> Conversely, the civil law approach of fixed shares has been criticized as too inflexible because it mandates allowances for family members who have no real need or claim to the assets

214. See Brashier, *supra* note 202, at 121-33 (arguing in favor of recognition of posthumous support obligation for minor children); Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 408 (1997) (arguing in favor of family maintenance scheme patterned on that of British Columbia).

215. See Chester, *supra* note, at 134-36.

216. See Deborah A. Batts, *I Didn't Ask to Be Born*, 41 HASTING L.J. 1197, 1197-99 (1990) (advocating "forced share" for children).

217. Concern for family protection is a not a recent development. See, e.g., Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 279 (1955) (remarking that "failure to protect the decedent's children" is one of most noticeable defects of estates law in American jurisdictions).

218. Professor Glendon colorfully expressed this concern:

The whole camel [discretion] was now inside the tent with a gleeful crowd of lawyers tending to its needs. Thus, with the passage of time, English family provision legislation has ceased to be merely a way to provide maintenance for needy spouses and dependent children. It now serves as a charter that allows judges to devise a substantially new estate plan for the deceased in a courtroom setting with a potentially large and colorful cast of characters as petitioners.

Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1188 (1986). So persuasive was this view, that it "effectively ended the debate" about the viability and desirability of adoption of a discretionary system of family maintenance. See Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WISC. L. REV. 1199, 1204 (noting that Professor Glendon's article was so influential in field that most leading scholars "have joined in her assessment to the point that today the overwhelming 'weight of opinion in this country opposes' adoption of a more flexible foreign model").

of the testator that outweigh the testator's own claim to dispositional control over those assets.<sup>219</sup>

These criticisms may seem to suggest that family protection would, or could, outweigh the testator autonomy policy if an appropriate legislative scheme could be designed. Two arguments undermine that conclusion.

First, many doctrines in the law of wills involve exactly the same shortcomings that critics of alternative family protection schemes identify. Elective share statutes, for example,<sup>220</sup> are as rigid as the civil law model of family protection, offering little or no opportunity to deny the elective share claim of an unworthy surviving spouse.<sup>221</sup> A fixed fraction approach to family protection would be no more inaccurate than the fixed fraction approach of the elective share. Conversely, doctrines of construction and reformation, which seek to effectuate the intent of the testator, involve case by case exercises of judgment and discretion that generate voluminous litigation.<sup>222</sup> Nothing, including a discretionary system of family maintenance for a limited portion of the estate, could generate more litigation.

Second, the legislative rejection of family protection in Louisiana and New York makes it clear that testator autonomy trumps family protection as a matter of policy rather than the inability to develop appropriate family protection doctrines. In Louisiana, the only American jurisdiction to follow the civil law system of forced heirship, the statutory inheritance rights

219. See Brashier, *supra* note 202, at 111; Chester, *supra* note 214, at 430; see also Chester, *supra* note 11, at 187.

220. Outside the context of family protection, many other wills statutes and doctrines are based upon rigid formulae that are embraced in the interest of certainty despite their obvious shortcomings. See, e.g., *Wasserman v. Cohen*, 606 N.E.2d 901, 903-04 (Mass. 1993) (rejecting intent based ademption doctrine in favor of retaining common law's objective ademption doctrine in interest of certainty); see also Mark L. Ascher, *The 1990 Uniform Probate Code: Newer and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 649 (1993) (advocating retention of traditional ademption doctrine and criticizing revisions to ademption doctrine); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 681 (1993) (offering arguments to minimize concerns about discretion in 1990 UPC revisions).

221. In some jurisdictions, abandonment by a surviving spouse will preclude an elective share claim. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 2004) (denying elective share claim where "spouse abandoned the deceased spouse, and such abandonment continued until the time of death").

222. A contemporary example is the new reformation doctrine, which authorizes the court to rewrite unambiguous wills whenever the court determines that the will misstates the testator's true wishes. See RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (1999) (exploring reformation doctrine); UNIF. TRUST CODE § 414, 8 U.L.A. 170 (Supp. 2004) (discussing reformation of trusts, including testamentary trusts). Another example is the "harmless error rule," which permits courts to forgive will execution defects so long as the court is satisfied, by clear and convincing evidence, that the decedent intended the instrument to be her will. See RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 3.3 (1999) (defining harmless error rule); UNIF. PROBATE CODE § 2-503, 8 U.L.A. 146 (1998) (excusing harmless errors).



of children were eliminated in 1996 except for those children under age twenty-four or permanently disabled.<sup>223</sup> In 1963, New York overhauled the family protection provisions of the Estates Powers and Trusts Law, but failed to adopt the proposed family maintenance statute that provided for greater judicial discretion where the provisions under the testator's will were deemed insufficient in light of relevant circumstances.<sup>224</sup> These two states, divergent in legal tradition and population demographics, each based its rejection of family protection on an express desire to preserve (in New York) or expand (in Louisiana) testamentary freedom.<sup>225</sup>

The consistency of the American refusal to expand family protection, extending across jurisdictions and over time, speaks powerfully about the relationship between family protection and testator autonomy. Family protection is important, but the overriding force of the policy of testator autonomy precludes enactment of a direct limitation on testamentary freedom for the benefit of family members.

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223. See LA. CIV. CODE ANN. art. 1493 (West 2000). At its inception, Louisiana's inheritance law provided for forced heirship and its state constitution forbade its repeal; the cutback of forced heirship for descendants thus required constitutional amendment. See *In re Succession of Lauga*, 624 So. 2d 1156, 1172 (La. 1993) (holding statute cutting back forced heirship unconstitutional). After a bitter battle, the constitutional amendment necessary to restrict forced heirship passed. See Katherine Connell-Thouez, *The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections upon the Integration of New Structures into a Classical Civil Law System*, 43 LOY. L. REV. 1, 6 (1997); Joseph W. McKnight, *Spanish Legitim in the United States—Its Survival and Decline*, 44 AM. J. COMP. L. 75, 98-103 (1996) (chronicling Louisiana's reform history). See generally Kerry J. Miller, Comment, *The New Forced Heirship Law, Its Implementing Legislation and Major Substantive Policy Changes of the Louisiana State Law Institute's Proposed Comprehensive Revision of the Successions and Donations Laws*, 71 TUL. L. REV. 223, 225 (1996) (summarizing history of curtailment of forced heirship rights in Louisiana); Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, 57 LA. L. REV. 55, 60 (1996) (providing in-depth look at evolution of forced heirship in Louisiana).

224. See Myles B. Amend, Jr., *The Surviving Spouse and the Estates Powers & Trusts Law*, 33 BROOK. L. REV. 530, 530 (1967) (noting that program of "family rights" passed in its entirety except for proposed family maintenance act).

225. See TEMP. ST. COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, N.Y. Legis. Doc. No. 5-19, 189th Sess., at 22 (1966) (acknowledging that family maintenance proposal would reduce testamentary freedom in New York); Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 TUL. EURO. & CIV. L.F. 183, 183 (1997) (remarking that abolishment of forced heirship in Louisiana will increase testator's "freedom of choice"). Subsequent legislative activity in both jurisdictions establishes a continuing preference for preserving testamentary freedom in this realm. See, e.g., N.Y. ST. BAR ASS'N TRUSTS AND ESTATES LAW SECTION, COMM. ON LEGIS., N.Y. Legis. Doc. No. 55, 224th Sess., at 1 (2001) (disapproving bill providing for limited scheme of family maintenance in New York because, among other reasons, bill "would impose an unreasonable restriction on the freedom to choose one's heirs, a freedom which in common law states has historically been encroached upon only in favor of the rights of a surviving spouse"); Max Nathan, Jr., *Forced Heirship: The Unheralded "New" Disinheritance Rules*, 74 TUL. L. REV. 1027, 1027-30 (2000) (discussing legislative changes expanding statutory basis for disinheriting forced heirs in Louisiana).

## IV. THE PROPOSAL

To produce a coherent body of case law, the testamentary capacity doctrine must explicitly articulate the relationship between the policies of family protection and testator autonomy as well as the relationship of each policy to the proof with which it most directly correlates. In addition, probate procedure and its supporting structure must facilitate the introduction of the evidence that the doctrinal standard contemplates. The following formulation, which is explained below, encapsulates these relationships:

*The Standard.* Testamentary capacity requires the testator to know, and to be able to work rationally with, the essential facts that bear on the testator's estate plan, including the nature and extent of the testator's property, the natural objects of the testator's bounty (including the testator's closest family members and others with whom the testator enjoyed a close relationship that might reasonably prompt a testamentary disposition) and the content of the testator's estate plan. In addition, the testator must appreciate the likely consequences of the estate plan.

*Presumptions.* In the case of any will that distributes property in a manner that is substantially similar to the distribution provided by the laws of intestacy for the testator's situation, the testator will be presumed to possess testamentary capacity, but the presumption can be rebutted with competent evidence of incapacity. In the case of any will that is executed simultaneously with the administration of the [state approved forensic assessment instrument], an irrebuttable presumption of testamentary capacity will arise in the case of any testator who achieves [the designated score] in that administration of the forensic assessment instrument.

A. *The Standard*

The proposal establishes a single, cognitive standard for all testators. In addition, it includes two presumptions: (1) a rebuttable presumption of capacity for wills that dispose of the property in a manner substantially similar to the disposition that would occur in intestacy; and (2) an irrebuttable presumption for testators who validate their testamentary capacity during life by successfully completing a forensic assessment specifically designed to measure the elements of cognition relevant to testamentary capacity.

1. *The Presumptions*

For testators whose wills parallel the distribution that would occur under intestacy, the will itself would establish a presumption of capacity.

This presumption facilitates the validation of wills that deviate from intestacy in ways that create important advantages for the testator's family without undermining the policy of family protection that intestacy reflects.

For example, a married testator's disposition of her estate in an A-B trust formulation, leaving the amount that passes free of estate tax to one trust for the benefit of children and the balance of the estate to a trust qualifying for the marital deduction, ordinarily would qualify for the presumption.<sup>226</sup> An additional example would be an estate plan that leaves property in trust for minor children rather than devising property outright to them. In these examples, intestate takers would have standing to challenge the will, but a challenge would contravene rather than facilitate society's interest in a sensible distribution of estates. Accordingly, a presumption alleviating the burden of establishing the testator's capacity is appropriate.

The presumption could be varied at the margins, either to increase or decrease its precision, or to be more or less inclusive than the examples above would suggest.<sup>227</sup> The critical component of the standard, however modified, is that it centers on the protection of identifiable family members as opposed to the wholly subjective conception of "family," which would vary on a case by case basis.<sup>228</sup>

The rebuttable presumption favoring wills that provide for family in no way undermines the legitimacy of a testamentary plan to benefit a family that falls outside the rigid intestacy definition.<sup>229</sup> To the contrary, the standard affords better protection to these families than present law does because it highlights, rather than obfuscates, the need to assure that evidence of testamentary capacity is preserved in the event that a will contest does arise.

To assure that sufficient evidence is easily available to testators who clearly possess the cognitive skills that the testamentary capacity standard requires, the standard allows the use of a particular test to secure an ir-rebuttable presumption of testamentary capacity for a particular will.<sup>230</sup>

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226. This type of estate plan is commonly used by married testators who wish to maximize the amount of their collective property that can pass free of estate tax to descendants or others. See JULE E. STOCKER ET AL., STOCKER & RIKOON ON DRAWING WILLS & TRUSTS § 4:2 (12th ed. 2000) (summarizing tax considerations involved in creating wills and trusts).

227. To be sure, this standard, like any other, leaves room for interpretation. For a discussion of a standards-oriented approach, see *supra* note 33.

228. For a further discussion on the continually transforming concept of the "family," see *supra* notes 95-97 and accompanying text.

229. See UNIF. PROBATE CODE § 2-103, 8 U.L.A. 84 (1998) (providing rigid testamentary scheme for distributing property to "family members" of decedent other than surviving spouse).

230. The test would validate a particular will rather than the testator's general testamentary capacity for two reasons. First, capacity must exist at the time the will is executed. For a further discussion on the requirement of capacity in will execution, see *supra* note 80. Second, the testator must establish that he or she knew the content of the will. For a further discussion on the requirement that a testator

Testators whose wills fall outside the scope of the rebuttable presumption favoring family need not undergo the test specified in the statute in order to make a valid will. They, like any other testator, may simply rely on the traditional probate process to validate their wills. The option of lifetime capacity assessment is simply a means of avoiding an inquiry into capacity after death.

## 2. *The Understanding Required for Testamentary Capacity*

The present standard for testamentary capacity is somewhat vague about the cognitive skills it requires. The standard is commonly understood to require less capacity than that required for the execution of any other legal document, but this vague generalization offers little concrete information about what exactly is required for testamentary capacity.<sup>231</sup> Often, the proper understanding necessary for testamentary capacity is described as one that is commensurate with the complexity of the transaction, but that is similarly ambiguous because it conveys only that the requisite knowledge varies with the situational facts.<sup>232</sup> It is unclear how, if at all, this standard tests the cognitive abilities of testators, such as their memory of relevant facts and their ability to manipulate relevant knowledge, reason from that knowledge or draw determinate conclusions based on that knowledge.<sup>233</sup>

Exposition of the cognitive qualities that a capacity standard could incorporate has been undertaken for areas of law other than testamentary capacity, most notably, the competency to refuse medical treatment.<sup>234</sup>

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know the content of his or her will to have the testamentary capacity to create a will, see *supra* note 3.

231. See ATKINSON, *supra* note 27, at 240 n.28 (“[L]ess mental capacity is required for a will than for any other legal instrument.”).

232. See Green, *Judicial Tests*, *supra* note 34, at 147 (commenting that “understanding test” as applied by court is “ambiguous, self-contradictory, and practically meaningless”).

233. Compare Frolik, *supra* note 67, at 265 (2001) (noting that, by requiring testators to possess ability to make reasoned choice, but not requiring reasonable choice, law assures that testators do not unwittingly unravel estate plan while simultaneously protecting testator’s right to make bad, unreasonable or unconscionable choices), with Green, *Proof*, *supra* note 7, at 306-07 (suggesting that reasonableness or fairness is paramount).

234. See, e.g., Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 353-54 (1996) (describing “understanding” as “simply the ability to comprehend the concepts involved, especially in the informed consent disclosure; it does not require the patient to comprehend the situation as a whole”); Roth et al., *Tests of Competency to Consent to Treatment*, 134 J. AM. ACAD. PSYCHIATRY & L. 279, 281-86 (1977) (describing and analyzing various tests of competency to consent to treatment); Saks, *supra* note 160, at 948-62 (setting forth competing standards of competency for medical decision making); see also Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 567-76 (1993) (advancing different approaches used to determine decisional capacity for criminal defendants); Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073,

While the policy interests at stake differ significantly, schemata of cognitive standards developed in the context of competency to refuse medical treatment serve well to illustrate the general range of qualities that a capacity doctrine might incorporate.

As a starting point, it is generally agreed that a basic skill relevant to meeting a capacity standard is the ability to understand information relevant to the decision as well as the ability to express the decision reached.<sup>235</sup> Those who have no ability to express a decision, such as comatose patients, present no dilemma in terms of capacity assessment.<sup>236</sup> Similarly, some degree of understanding is necessary to confirm the autonomy of an act. An action undertaken without understanding, for example the execution of a will that is written and explained in a foreign language, hardly can be considered autonomous by even the most extreme definitions of autonomy.<sup>237</sup> Conversely, a legal refusal to recognize an action undertaken with full understanding of the act and its consequences is a denial of autonomy by any definition. The alternative gradations of cognitive standards of capacity differ in the nature and extent of understanding required.

The nature of the understanding necessary for testamentary capacity could include: a comprehension of information in the abstract, an ability to appreciate the nature of the situation and its likely consequences for the individual whose capacity is at issue, an ability to manipulate information rationally or some combination of these three abilities.<sup>238</sup> The first ability, comprehension of information in the abstract, merely requires that the individual whose capacity is at issue to comprehend the concepts involved in the decision; the individual need not comprehend the situation as a whole to meet this standard.<sup>239</sup> The second ability, appreciation of the nature of the situation and its likely consequences, demands that the individual be able to understand how relevant facts bear on the situation as a whole.<sup>240</sup> The third ability, rational manipulation of information, demands that the individual possess some ability to reason or employ logic to

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1082-90 (1994) (discussing capacity as it relates to legal representation of older clients); Rein, *supra* note 123, at 1130 (suggesting that doctors should be responsible for this decision and noting that “an accurate determination of incompetency . . . involves much more than simply chatting with the client or patient for several minutes or even several hours”).

235. See Christopher Slobogin, “Appreciation” as a Measure of Competency: Some Thoughts About the MacArthur Group’s Approach, 2 PSYCHOL. PUB. POL’Y & L. 18, 21 (1996).

236. See Berg, *supra* note 234, at 353.

237. See Saks, *supra* note 160, at 953 n.21 (invoking foreign language illustration).

238. See Berg, *supra* note 234, at 351-62.

239. See *id.* at 353-54 (“The most common ability required by courts and legislatures in their competence standards focuses on the patient’s comprehension of information related to the particular decision at hand.”).

240. See *id.* at 355 (illustrating how individual can satisfy knowledge requirement but fail appreciation requirement by offering as example “patients who ac-

compare available alternatives.<sup>241</sup> This third ability requires not a rational decision, but rather, a rational decision making process.<sup>242</sup>

To illustrate the differences in these cognitive abilities, consider the case of *In re Angle*,<sup>243</sup> which involved the will of a father survived by seven children.<sup>244</sup> The testator, Mr. Angle, devised real property to the only two children who did not own homes.<sup>245</sup> He also devised real property to his youngest son, with whom the testator shared a particularly close relationship.<sup>246</sup> These three dispositions of real property accounted for nearly two thirds of the total estate.<sup>247</sup>

Comprehension of information in the abstract requires only that the testator generally understand the size of his estate, that children are the natural (or potential) objects of the testator's bounty and that the will benefits the children disproportionately.<sup>248</sup> If the devise of real estate to the three children would result in another child having to move off of the property and find a new home, understanding of this consequence would not be required to satisfy a standard requiring only comprehension of information in the abstract. Understanding of the consequences for the displaced child would, however, be required under a standard including an appreciation component.

The ability to logically connect the final disposition to a set of preferences would not be required by either the abstract understanding compo-

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cept that their physicians believe they are ill, but deny that there is a problem in the face of objective evidence to the contrary").

241. *See id.* (describing rational manipulation as "the ability least often included in legal competence standards and . . . the hardest to operationalize").

242. *See id.* at 357.

243. 777 A.2d 114 (Pa. Super. Ct. 2001).

244. *See id.* at 125.

245. *See id.* at 120.

246. *See id.* at 125.

247. *See id.*

248. The phrase "natural objects of bounty" has eluded crisp definition, incorporating more than testators' intestate distributees and even more than the wider family circle:

There is a tendency of the appellate courts not to require, or to sanction, a clear-cut definition of the term "natural objects of bounty" which would apply in all instances, in an instruction using that term, but to make the determination of who come [sic] within the definition dependent to some extent upon the circumstances present in the particular case.

*See* L. S. Tellier, Annotation, *Instructions, in Will Contests, Defining Natural Objects of Testator's Bounty*, 11 A.L.R.2d 731, 732 (1950). Although a broad based definition of this sort could exclude relatives, intestate distributees generally qualify as natural objects of the testator's bounty. *See* Green, *Judicial Tests*, *supra* note 34, at 302 (stating intestate distributees normally qualify as natural objects); *see also* Norris v. Bristow, 219 S.W.2d 367, 370 (Mo. 1949) (holding that facts and circumstances determine who qualifies as natural object of bounty, but that "ordinarily, all things being equal, the natural objects of a testator's bounty are those who unless a will exists will inherit his property"). In contrast, caregivers generally do not so qualify. *See, e.g.*, Foster, *supra* note 124, at 208 (stating that long-term caregivers are "considered an 'unnatural' recipient of the decedent's estate").

ment or the appreciation component of cognition, but it would be required by a rational manipulation of the information component of a capacity standard. Thus, if the testator's paramount priority was to assure that the basic needs of all of his or her children were met, selection of a dispositive plan likely or certain to fail to achieve that goal would constitute an incompetent choice.

Following the mantra that wills require less capacity than the execution of any other legal document would suggest that the standard ought to require only knowledge of the relevant facts rather than appreciation or rational manipulation of them.<sup>249</sup> That approach is rejected here because a very low standard cannot adequately support the differentiation of wills that are presumptively valid based on their content from other wills that the policy premise of this proposal requires.<sup>250</sup> If a higher standard applies, the denial of probate to inexplicable wills of atypical testators will tend to be correct in those cases where there is little or no probative evidence of capacity. A lower standard, on the other hand, cannot explain the preferential treatment of wills favoring family or other dispositions based on fairness. This preference can be found in both this Article and in existing case law.

The difficulty with the higher standard lies not in what it requires but in the ability to prove after death that a testator did satisfy the standard. The remedy for this difficulty is the creation of an evidentiary means by which testators can establish that they satisfied the standard.

### 3. *A Note About the Relevance of a Diagnosis of Mental Disorder*

Overlapping with the questions about measuring cognition is the question whether diagnosis of a mental disorder or disability ought to be required in order to challenge testamentary capacity.<sup>251</sup> In a probate regime that operates strictly after death, requiring psychiatric or psychological diagnosis to establish testamentary incapacity would be untenable. Those with undiagnosed mental illness or disability would bypass the requirement of testamentary capacity, causing the standard to be unacceptably under-inclusive. In addition to obvious problems of fairness, predicating testamentary capacity on diagnosis would create a disincentive to seek treatment or assistance for mental illness or disability. Thus, the

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249. See ATKINSON, *supra* note 27, at 240 ("Surely one may possess mentality enough to deal with a simple disposition of his property, when he would be baffled and quite at sea in considering complicated testamentary matters.").

250. For a further discussion of the competing policy values in testamentary capacity law, testator autonomy and family protection, see *supra* notes 113-225 and accompanying text.

251. See generally Marson, *supra* note 14, at 74-78 (discussing relevant issues regarding testamentary capacity and mental disorders).

issue of whether diagnosis ought to be required to support a determination of testamentary incapacity has never been a serious question.<sup>252</sup>

In the context of a testamentary capacity requirement that centers on process and a procedural structure that supports collection of evidence about process during the testator's lifetime, however, predicating testamentary incapacity on diagnosis of mental disability or disorder becomes somewhat more viable.<sup>253</sup> One might argue that such a predicate is appropriate because decisions made in the absence of an actual diagnosis must be respected as legitimate exercises of autonomy.<sup>254</sup>

For capacity issues outside the law of donative transfers, the general objection to this view is that diagnosis interferes with capacity assessment because the existence of the diagnosis substitutes, rather than serves as a predicate, for addressing the question whether capacity exists.<sup>255</sup> Within the context of wills laws the problem with predicating a determination of testamentary incapacity on diagnosis of a mental disorder or disability is even more basic. The demands of testamentary capacity—as crudely reflected in case law and expressly advocated here—require a level of understanding, appreciation and rational manipulation that exceed thresholds for any recognizable mental disorder. Predicating determination of incapacity on diagnosable mental condition or disease would produce a radical decrease in the standard for testamentary capacity. Accordingly, the present law's approach of determining testamentary capacity independent

252. See, e.g., *Villwok v. Villwok*, 413 N.W.2d 921, 924 (Neb. 1987) (asserting that alcoholism, associated delusions and blackouts do not establish testamentary incapacity); *In re Angle*, 777 A.2d 114, 125 (Pa. Super. Ct. 2001) (holding that Alzheimer's diagnosis did not establish testamentary incapacity).

253. See Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 32 (2003) (arguing that requirement of diagnosis in guardianship statutes is preferable to guardianship standards defined in purely functional terms).

254. See, e.g., Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1188 (1994) (commenting that diagnosis is "critical anchor and validator" in competency judgments that helps to preserve testamentary freedom); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 UTAH L. REV. 515, 536-38 (1987) (indicating that imposition of guardianship over proposed ward's objection is justified when proposed ward's choices are product of mental illness or dysfunction rather than individual's free will).

255. See *supra* note 253. The fluidity of diagnostic categories is another general objection. See, e.g., STADDON, *supra* note 165, at 1 (describing psychology as "an . . . emperor . . . if not unclothed, at least down to his skivvies"); John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95, 134-35 (1999) (noting problems with allowing common law fact finder to determine mental illness based on capacity because "courts advancing this cluster of concerns uniformly premise their denial of a capacity defense on skepticism with the accuracy and reliability of differential diagnoses in psychiatry and psychology"); see also J. ALLAN HOBSON & JONATHAN A. LEONARD, *OUT OF ITS MIND: PSYCHIATRY IN CRISIS* 49 (2001) (beginning chapter entitled "Psychiatry's Downfall" with quote attributed to E. Fuller Torrey: "Psychiatry is an emperor standing naked in his new clothes").



of (though not oblivious to) mental disorder or disability diagnosis is sound, even in the context of a system that facilitates lifetime assessment of testamentary capacity.

### B. *A Forensic Assessment Instrument for Testamentary Capacity*

The value of a specialized forensic assessment instrument (“FAI”) for testamentary capacity is that such an instrument offers both substantive and procedural controls.<sup>256</sup> Substantively, the validation would assure that the FAI incorporated the elements of cognition relevant to testamentary capacity. Procedurally, the validation would provide assurances about the administration of the test that are lacking in the presently used contemporaneous expert assessments. Thus, adoption of an FAI has enormous potential to improve the quality of testamentary capacity determinations, but only if it is soundly designed and properly used.

#### 1. *The Design*

An FAI for testamentary capacity requires significant effort to design because a forensic instrument can function only in relation to a particular legal test.<sup>257</sup> Thus, an FAI for testamentary capacity would be very different from an FAI designed to assist in determinations about competence to consent to treatment. Similarly, if New York’s standard for testamentary capacity differs from the standard California utilizes, then a single FAI cannot serve both jurisdictions.

Creation of an FAI requires collaboration between lawyers who are knowledgeable about the requirements of the legal standard to which the FAI will relate and psychologists who have the expertise to design psychological questions or other tests that will provide information about the cognitive requirements that the legal standard requires.<sup>258</sup> In this partnership, the psychologists defer to the lawyers because it is, in the end, a legal question that the FAI will be designed to address.<sup>259</sup>

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256. For a discussion of the value of assessing testamentary capacity during the life of the testator, see *supra* note 42 and accompanying text.

257. See Roth et al., *supra* note 234, at 283 (describing attempt to create objective, accurate and workable instrument for measuring capacity to make medical decisions as search for “the Holy Grail”).

258. See GRISSE, *supra* note 26, at 25-26 (stating that examiners must assess performance demands required within specific context).

259. See *id.* at 28-30 (recognizing that purpose of forensic assessment instrument (“FAI”) is to provide information that standard of capacity defines as relevant).

The “gold standard” in development of FAIs<sup>260</sup> is the MacArthur Treatment Competence Study.<sup>261</sup> While the MacArthur Study involved development of reliable and valid information for use in addressing clinical and policy questions regarding a mentally ill person’s abilities to make decisions about psychiatric treatment, the MacArthur investigators’ reports and extensive critiques of such reports offer guidance to those who would endeavor to create an FAI. Specifically, the reports and critiques prove helpful in determining the scope of the challenges inherent in the endeavor, how those challenges may be met and, most importantly, the limits of FAIs.<sup>262</sup>

The standard for capacity articulated in Part IV, Section A, requires testators to have the ability to work rationally with the information that bears upon their testamentary dispositions and also to appreciate the impact of their decisions.<sup>263</sup> These components, especially the appreciation component, are tricky to operationalize into a psychological test. The appreciation criterion triggered the most significant discussion with respect to the MacArthur study,<sup>264</sup> invoking criticism both of MacArthur investigators’ inclusion of appreciation in the abstract standard of capacity to consent to treatment and also of the manner in which the MacArthur investigators operationalized that criterion.<sup>265</sup> The basis of the concern

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260. See Bruce J. Winick, *Foreword: A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme*, 2 PSYCHOL. PUB. POL’Y & L. 3, 3 (1996) (noting MacArthur study is “one of the most ambitious social science research projects ever undertaken involving an area of law”).

261. The results of the MacArthur Treatment Competence Study, a project undertaken to develop reliable and valid information for use in addressing clinical and policy questions regarding the abilities of persons with mental illness to make decisions about psychiatric treatment, are reported in three papers: Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competency Study. I: Mental Illness and Competency to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105 (1995) [hereinafter *MacArthur I*]; Thomas Grisso et al., *The MacArthur Treatment Competence Study. II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995) [hereinafter *MacArthur II*]; Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric Medical Treatments*, 19 LAW & HUM. BEHAV. 149 (1995) [hereinafter *MacArthur III*].

262. See generally *MacArthur I*, *supra* note 261, at 105-26; *MacArthur II*, *supra* note 261, at 127-48; *MacArthur III*, *supra* note 261, at 149-69.

263. For a further discussion of the standard for testamentary capacity presented here, see *supra* notes 231-50 and the accompanying text.

264. See Kirk, *supra* note 154, at 63-64; Slobogin, *supra* note 235, at 23-27; Susan Stefan, *Race, Competence Testing and Disability Law: A Review of the MacArthur Competence Research*, 2 PSYCHOL. PUB. POL’Y & L. 31, 38-41 (1996); see also Thomas Grisso & Paul S. Appelbaum, *Values and Limits of the MacArthur Treatment Competence Study*, 2 PSYCHOL. PUB. POL’Y & L. 167, 171-74 (1996) (responding to criticisms of operationalization appreciation in MacArthur study).

265. The appreciation criterion has been the object of some study. See Michel Silberfeld et al., *Acknowledgement of Limitations and Understanding of Their Consequences in Mental Capacity Assessments*, 13 BEHAV. SCI. & L. 381, 381-89 (1995) (investigating two criteria used in mental capacity assessments, including understanding consequences of personal limitations).

lies in the difficulty of isolating the cognitive component of appreciation and segregating it from value judgments that are independent of cognitive function. Similar concerns apply when requiring rationality in the decision making process.<sup>266</sup>

These concerns have some validity. The source of the difficulty is that appreciation and rational manipulation criteria inevitably, as a practical matter if not a theoretical one, involve considerations of substantive fairness or other outcome-oriented criteria. Where protection of individual autonomy is the paramount policy interest, persuasive arguments for excluding appreciation and rational manipulation criteria from a capacity inquiry exist.<sup>267</sup> In the testamentary capacity context, however, the policy mandate for a degree of family protection compels inclusion of these criteria. As surely as a pure outcome-oriented standard arbitrarily discriminates, a standard devoid of outcome considerations reneges on the law's obligations to the testator's survivors.<sup>268</sup>

The translation of the concepts of appreciation and rational manipulation is the core of the psychologists' work in designing the FAI. Lawyers hold the equally important role of evaluating the FAI for bias. The end product should be an instrument that will validate the capacity of a testator whose cognitive functioning is sufficiently strong so that the legal judgment of testamentary capacity would not need to rely on the dispositive content of the will to adjudicate capacity.

## 2. *The Use*

Courts, juries and others making legal determinations about capacity use information an FAI provides and professional interpretations of it together with other relevant evidence to render their decisions.<sup>269</sup> FAIs do not substitute for legal adjudications of capacity, but rather supply fact finders with information that otherwise would be unavailable.<sup>270</sup> Properly differentiating the factual questions that an FAI can address definitively

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266. See Berg, *supra* note 234, at 357-58 (noting inclusion of "rational manipulation in a legal standard of competence may seem troublesome because it could lead to incompetence adjudications based simply on the unconventionality of a patient's decisions"); Margulies, *supra* note 234, at 1075 ("The medical profession historically has adopted a paternalistic view of capacity based on the substance of decisions. . . . If the decisions appear 'right,' the individual possesses capacity. . . . If the decisions are 'wrong,' the individual lacks capacity."); Saks, *supra* note 160, at 945 (arguing competency standard must "protect a person's expression of her values and beliefs, however unconventional").

267. See Berg, *supra* note 234, at 357-58.

268. For a discussion of the irrational sanist discrimination inherent in a purely outcome-oriented test to measure compliance with a mental process-oriented standard, see *supra* notes 154-56 and accompanying text.

269. See Kapp & Mossman, *supra* note 31, at 87.

270. See *id.*

from the legal questions that fall outside their scope is the most important issue involved in the use of an FAI.<sup>271</sup>

The most ardent advocate of FAIs would readily agree that an FAI cannot itself adjudicate the question of testamentary capacity in all cases.<sup>272</sup> The values that guide testamentary capacity determinations in the marginal cases—society's sense of family and familial responsibility—must come from the legal system. Views differ, however, on the propriety of relying on an FAI alone to evaluate capacity in cases that fall squarely within or outside a capacity standard.

The more aggressive view is that an FAI can dispose of clear cases alone, with no additional adjudicatory process beyond confirming proper administration of the instrument. Under this view, the FAI would serve a gate-keeping function to segregate clear cases from questionable ones, validating the capacity of those who clearly demonstrate the functions associated with capacity that the FAI measures and channeling the others to alternative procedures.

The more conservative view is that an FAI cannot be used responsibly without an accompanying adjudicatory process. This view reflects concerns about the ability to cabin the discretion of mental health professionals in the design, administration and interpretation of FAIs—a particularly sensitive issue given the subservient role psychological and psychiatric assessments play in legal determinations of capacity.<sup>273</sup> The principal con-

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271. See *id.* at 73 (arguing there are “serious generic, inherent problems connected with any attempt to construct a universally acceptable version of a capacimeter”); see also MacArthur III, *supra* note 261, at 170 (discussing decisional abilities courts consider in making competency determinations); Ronald Roesch et al., *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competency Model*, 2 PSYCH. PUB. POL'Y & L. 96, 96 (1996) (noting MacArthur Treatment Competence Study competence measures may have limitations because link between “psycholegal constructs and forensic assessment procedures is complex and indirect”).

272. See, e.g., Grisso & Appelbaum, *supra* note 264, at 168 (describing proper uses and limitations of MacArthur instruments).

273. See Rein, *supra* note 123, at 1120 (stating that although lawyers are not qualified to make competency determinations, neither are most doctors). Concerns about the (mis)use of mental health experts are widespread. See, e.g., Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 S.M.U. L. REV. 329, 351-63 (1992) (discussing inaccuracies in decision making by mental health professionals in forensic contexts); David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 2 (2003) (arguing that “science wars” are significant for educating judges about science so that they may maintain “their gatekeeping role with respect to proffered expert testimony”); Ian Lambie, *Assessing Competency in Psychiatric Contexts*, 29 J. AM. ACAD. PSYCHIATRY & L. 29, 34-36 (2001) (discussing difficulties clinicians have in applying legal standards); Joseph Sanders et al., *Legal Perceptions of Science and Expert Knowledge*, 8 PSYCHOL. PUB. POL'Y & L. 139, 148-50 (2002) (examining assumptions about expert knowledge implicit in standards governing admissibility of expert testimony); Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based upon Clinical Judgment and Scientific Research*, 4 PSYCHOL. PUB. POL'Y & L. 1226,

cern, expressed in the context of the MacArthur study of competency to consent to treatment, is that the number of instances in which an FAI could effectively determine capacity without additional scrutiny and judgment would be prohibitively small. An exacerbating factor is that the issue of capacity arises for each particular treatment decision and many such decisions may be required of one individual.<sup>274</sup>

These concerns, though real, are far less significant to forensic assessment of testamentary capacity. The number of cases in which capacity would be clear enough to justify reliance on an FAI alone depends on how the candidates for capacity inquiry are identified. Where identification of candidates occurs in the context of medical or mental health treatment, a professional health care provider is available to allay concerns about capacity in clear cases. Only when the health care provider has concerns about capacity, or when those involved reject his or her opinion, would capacity determinations be required. Consequently, cases clear enough for an FAI to resolve would be limited to those in which the health care provider was wrong in his or her judgment or ignored by the patient or others involved in the patient's care. It is reasonable to anticipate that those cases would be relatively rare.

In contrast, questions about testamentary capacity would mainly arise in the context of estate planning where lawyers—rather than health care professionals—would consider the possibility of using an FAI. Lawyers' judgments about a client's cognitive functioning would, on the whole, be less accurate than the judgment of health care professionals. Even where the lawyer determined the client to clearly possess capacity, validation of that judgment by administering an FAI would be important in cases where a will contest was anticipated. In fact, the goal of lifetime capacity assessment is combating strike suits. By definition, this goal involves only those testators whose capacity is clearly sufficient. Consequently, a need for confirmation of capacity in clear cases exists in the context of testamentary capacity.

Additionally, the concern about the number of administrations of an FAI is less relevant in the context of testamentary capacity than in the context of capacity to consent to treatment. Treatment may require several different procedures, drugs and other bodily impositions that occur at

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1228-30 (1998) (discussing limitations of clinical decision making as compared to statistical decision making and proposing laxer standard for admissibility of pure clinical testimony); see also Douglas Mossman & Marshall B. Kapp, "Courtroom Whores"?—or Why Do Attorneys Call Us?: Findings from a Survey on Attorneys' Use of Mental Health Experts, 26 J. AM. ACAD. PSYCHIATRY & L. 27, 31-33 (1998) (discussing empirical studies of attitudes about expert witnesses); Richard E. Redding et al., *What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar*, 19 BEHAV. SCI. & L. 583, 584 (2001) (recognizing that not all expert testimony is equally valid or probative and discussing appropriateness of different types of expert mental health testimony).

274. See Kapp & Mossman, *supra* note 31, at 87 (addressing specific problems associated with FAIs).

different moments in time, each of which likely requires consent. Execution of a will, in contrast, is a single transaction that occurs at one moment in time. Consequently, only one FAI would be needed to validate capacity to make a particular will, whereas multiple FAIs might be needed to secure complete consent to a course of treatment for a single illness.<sup>275</sup>

A testamentary capacity FAI thus has the potential to serve an important gate-keeping function. By identifying cases in which capacity clearly exists, a testamentary capacity FAI can protect testators against strike suits that otherwise would be possible.

### C. *Probate Procedure Accommodations*

Many testators neither want nor need an alternative to traditional probate. Consequently, traditional probate must remain intact and available whether or not a lifetime capacity assessment option exists. Maintaining a probate system that offers both pre- and post-mortem capacity assessment raises two important questions. One question, which received extensive attention in earlier reform efforts, is how to create a workable procedure for lifetime capacity assessment.<sup>276</sup> The other question, which has received little attention, is how the existence of an opportunity for lifetime capacity assessment impacts existing practice and procedure for traditional probate.<sup>277</sup>

#### 1. *Procedure for Lifetime Capacity Assessment*

The proposed use of an FAI to establish capacity during life raises the question of what procedures would govern the administration of the FAI. Such questions include: who should be qualified to administer an FAI; how a testator's achievement of a "passing" score should be documented for use in a subsequent will contest; what procedures should be available to will contest litigants to confirm that there was no impropriety in the administration of the FAI; and whether coaching, practice or multiple attempts at the FAI are improper. While these issues are all important, discussion about them would be most appropriate in the course of the development of the FAI.

There is one issue which must be confronted at this juncture, which is whether the testator's family members (those who would take in intestacy) would be required to have notice of the administration of the FAI and an opportunity to participate. This is the issue that ended the efforts to design a comprehensive procedure under which a testator could achieve

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275. For a further discussion on why an FAI would validate a particular will rather than a testator's testamentary capacity, see *supra* note 230 and accompanying text.

276. For a further discussion on the suggested role for an FAI in testamentary capacity assessment, see *infra* notes 278-95.

277. For a further discussion on the potential impact of lifetime capacity assessments on traditional probate procedures, see *infra* notes 296-305.

complete or partial assurance that his or her will, upon death, would be admitted to probate.<sup>278</sup> This concept, dubbed “living probate,” was first motivated by concerns about limitations in the ability to adjudicate testamentary capacity after a testator’s death, but it grew to encompass all possible objections to a will during the testator’s lifetime.<sup>279</sup>

Although the testator’s family had no constitutional right to notice of the proceeding,<sup>280</sup> concerns about fairness to family prompted the earlier reformers to include provisions for notice to presumptive heirs of the testator.<sup>281</sup> This feature made living probate quite unattractive to testators because it simply accelerated the will contest, forcing testators to participate in the very type of litigation that living probate was supposed to obviate.<sup>282</sup> Yet dispensing with family participation in living probate proceedings would represent an unequivocal rejection of family protection policy, not just for testamentary capacity, but for all will validity doctrines. The inability to design a procedure that was both attractive to testators and protective of their families effectively ended the efforts to design a scheme for living probate.

The impasse in the dialogue about living probate underscores the importance of incorporating effective protections for the testator’s family in the design of any procedure that would supplant traditional probate. The impasse does not, however, suggest that notice to family and an opportunity to engage in the adversarial process is the only way to ensure adequate fairness to the family. Any procedure that is fair, and perceived to be fair by those affected, could replace the adversarial process.<sup>283</sup> The perception factor creates a presumption against change because of the longstanding reliance on the adversarial process to achieve fairness.<sup>284</sup> A procedure that is demonstrably fair, however, should be able to overcome this presumption.

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278. See Leopold & Beyer, *supra* note 6, 180-81 (describing abandonment of uniform law project).

279. See Fellows, *supra* note 10, at 1078 (suggesting that underlying problem inspiring living probate proposals is expense and uncertainty of mental capacity requirement for executing valid will); Langbein, *supra* note 5, at 63 (noting “[l]iving probate is addressed to the predicament of a testator who fears that after his death his estate may be subjected to a will contest in which it will be alleged that he lacked the mental capacity to execute his will”).

280. See Fellows, *supra* note 10, at 1096-109 (articulating constitutional argument to notice under Fourteenth Amendment, but noting how it could be circumvented).

281. See Leopold & Beyer, *supra* note 6, at 170-75 (analyzing ante-mortem legislation and noting notice provisions in North Dakota, Ohio and Arkansas).

282. For a further discussion on ante-mortem statutes based on the contest model, see *supra* notes 5-6 and accompanying text.

283. See PROCEDURAL JUSTICE 3-4 (Klaus F. Rohl & Stefan Machura eds., 1997) (analyzing fairness in procedural justice).

284. See generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 93-127 (1988) (finding procedural justice to emphasize importance of notice and participation in decision making process).

To demonstrate the fairness of an alternative procedure, the procedure must ensure that it is at least as likely as the adversarial process to bring out the relevant facts. The relevant facts vary for each of the will validity doctrines; as a result, a lifetime procedure that works for one doctrine will not necessarily work for another. Fraud, for example, involves wrongdoing that is unknown to the testator.<sup>285</sup> As such, the testator's participation in the proceeding does not necessarily offer more, and may well offer less, than the adversarial process of traditional probate.

For testamentary capacity, on the other hand, a contemporaneous expert assessment, conducted in a controlled setting with pre-established substantive content, is likely to provide evidence superior to the evidence typically available in traditional probate for many cases. For cases involving testators with marginal cognitive abilities, contemporary expert assessment would not necessarily provide superior evidence to traditional probate because the evidence for those cases would require consideration of factors outside the scope of mental health expertise. By restricting use of the lifetime validation to clear cases, the proposal offers the intestate takers as much protection as they can legitimately claim. For all of these reasons, the procedural aspects of this proposal are more likely to be accepted than were the procedural alternatives incorporated into the living probate proposals.

Limiting the scope of the proposal to validation of testamentary capacity makes the notice issue more manageable than it was in the living probate context, but at the same time the proposal offers less than living probate would have. This can hardly be an objection to the proposal, however, because living probate is not, at least yet, a viable alternative. The costs of requiring an adversarial process for living probate, whether measured relationally or financially, must outweigh the benefits because the living probate schemes that have been enacted incorporating the adversarial process are not used.<sup>286</sup> It is thus clear that the greater benefit of living probate is not worth its greater cost.

This proposal delivers the principal benefit living probate proposals were originally aimed at, but for a far lower cost. In terms of emotional cost, it requires no litigation among family members during the testator's life and it reduces the likelihood that survivors will suffer the irreparable destruction of relationships that will contests often cause.<sup>287</sup> Financially,

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285. For a discussion of fraud in the execution of a will, see *supra* note 138 and accompanying text.

286. For a further discussion on the living probate schemes incorporating the adversary process under the contest model, see *supra* note 5 and accompanying text.

287. See generally THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 11-12 (Bruce J. Winick ed., 1997) (discussing wide acceptance that therapeutic jurisprudence has gained in past two decades). These psychological effects, not accounted for in the era in which Green wrote, are now recognized as an integral part of law and law reform. See *id.* at 3 (acknowledging rise of law and psychology). The most well-recognized framework for analyzing the psychological



an ex parte assessment would cost far less than litigation in either living probate or traditional probate.

In addition to testamentary capacity challenges, the FAI contemplated by the proposal would preclude a challenge based on the “insane delusion” doctrine.<sup>288</sup> The insane delusion doctrine invalidates the will of an individual who is otherwise competent but “persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence.”<sup>289</sup> The cognitive standard applied in those cases is higher than mere knowledge, instead requiring the individual whose competency is in question to both understand the evidence relevant to the decision and avoid forming patently false beliefs about that evidence.<sup>290</sup> This amounts to a minimal standard of appreciation, which would be less than the standard implemented by the FAI and incorporated in this proposal. Accordingly, this proposal would offer certainty about any objection based on the insane delusion doctrine.

Similarly, lifetime validation of testamentary capacity would undermine an allegation of undue influence, but a testamentary capacity FAI could not entirely foreclose one. A robust performance on the testamentary capacity FAI would undermine a subsequent undue influence claim significantly because undue influence applies to testators whose mental state is, in some respect, weakened.<sup>291</sup>

In the context of the present law’s fuzzy conception of testamentary capacity, a lifetime adjudication limited to capacity would offer negligible assurance about the outcome of a post-mortem claim of undue influence.<sup>292</sup> In contrast, in the context of an express recognition of the high

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impact of law is therapeutic jurisprudence. *See id.* (“[Therapeutic jurisprudence] recognizes that, whether we realize it or not, law functions as a therapeutic agent, bringing about therapeutic or antitherapeutic consequences.”) “Therapeutic jurisprudence seeks to apply social science to examine law’s impact on the mental and physical health of the people it affects.” *Id.*; *see also* *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1991) (explaining and clarifying therapeutic jurisprudence); *LAW IN A THERAPEUTIC KEY* (David B. Wexler & Bruce J. Winick eds., 1996) (collecting and examining scholarly works on therapeutic jurisprudence); *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (David B. Wexler ed., 1990) (arguing that mental health law would better serve society if efforts were taken to study and improve role of law as therapeutic agent).

288. *See* *Am. Seamen’s Friend Soc’y v. Hopper*, 33 N.Y. 619, 624 (1865) (explaining insane delusion doctrine).

289. *Id.*

290. *See* *Saks*, *supra* note 160, at 956 (outlining cognitive standard applied to test capacity in insane delusion cases).

291. For a further discussion on undue influence as grounds for challenging the validity of a will, *see supra* note 67 and accompanying text.

292. *See* Langbein, *supra* note 5, at 84-85 (opining that “[f]ailure to extend the res judicata effect of the living probate decree to the undue influence theory would undermine most of the reform [of lifetime capacity determination], since it

standard of testamentary capacity advocated here, greater confidence attends the conclusion about capacity, and this in turn restricts the role of undue influence in identifying invalid wills.<sup>293</sup> Thus, the possibility of a successful challenge to the will of a testator who established testamentary capacity through lifetime procedures based on a post-mortem allegation of undue influence would remain, but the difficulty of succeeding with a meritless claim of undue influence would increase.<sup>294</sup> This is a significant benefit for a testator to secure.

The proposal would have no impact on claims of fraud or faulty will execution. This is a negligible limitation, however, because neither fraud nor faulty will execution is a serious concern for a testator who has a competent lawyer.<sup>295</sup>

Finally, this proposal offers significant savings to the state. By avoiding will contests, or limiting their scope to issues outside testamentary capacity, the burden that will contests impose on courts would decrease.

Individuals have not yet had the opportunity, as they have with living probate, to demonstrate their interest in this proposal. For all of the reasons described here, however, it is likely that some would use the procedure proposed here if given the opportunity to do so.

## 2. *Coordinating Lifetime Capacity Assessment and Traditional Probate*

Logic's mandate for a process-oriented standard of capacity and a lifetime capacity assessment procedure to implement it is not necessarily inconsistent with the co-existence of post-mortem capacity assessment. Just as individuals may choose intestacy rather than an individually designed

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is so easy (and so common) to tack an undue influence count to an unsound mind claim").

293. See, e.g., *Crittell v. Bingo*, 36 P.3d 634, 641-42 (Alaska 2001) (upholding lower court finding that physically and mentally impaired testator lacked sufficient capacity to form valid will and that testator was victim of fraud and undue influence); *Pyle v. Sayers*, 34 S.W.3d 786, 788 (Ark. Ct. App. 2000) (noting "questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considers them together" and upholding will as valid); *In re Estate of Campbell*, 573 S.E.2d 550, 562 (N.C. Ct. App. 2002) (highlighting restricted role of undue influence by holding that "without evidence that the testator is susceptible to fraud or undue influence, evidence of undue influence itself is often too tenuous for consideration").

294. See generally Frolik, *supra* note 67, at 266 (finding that as capacity determinations become more refined, doctrine of undue influence will be less malleable). Moreover, strides in the law of testamentary capacity could rejuvenate interest in reform of the doctrine of undue influence, which could further reduce the possibility of misguided or malicious application of that doctrine. See Champine, *supra* note 153, at 557.

295. Due execution is not a serious concern because the requirements of the statute, though picayune in some jurisdictions, are not difficult to comprehend. Fraud is not a serious concern because the objection of undue influence, which is easier to prove, covers most fact patterns fraud would cover. See PAGE, *supra* note 67, §§ 14.3, 15.1 (explaining general nature and classification of fraud and undue influence).

estate plan, they may choose an estate planning process that subjects their testamentary wishes to the scrutiny inherent in a post-mortem testamentary capacity assessment. For the many whose testamentary wishes conform to majoritarian norms, this choice will be safe and sound. For others, lifetime capacity assessment may be an important, possibly indispensable, step in securing the right to will property to those whom the testator chooses.

To ensure the availability of real choice, estate planning lawyers must bear a responsibility for advising clients about the option of lifetime capacity assessment in appropriate cases. This responsibility amounts to a duty that has implications for lawyers and clients as well.

The desirability of facilitating lawyers' efforts to assess the capacity of clients whose cognitive skills appear questionable is well-recognized in the ethical realm. The Model Rules of Professional Conduct,<sup>296</sup> for example, allow the lawyer to "take reasonably protective action" when "the lawyer reasonably believes the client has diminished capacity, is at risk of substantial harm . . . and cannot adequately act in the client's own interest."<sup>297</sup> The American College of Trusts & Estates Counsel (ACTEC), which issued its own commentary to explain the application of the Model Rules to estate planning, goes further, providing that:

[I]f testamentary capacity is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will or

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296. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.15 (3d ed. 2001) (stating that Model Rules of Professional Conduct were promulgated by American Bar Association for adoption by states and that as of January 1, 2001, forty-three jurisdictions had adopted Model Rules).

297. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002) (providing ethical standards for attorneys servicing clients with diminished capacity). Model Rule 1.14 provides:

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at the risk of substantial physical, financial or other harm, unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by [Rule 1.6]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

*Id.*; see also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *Geo. J. Legal Ethics* 441, 460-61 (2002) (describing considerations involved in 2002 revision of Model Rules).

other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline.<sup>298</sup>

In the context of a muddled body of testamentary capacity law, the imposition of the type of duty that ACTEC advocates interferes with autonomy because the lawyer has no clear standards to follow.<sup>299</sup> Where testamentary capacity is susceptible to more objective measure, however, the lawyer's responsibilities are more clear-cut and the infringement on autonomy correspondingly less. Working out the scope of such a duty may require clarification or modification to the general duties of zeal,<sup>300</sup> loyalty<sup>301</sup> and confidentiality.<sup>302</sup> The important point for purposes of this proposal is that imposition of an ethical duty on the lawyer to concern

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298. See AM. COLL. OF TRUSTS & ESTATES COUNSEL (ACTEC), COMMENTARIES ON THE MODEL RULES OF PROF'L CONDUCT 218 (ACTEC Found. 3d ed. 1999) [hereinafter ACTEC COMMENTARIES] (commenting on lawyer's role in working with client who may lack capacity).

299. See Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 246-47 (1998) (disagreeing with ACTEC Commentaries to Rule 1.14); see also James D. Gallagher & Cara M. Kearney, Comment, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 604-06 (2003) (discussing potential applications of Rule 1.14 to estate planning context); Comm'n on Significant New Developments in Probate and Trust Law Practice, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1, 29-30 (1987) (noting vagaries of earlier version of Model Rule 1.14, addressing clients under disability, as applied to estate planning context).

300. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 12 (2003), reprinted in 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING app. A, A-19 (3d ed. 2001) (establishing duty of diligence and providing that "lawyer must . . . act with zeal in advocacy upon the client's behalf"). See generally Rein, *supra* note 299, at 245-46 (discussing basis for attorney-client relationship in situations where lawyer must assess client's capacity).

301. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003) (establishing duty to avoid conflicts of interest). Model Rule 1.7 provides:

- (a) Except as provided in paragraph (b) [authorizing representation where specified conditions, including the client's consent, have been satisfied], a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of a client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer.

*Id.*; see also Rein, *supra* note 299, at 247-48 (offering discussion of interrelationship between ethical duty of rule 1.7 and undertaking to assess client's capacity).

302. See MODEL RULE OF PROF'L CONDUCT R. 1.6 (2005) (establishing obligation of confidentiality). Rule 1.6 provides:

himself or herself with a client's capacity is consistent with pre-existing ethical analyses.

A duty to advise about lifetime capacity alternatives also would be consistent with trends in malpractice law. While once uncommon, malpractice claims relating to estate planning are now increasingly recognized for many aspects of the estate planning endeavor—from faulty compliance with will execution requirements to botched tax planning.<sup>303</sup> While the cases themselves have not yet articulated a cogent doctrine to differentiate which types of claims will be recognized, it has been argued persuasively that the standard is simply whether the decedent's intent is clear.<sup>304</sup> Under this standard, a coherent testamentary capacity law would support imposition of a duty recognizable in malpractice claims.

Imposing ethical and legal duties on lawyers to advise clients about lifetime capacity assessment increases the possibility that such assessments will occur. This, in turn, has two major implications for estate planning clients.

First, the imposition of duties relating to capacity assessment increases the cost of estate planning for all of the clients that fall within the scope of

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- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraph (b).
  - (b) A lawyer may review information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    - (1) to prevent reasonably certain death or substantial bodily harm;
    - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another in furtherance of which the client has used or is using the lawyer's services;
    - (3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
    - (4) to secure legal advice about the lawyer's compliance with [the Model Rules];
    - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to response to allegations in any proceeding concerning the lawyer's representation of the client; or
    - (6) to comply with other law or a court order.

*Id.*; see also Rein, *supra* note 299, at 248-50 (illustrating interrelationship between attorney's ethical duty of confidentiality and undertaking to assess client's capacity).

303. See Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 285-341 (2003) (categorizing and discussing complex malpractice cases in estate planning).

304. See *id.* at 368 (noting that courts are developing this standard to limit liability of lawyers).

the duty. This cost increase is out of sync with the widespread desire to minimize costs in an area of practice that is already beleaguered by economic considerations.<sup>305</sup> This consideration counsels in favor of a pragmatic approach to defining the scope of the duty that is mindful of cost. Complete capitulation to cost considerations, on the other hand, eliminates the lawyer's ability to ascertain the true wishes of clients. If the law of wills is to effectuate its fundamental purpose, it must encourage and support efforts to ascertain clients' true wishes.

The second implication that follows from the imposition of duties to advise clients about capacity is that, in some cases, the assessment will indicate that the client ought not to make a will. For those clients, the lifetime capacity assessment produces evidence that may dissuade the lawyer (or another lawyer) from preparing a will. Even if a will is prepared, the existence of the evidence may damage the likelihood that the will is admitted to probate. This reality requires consideration of whether evidence of lifetime testamentary capacity assessment ought to be available to contestants who bring capacity challenges in traditional probate proceedings. Many factors bear on this important question, including the specifics of the FAI. Accordingly, these considerations are most appropriately addressed in the context of a detailed proposal for a lifetime capacity assessment procedural structure.

## V. CONCLUSION

Contemporary expert assessment is the missing link in the quest to transform the unpredictable morass of testamentary capacity decisions into a coherent body of law. The development and use of FAIs in other areas of law offer a model for the development of a testamentary capacity FAI. Testamentary capacity law stagnated for the entirety of the twentieth century; it ought not to continue stagnating in the twenty-first.

In order to move forward, the testamentary capacity doctrine must give clear guidance to the psychologists who would design a testamentary capacity FAI, and procedure must facilitate its use. Doctrinal and procedural modifications to testamentary capacity law must originate in a logical, workable and generally acceptable policy vision. The aim of this Article has been to offer such a vision.

Much remains to be done. The FAI must be designed, the procedural framework must be set forth in detail; a legislative proposal must be packaged and passed; and estate planning lawyers and their clients must be educated about the potential benefit of the reform. The agenda is daunting, but the magnitude of the potential benefit of this reform is even greater. Never has there been such a promising opportunity for meaningful reform in this area where reform has been so near and yet so far for far too long.

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305. See Johnson, *supra* note 85, at 528-30 (recognizing economic considerations as trend in practice).

