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surance contract. This would permit the father of a minor decedent to collect for a separate and distinct bodily injury.

There are two important questions that need to be resolved before judicial interpretation concordant with the tenor of this note can be forthcoming. First, would this interpretation be a judicial encroachment of a legislative area; and, second, would it have desirable consequences policy-wise?

The answer to the first question is a matter of conjecture. If the insurance companies alter policy wording, the result of the liberal construction will be short-lived. Conversely, if the insurance companies increase premiums to absorb the cost of the added protection, the corresponding increase in the minimum liability limits of Florida's financial responsibility law will have been caused by judicial legislation. However, indirect judicial legislation, as is evidenced by Florida's judge-made dangerous instrumentality doctrine, has not been held to constitute error.

In answer to the second question, the policy interpretation herein proposed would effectuate a closing of the practical gap between Florida's minimal mandatory insurance and the ever-increasing cost of injuries and death.

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MENTAL INCOMPETENCE AS IT AFFECTS WILLS AND CONTRACTS

In law, as in medicine, there is an awareness that all men's minds are not the same. Much study has been devoted to the human mind. Most legal writing on this subject has been in the criminal context. Since the propounding of the right-and-wrong test in 1843 in the *M'Naghten* case,[1] there has been a continuing search for the best test of criminal responsibility. The tests, as drawn from various decisions, have varied from acquittal if the crime was the product of an insane delusion[2] to the conclusion that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[3] It is in the criminal area of the law that the greatest publicity is attained. Somewhat less thought has been given to the

[1]10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
[2]Hadfield's Case, 27 Howell St. Tr. 1281 (1800).
[3]Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

comparatively unsensational but equally important field of everyday business and its interrelation with insanity or mental unsoundness. Yet tests are needed here, for example, to determine who can serve as a juror,[4] appear as a witness,[5] escape liability for some torts,[6] make a binding contract,[7] or execute a valid last will and testament.[8] A recent case[9] points out that the tests of criminal responsibility are not the same as those in other areas of the law. Certainly the right-and-wrong test has no application outside the scope of criminal law.[10] Though there are many situations in which mental competence is a factor, the coverage of this note is restricted to mental capacity as it concerns wills and contracts.

The problem has been pointed out by the Supreme Court of Arkansas:[11]

> "The law furnishes no definite enumeration of the mental powers and no exact measure by which to determine the degree of their exercise, in order to decide whether or not an individual is of sound or unsound mind. There are numerous civil proceedings where insanity or mental incapacity may be shown, and the rule for establishing the degree of the insanity necessarily depends upon the purpose for which the insanity is to be proved. It may be that the object of proving insanity is to annul a contract, or to defeat the execution of a will . . . . The rule for establishing the degree of insanity in these various cases varies with the case."

Showing an exactly opposite opinion to that expressed by the Arkansas court is the statement of the Supreme Court of Colorado that contractual capacity and testamentary capacity are the same.[12]

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[4]See FLA. STAT. §40.07 (1959).

[5]See Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892); People v. Enright, 256 Ill. 221, 99 N.E. 936 (1912).

[6]See Phillips' Committee v. Ward's Adm'r, 241 Ky. 25, 43 S.W.2d 331 (1931); Chaddock v. Chaddock, 130 Misc. 900, 226 N.Y. Supp. 152 (Sup. Ct. 1927).

[7]See, *e.g.*, Sheppard v. Cherry, 118 Fla. 473, 159 So. 661 (1935); Douglas v. Ogle, 80 Fla. 42, 85 So. 243 (1920); Downham v. Holloway, 158 Ind. 626, 64 N.E. 82 (1902); French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N.W. 927 (1900).

[8]See FLA. STAT. §731.04 (1959).

[9]Anderson v. Grasberg, 247 Minn. 538, 78 N.W.2d 450 (1956).

[10]See Anderson v. Grasberg, *supra* note 9.

[11]Pulaski County v. Hill, 97 Ark. 450, 456, 134 S.W. 973, 975 (1911).

[12]Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

Other cases hold that it takes less mental capacity to make a will than to enter into a contract.[13] A conclusion as to the validity of any of these statements can better be made after some study of the fields of contractual and testamentary capacity. An attempt is made here to set out the various tests used, to detect their similarities and differences, and to show their application to, and the conclusions to be drawn from, the many factual situations that arise.

CONTRACTS

Text writers[14] and cases[15] point out that contracts of insane persons are usually either void or voidable. Williston states that the generally prevailing modern test for invalidity because of insanity is "whether the alleged lunatic had sufficient reason to enable him to understand the nature and effect of the act in dispute."[16] It is to be noted that this test disregards all aspects of the contracting party's mental ability except his capacity for understanding the particular transaction involved. The person might have been completely incompetent in every other way, but if he understood the particular contract, it is binding upon him. The Florida Supreme Court upheld this test by holding that a contract is valid "if the person has sufficient intelligence to understand the nature of the transaction . . . ."[17] Similarly, the Supreme Court of Georgia accepted this test by upholding the trial court's charge to the jury that "a person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of the nature and consequences of his or her act in making the contract."[18]

It might be concluded from this test that even though the contract is prompted by some insane delusion, it is valid if the person is capable of understanding the outcome of the transaction. Other cases,[19] however, further clarify the competency problem by pointing

[13]*E.g., In re* Weber's Estate, 201 Mich. 477, 167 N.W. 937 (1918); *In re* Barney's Will, 187 Mich. 157, 153 N.W. 730 (1915).

[14]*E.g.*, SIMPSON, CONTRACTS 288 (1954); 1 WILLISTON, CONTRACTS 741 (rev. ed. 1936).

[15]*E.g.*, Sheppard v. Cherry, 118 Fla. 473, 159 So. 661 (1935); Douglas v. Ogle, 80 Fla. 42, 85 So. 243 (1920); Downham v. Holloway, 158 Ind. 626, 64 N.E. 82 (1902); French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N.W. 927 (1900).

[16]1 WILLISTON, CONTRACTS 754 (rev. ed. 1936).

[17]Donnelly v. Mann, 68 So. 2d 584, 586 (Fla. 1953).

[18]Barlow v. Strange, 120 Ga. 1015, 1017, 48 S.E. 344, 345 (1904).

[19]See Sampson v. Pierce, 33 S.W.2d 1039 (Mo. 1930).

out that the reasoning prompting the contract aids in determining the question of ability to understand its "nature and consequences." They make it clear that if the contract is prompted by insane delusions, the afflicted party is not acting rationally, nor is he, according to the law, able to understand the nature and effect of the agreement. This test might be labeled the "capability to understand the particular transaction" test. It should be noted that the emphasis is not upon actual understanding but upon the actor's ability to understand. If he had the ability, it is immaterial that he did not in fact understand the transaction.[20] Other cases have taken the view that actual understanding is required if the transaction is to be valid.[21] These cases, however, represent a minority view. In discussing and applying the theory of insane delusion the courts make it clear that a person might have innumerable insane delusions and still retain his contractual capacity as long as the delusions were not connected with the act sought to be invalidated.[22]

Some cases maintain that the ability of the person concerned to understand and transact business generally[23] is the test of his mental competence. One decision states that "if a person is capable of reasoning correctly on the ordinary affairs of life; or is capable of contemplating and understanding the consequences which usually accompany ordinary acts, he will be held *compos mentis* and be bound by his acts."[24] This certainly is not a proper test of contractual capacity; it completely overlooks the possibilities that one ordinarily capable of transacting business may have an insane delusion that will invalidate the particular agreement in question or that he may understand one contract but not necessarily be able to understand all contracts. Likewise, it disregards the situation in which one ordinarily incompetent to contract makes a binding contract during a lucid interval. The mental capacity at the time of and in regard to the particular transaction is the question that must be determined.[25] Some of the same

[20]See Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946); Barlow v. Strange, 120 Ga. 1015, 48 S.E. 344 (1904).

[21]Drum v. Bummer, 77 Cal. App. 2d 453, 175 P.2d 879 (1946); Carr v. Sacramento Clay Prod. Co., 35 Cal. App. 439, 170 Pac. 446 (1917).

[22]*E.g.*, Weller v. Copeland, 285 Ill. 150, 120 N.E. 578 (1918); Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

[23]Dew v. Requa, 218 Ark. 911, 239 S.W.2d 603 (1951); Pulaski County v. Hill, 97 Ark. 450, 134 S.W. 973 (1911); Titcomb v. Vantyle, 84 Ill. 371 (1877); Baldwin v. Dunton, 40 Ill. 188 (1866).

[24]Baldwin v. Dunton, 40 Ill. 188, 192 (1866).

[25]Gilmore v. Samuels, 135 Ky. 706, 123 S.W. 271 (1909).

cases that set out general business capacity as the determinant[26] also, in seemingly contradictory terms, set out capacity to understand the questioned act as the problem for determination. The two tests are irreconcilable unless the courts are considering ordinary business capacity merely as evidencing understanding of the transaction at issue. General capability or incapability to conduct the ordinary affairs of life should not be overlooked, however, since it may be an evidentiary factor in the determination of the individual's understanding of the particular transaction.[27]

It should be remembered that in civil[28] as well as in criminal[29] actions in which mental capacity or sanity becomes an important factor, the original presumption is always in favor of the sanity of the individual and that the person seeking to rely on lack of sufficient mental capacity has the burden of proof. A dissimilarity occurs, however, between the civil and criminal fields as to the quantum of proof required to overthrow the presumption of sanity. A preponderance of the evidence is required in civil cases,[30] while the criminal law calls for sufficient evidence to overcome any reasonable doubt as to the question of sanity.[31]

WILLS

Among the requirements for the making of a valid will as set out by statute in various states,[32] the testator must have a certain degree of mental capacity. One court recognized this problem and dealt with it by stating:[33]

> "Anything short of a normal and healthy mind . . . , in a medical sense, may constitute insanity or unsoundness of mind,

[26]Dew v. Requa, 218 Ark. 911, 239 S.W.2d 603 (1951); Titcomb v. Vantyle, 84 Ill. 371 (1877); Baldwin v. Dunton, *supra* note 23.

[27]Gilmore v. Samuels, 135 Ky. 706, 123 S.W. 271 (1909).

[28]Hanks v. McNeil Coal Corp., *infra* note 29; Saliba v. James, 143 Fla. 404, 196 So. 832 (1940); Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921); Grove v. Taylor, 143 Md. 184, 121 Atl. 923 (1923).

[29]Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

[30]Dew v. Requa, 218 Ark. 911, 239 S.W.2d 603 (1951); Wilkinson v. Service, 249 Ill. 146, 94 N.E. 50 (1911); Grove v. Taylor, 143 Md. 184, 121 Atl. 923 (1923).

[31]People v. Myers, 20 Cal. 518 (1862); State v. Murray, 11 Ore. 413, 5 Pac. 55 (1884).

[32]*E.g.*, FLA. STAT. §731.04 (1959); IDAHO CODE ANN. §14-301 (1947); OHIO REV. CODE ANN. §2107.02 (1953).

[33]*In re* Guilbert's Estate, 46 Cal. App. 55, 62, 188 Pac. 807, 810 (1920).

> 'but the law does not demand such perfection to give capacity to manage one's affairs and make valid dispositions of property.' The insanity which will render a will invalid is general mental incompetence, or some narrower form under which the testator is the victim of some hallucination or delusion, and in the latter instance the act to be avoided must have been produced in whole or in part by said delusion."

This test is nothing more than a combination of the "ordinary affairs of life" and "insane delusion" tests used in the contracts area. Undoubtedly the court knew what it was looking for, but the statement of the problem warrants further study and explanation. Unless "general mental incompetence" is understood to include incapability to understand the questioned transaction and to exclude the possibility of a lucid interval, the test must be set aside as too broad. Unless so interpreted, it fails to consider that one who is a general mental incompetent, incapable of facing everyday transactions, may still understand the problem of making a will.

Other cases set out in varying language what amounts to a four-point test of testamentary capacity.[34] They require that the testator have the capability of understanding and remembering (1) the nature and extent of the property devised, (2) the persons who are the natural objects of his bounty or who have a valid right to expect to be, and (3) the scope and bearing of the dispositions made. They require further that (4) in forming the plan for distribution he be uninfluenced by any insane delusions.

In order to understand the nature and consequences of the act of making a will, it is necessary that the aforementioned four elements of understanding be present. Certainly a testator cannot understand the consequences of his will if he is not capable of understanding the extent of the property devised, the persons who have some natural right to expect to be beneficiaries, and the persons to whom this property is in fact given. He also must be able to form the scheme of the disposition with a mind free from delusion if he is to understand its consequences. The four requirements, then, are only an explanation or enumeration of the elements that go to make up an understanding of the nature and consequences of the act of making a will. These elements may be helpful in guiding the court or jury to a determina-

[34] *E.g.*, Hamilton v. Morgan, 93 Fla. 311, 112 So. 80 (1927); Newman v. Smith, 77 Fla. 633, 82 So. 236 (1918); Applehans v. Jurgenson, 336 Ill. 427, 168 N.E. 327 (1929).

tion, but the basic problem is still the same. Other courts have not stated the elements but merely set out in simple terms that the testator must be able to understand the business of making a will[35] or to appreciate the effect of the disposition made by him of his property.[36]

Again, as in the determination of contractual mental capacity, the emphasis is on the particular act; and the question of competence turns upon whether the testator had the mental capacity to understand his dispositive act. The presence or absence of insane delusions influencing the making of the will is one of the factors determining the testator's "capability to understand the particular transaction." Or this may be considered alternatively as a separate test. That is, if the testator was able to understand the nature and consequences of the will as determined by elements (1), (2), and (3), did he form the dispositive scheme with a mind uninfluenced by insane delusions? All other capabilities or incapacities of the testator concerning other transactions or periods of time are immaterial except as they evidence the testator's competency in regard to the particular will.

With the emphasis thus placed on the facts of each case, the so-called test to determine mental capacity is not a mathematically certain formula that can be applied to any factual situation in order to arrive at an unquestioned conclusion. It is merely a restatement of the problem in different terms; at most it refines the problem further and establishes capability to understand as the common issue for determination.

Comparison of Contracts and Wills

With the differences in wording reconciled and accepted, the test that emerges as to who is mentally qualified to contract or make a will is the same. The courts are looking for comprehension, or at least capacity to understand. No broad conclusion can be drawn that either the making of a binding contract or the drawing of a valid will requires a greater degree of mental capacity or soundness than the other.[37] Each case requires a decision on its own facts. The intricacies of the individual transaction must be balanced against the capability of the actor. Conceivably a person might make a valid contract and a void or voidable contract on the same day, depending on the degree of complexity. Similarly, the mental power re-

[35]Havens v. Mason, 78 Conn. 410, 62 Atl. 615 (1905).
[36]Thompson v. Smith, 70 App. D.C. 65, 103 F.2d 936 (1939).
[37]Murphy v. Nett, 47 Mont. 38, 130 Pac. 451 (1913).

quired should vary with the complexity of the will.[38] The ability to understand a will disposing of valuable estates with diverse holdings and interests should necessarily require a mind freer from aberration than would be required to comprehend the simple act of contracting to sell a bicycle. Actually the degree of capacity necessary to contract and to devise should not even be compared; each is no more than evidence of the other.[39]

Even if the tests of competency for wills and contracts are the same, a complication arises in connection with wills that may or may not exist in the contract context. In the case of wills, the person whose mental faculty is at issue is necessarily dead before the controversy arises. It is not surprising, therefore, that a greater conglomeration of objective facts should be mustered to prove or disprove the sufficiency of his capacity.

Application of the Competency Test

If the court has determined that it will base its decision as to the mental capacity of the maker of the will or contract on his capability of understanding the particular transaction, it must seek evidence of this capability. Even if it is possible to know as a matter of fact that the actor did not understand the nature and consequences of his act, his *ability* to understand still remains unascertained. The determination sought is of a mental condition, but the court can arrive at an answer only from the evidence of physical manifestations. Capability of the actor to cope with the everyday transactions of business and life, both prior and subsequent to the questioned act, becomes important.[40]

It has been held that actions evidencing mere mental weakness,[41] poor judgment,[42] eccentricities,[43] idiosyncracies,[44] and even hallucinations and delusions,[45] do not of themselves amount to incapacity.

[38]Dillman v. McDaniel, 222 Ill. 276, 78 N.E. 591 (1906); *In re* Weber's Estate, 201 Mich. 477, 167 N.W. 937 (1918).

[39]Murphy v. Nett, 47 Mont. 38, 130 Pac. 451 (1913).

[40]See Gilmore v. Samuels, 135 Ky. 706, 123 S.W. 271 (1909); Ravenscroft v. Stull, 280 Ill. 406, 117 N.E. 602 (1917); *In re* Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19 (1946).

[41]Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921); Waterman v. Higgins, 28 Fla. 660, 10 So. 97 (1891).

[42]See Hawley v. Griffin, 82 N.W. 905 (Iowa 1900).

[43]Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942).

[44]*In re* Hanson's Will, 50 Utah 207, 167 Pac. 256 (1917).

[45]Lewis v. Arbuckle, 85 Iowa 335, 52 N.W. 237 (1892).

It should be considered, however, that what may be termed mere mental weakness in one transaction may be incapacity in a more complex situation. The label of "mere mental weakness" is a tag affixed to a particular mental state, already determined not to be incompetence, in a given situation. This tag is only a conclusion; it adds nothing to an understanding of future cases. Nevertheless, the courts are concerned with questionable actions of the individual, and somewhere along the continuum of acts that display mentality varying from normalcy to idiocy will draw the line determining whether he could have understood his contract or will. Conduct not affecting comprehension of the act at issue indicates "mere mental weakness" and is not germane to the problem to be determined. In making a decision the courts consider the actor's habits, business ability, actions, and conversation at other times in so far as they tend to show presence or absence of capacity for the questioned act. Consequently, almost anything a person has done or said may bear on his capacity to contract or to make a will as long as it was not too remote in time from the act at issue.[46]

The contract[47] or will[48] is itself an important evidence of capacity. The disposition or agreement made in the will or contract is considered by the courts, and the naturalness or fairness of it can indicate presence or absence of capacity. But the courts announce that unnaturalness or unfairness alone will not invalidate an otherwise valid transaction.[49] Likewise it has been held that the person contracting need not be able to make a good bargain.[50] Consequently an inequitable contract does not necessarily indicate incapacity. These are merely factors to be considered along with other evidence.[51]

CONCLUSION

Contractual or testamentary capacity can be destroyed by mental incompetence if it is sufficiently pronounced. No rigid mental stand-

[46]Mileham v. Montagne, 148 Iowa 476, 125 N.W. 664 (1910).

[47]Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921).

[48]*In re* White's Estate, 128 Cal. App. 2d 659, 276 P.2d 11 (1954); Norris v. Bristow, 361 Mo. 691, 236 S.W.2d 316 (1951).

[49]*E.g.*, Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953); O'Brien v. Collins, 315 Mass. 429, 53 N.E.2d 222 (1944); *In re* Holmes' Will, 224 N.C. 830, 32 S.E.2d 614 (1945).

[50]Sprinkle v. Wellborn, 140 N.C. 163, 52 S.E. 666 (1905).

[51]Brown v. Emerson, 205 Ark. 735, 170 S.W.2d 1019 (1943); *In re* Mickich's Estate, 114 Mont. 258, 136 P.2d 223 (1943); Branson v. Roelofsz, 52 Wyo. 101, 70 P.2d 589 (1937).