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Testamentary Incapacity, Undue Influence, and Insane Delusions

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TESTAMENTARY INCAPACITY, UNDUE INFLUENCE, AND INSANE
DELUSIONS

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I. INTRODUCTION 176

II. DISCUSSION 179

 A. WILL [IN]VALIDITY 180

 1. Testamentary Incapacity 184

 a. Nature and Extent of One’s Property 189

 b. Natural Objects of One’s Bounty 190

 c. Disposition One Wishes to Make 192

 2. Insane Delusions 192

 a. Irrational Belief 197

 b. Not Susceptible to Correction 198

 c. Affecting a Bequest: Causation 199

 3. Undue Influence 200

 a. Testator’s Susceptibility 207

 b. Wrongdoer’s Opportunity to Influence 208

 c. Disposition of Wrongdoer to do Wrong 209

 d. Results of the Influence: Causation 212

 4. Other Roadblocks to Will Validity (or Theories for the Will
 Contestant) 213

 a. Fraud: Intentional Trickery and Deception 213

 b. Duress: Amped-up Undue Influence 214

 c. Tortious Interference with an Expectancy: A Nascent Tort
 Theory 214

 5. The Uncertain Status of Mistakes 215

 B. ESTATE OF BERG: AN ILLUSTRATION OF FREEDOM OF
 DISPOSITION 217

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1. <i>The Facts and Background</i>	217
2. <i>The Procedure and Trial</i>	220
3. <i>The Opinion and its Quiet Legacy</i>	221
C. READING AND ASSESSING <i>BERG</i>	228
III. CONCLUSION	230

ABSTRACT

Testamentary incapacity, undue influence, and insane delusions are recurring doctrines in the context of an impaired, weakened, or confused individual leaving a will, the validity of which comes under question. In the case of In re Estate of Berg the South Dakota Supreme Court, in 2010, held that an individual possessed testamentary capacity even where he suffered a static lifelong delusion about the identity of his father and was unable to articulate an accurate estimate of his net worth. This article uses Berg as a means of framing the requirements of a valid Last Will and Testament along with the theories under which a will may be set aside, with special emphasis given to the doctrines of insane delusions and undue influence. The author offers an analysis of the holdings and outcome in Berg along with related cases and authority in context. Berg, the author concludes, was correctly decided, its reasoning squaring with longstanding deference towards the freedom of testamentary disposition, even for individuals with diminished capacity and mental delusions.

I. INTRODUCTION

In the case of *In re Estate of Berg*,¹ the South Dakota Supreme Court upheld the validity of a will executed by Fred Berg, an individual under a conservatorship who suffered from numerous delusions and who had been unable to live independently for most of his adult life. Fred Berg's will left his estate to his nephew Roger to the exclusion of Fred's siblings and their descendants.² Following a three-day trial, at which a recognized psychiatrist offered his forensic opinion that Fred was thought disordered and psychotic on the date the will was made, the Honorable Jerome Eckrich held that Fred possessed testamentary capacity and that his will was not the product of undue influence.³

Capacity to make a will depends on the individual being capable of identifying the "natural objects of their bounty" and both the nature and extent of

1. 2010 SD 48, 783 N.W.2d 831.

2. *Id.* ¶¶ 20, 28, 783 N.W.2d at 836, 838.

3. *Id.* ¶¶ 30-32, 38-39, 783 N.W.2d at 839-41.

their property.⁴ Fred believed that his father was either the television and movie actor Fred MacMurray or a non-existent German man.⁵ He had also, at some periods in the past, claimed several other non-existent relatives: a sister Hattie, a brother Charles, a niece Murtle, and a “common-law-son” Eugene.⁶ Moreover, Fred indicated that his net worth was \$100,000, while in fact it was five times that amount.⁷ Nevertheless, the South Dakota Supreme Court upheld the will.

The following discussion assesses will validity primarily through the lens of South Dakota law, although case law from other jurisdictions is also considered. The article’s observation and conclusions have import on a wider scale than South Dakota as will validity doctrines share more commonalities than dissimilarities across the country. Forgery—where the testator⁸ has not herself signed her will—has been omitted from this article.⁹ The discussion excludes considerations of whether an otherwise valid will has been revoked either by the testator’s acts or by operation of law due to certain categories of changed circumstances such as marriage.¹⁰ The discussion ignores the operation of the slayer rule, which functions to override an otherwise valid bequest when the devisee kills the testator.¹¹ The discussion bypasses ethical issues present when the drafting attorney improperly benefits as a devisee.¹² The discussion omits an

4. See *infra* Part II.A.1 for a discussion of testamentary capacity. The “natural objects of one’s bounty” typically refers to the individual’s close family members. See *infra* Part II.A.1.b for a discussion of this element of testamentary capacity.

5. *Estate of Berg*, 2010 SD 48, ¶ 32, 783 N.W.2d at 839 n.11.

6. *Id.* ¶ 32, 783 N.W.2d at 839.

7. *Id.* ¶¶ 16, 20, 783 N.W.2d at 835-36.

8. “Testator,” which is a term borrowed from civil law, means “[a] person who has made a will; esp., a person who dies leaving a will,” while “testatrix” is the feminine form of testator. BLACK’S LAW DICTIONARY 1613 (9th ed. 2009). This article uses the term testator regardless of the gender of the individual who made a will. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS AND ESTATES 44 (9th ed. 2013) (noting that the authors “do not use the Latin suffix indicating feminine gender for women” such as testatrix or executrix although it is “still in current fashion”).

9. See, e.g., *Brown v. Traylor*, 210 S.W.3d 648, 677 (Tex. App. 2006) (upholding a jury determination that a will was not forged based on conflicting evidence).

10. See S.D.C.L. § 29A-2-804(b)(1) (2004) (providing that divorce revokes bequests to a former spouse in a will as well as a nomination for a former spouse as personal representative); see also S.D.C.L. § 29A-2-301 (2004) (providing that marriage following the date of a will entitled a surviving spouse to an intestate share in most circumstances). Except for the “slayer rule” and divorce, no other change in circumstances affects a will revocation. S.D.C.L. §§ 29A-2-508, -803, -804(f) (2004). Devised property, however, may be subject to the doctrine of ademption by satisfaction. S.D.C.L. §§ 29A-2-606, -609 (2004). Omitted children born to or adopted after the date of the will may be included as additional devisees. S.D.C.L. § 29A-2-302 (2004). These doctrines, however, are considered rules of construction rather than revocations. See S.D.C.L. § 29A-2-601 (2004).

11. S.D.C.L. § 29A-2-803; *In re Estate of Gibbs*, 490 N.W.2d 504, 507 (S.D. 1992); *Zotell v. Mut. Life Ins. Co. of N.Y.*, 245 N.W. 58, 65 (S.D. 1932).

12. Some states invalidate certain bequests to attorney-drafters by statute or impose a presumption of invalidity on account of undue influence or fraud. See, e.g., CAL. PROB. CODE § 21380 (West 2015). In others like South Dakota, the attorney may be subject to disciplinary action, but the will instrument itself would be subject to an undue influence analysis on account of the confidential attorney-client relationship. See S.D.C.L. RULES OF PROF’L CONDUCT, APP., CH. 16-18, R. 1.8(c) (2004) (providing that “[a] lawyer shall not solicit . . . a testamentary gift [from a client] . . . unless the lawyer . . . is related to the client and the gift is not significantly disproportionate.”). See also *Comm. on Prof’l. Ethics v. Randall*, 285 N.W.2d 161 (Iowa 1979) (disbarring a former ABA president for drafting a will that named him as a devisee); *Haynes v. First Nat’l State Bank of N.J.*, 432 A.2d 890 (N.J. 1981) (presumption of

analysis of creditor claims or elective share petitions both of which can also defeat the operation of a valid will, in whole or in part.¹³ Nor are pre-mortem will challenges explored.¹⁴ Finally, I do not include the problem of nonprobate asset transfers such as accounts titled with rights of survivorship or governed by a beneficiary designation, even where the vesting of those rights may be contrary to the provisions of a will.¹⁵ Instead, the following discussion centers on the validity, invalidity, or, in some cases, the partial invalidity, of a will.¹⁶

As an additional threshold matter, it should be noted that the tests for capacity vary across different contexts.¹⁷ An individual's legal capacity to execute a deed or enter into marriage are assessed differently than the capacity to make a will.¹⁸ An individual may qualify for the protection offered by a conservatorship yet still retain the ability to make a will.¹⁹ Arguably, the

undue influence by lawyer drafting will leaving client's estate to another client of the same lawyer, even though the devisee was the testator's daughter).

13. See S.D.C.L. §§ 29A-2-201 to -214 (2004) (detailing elective share rights and procedures); S.D.C.L. §§ 29A-3-801 to -817 (2004) (setting forth creditor rights and procedures). An enforceable creditor claim can deplete or eliminate what devisees would otherwise receive under a will. Conversely, an enforceable creditor claim asserted by a devisee can increase what the devisee-creditor receives to the detriment of other heirs. Claims of exempt property may also undermine the operation of a will. S.D.C.L. § 29A-2-403 (2004) (a decedent's surviving spouse or minor children are entitled to a homestead allowance); S.D.C.L. § 43-31-13 (2004) ("Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead . . . and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age.").

14. See S.D.C.L. §§ 21-24-1 to -16 (2004) (outlining declaratory actions); S.D.C.L. § 29A-5-420 (2004) (authorizing court-approved conservator-made wills for protected persons); S.D.C.L. § 55-4-57 (2012 & Supp. 2014) (describing pre-mortem procedures for validating revocable and irrevocable trusts). Some states specifically authorize pre-mortem will contests and validity proceedings. See, e.g., ARK. CODE ANN. § 28-40-202 (West 2015); N.D. CENT. CODE § 30.1-08.1-01 (West 2015); OHIO REV. CODE ANN. § 2107.081 (West 2015); see also Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990) (explaining evolution and modern theories of ante-mortem probate). South Dakota's declaratory judgment procedures are available for pre-mortem will contests. See S.D.C.L. § 21-24-3 ("Any person interested under a . . . will . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder").

15. See S.D.C.L. §§ 29A-6-101 to -114 (2004); *McDonough v. Kahle*, 1999 SD 14, 588 N.W.2d 600 (probate of joint bank account and farmland). See also Anne C. Hajek, Note, *Will Substitutes, Joint Accounts, and Tentative (Totten) Trusts: Uncertainty after Estate of Bol*, 34 S.D. L. REV. 381 (1989) (summarizing South Dakota jurisprudence of Totten trusts).

16. If an individual lacks testamentary capacity at the time of the execution of a will, codicil, or the revocation of a will or a codicil, then the entire purported testamentary act fails; yet undue influence or an insane delusion may invalidate only the affected provisions of a will or codicil. WILLIAM M. MCGOVERN, JR., SHELDON F. KURTA & JAN ELLEN REIN, *WILLS, TRUSTS AND ESTATES* 277 (1988). See *In re Estate of Lane*, 492 So. 2d 395, 397-98 (Fla. Dist. Ct. App. 1986) (striking severable bequest to wrongdoer exerting undue influence but salvaging remainder of will). But see *Kelley v. First State Bank of Princeton*, 401 N.E.2d 247, 256 (Ill. App. Ct. 1980) (asserting that "[w]hen undue influence is found, it invalidates the whole instrument, and not just those provisions benefiting the person found guilty of such influence, unless contrary findings are made with respect to various provisions of the instrument.") (citation omitted).

17. Lawrence A. Frolik & Mary F. Radford, "Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA J. 303, 307-09 (2006).

18. *Lee v. Lee*, 337 So. 2d 713, 714 (Miss. 1976); *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. Dist. Ct. App. 1980) (concluding decedent was competent to marry his housekeeper).

19. E.g., *In re Estate of Hastings*, 347 N.W.2d 347, 350 (S.D. 1984) (noting that "[t]he fact that a guardian was appointed over a testator's estate does not of itself invalidate a will because of a lack of

capacity test for entering into a revocable trust agreement is different than the capacity test to make a will or to designate beneficiaries on a policy of life insurance even though all have similar testamentary objectives and outcomes.²⁰ The capacity to make a lifetime gift is assessed under a different standard than the ability to make a will, and the capacity to make an irrevocable lifetime gift may vary with the form or content of the gift.²¹ The confusing array of capacity tests rests on the recognition that different legal acts or decisions depend on assessments of capacity particular to the act or decision in question.²² In the discussion which follows, however, testamentary capacity will be considered in isolation.

II. DISCUSSION

There are several different avenues by which the operation of a will may be frustrated as highlighted above. In this article, I focus on the threshold issue of testamentary capacity along with two additional doctrines by which a will can be held invalid once testamentary capacity has been established: insane delusions and undue influence. Situating these doctrines in relation to one another can be helpful in developing an understanding of the precise contours and limits of each legal concept. The doctrine of insane delusions in particular has often suffered from conflation with the related but independent question of testamentary capacity.

Testamentary capacity precedes an analysis of either undue influence or insane delusions; it considers whether the individual had the capacity to understand the nature and extent of his property, to know the natural objects of his bounty, and to form an intent regarding the disposition of his property at

testamentary capacity.”). The capacity requirement for executing a will is being of sound mind. S.D.C.L. § 29A-2-501 (2004). Eligibility for a conservatorship depends on proof, by clear and convincing evidence, that an individual’s “ability to respond to people, events and environments is impaired to such an extent that the individual lacks the capacity to manage property or financial affairs or to provide for his support or the support of legal dependents without the assistance or protection of a conservator.” S.D.C.L. §§ 29A-5-303, -312 (2004).

20. *Hilbert v. Benson*, 917 P.2d 1152, 1156 (Wyo. 1996), *overruled by* WYO. STAT. ANN. § 4-10-601 (West 2015). *But see* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) cmts. d-e (2003); RESTATEMENT (THIRD) OF TRUSTS § 11(1) (2003); UNIF. TRUST CODE § 601 (2010) (providing that “[t]he capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”).

21. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c). To effect a gift, the donor must have the capacity to make a will and “be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.” *Id.* *See also* *Benell v. Ross*, 808 N.W.2d 657, 661-62 (Neb. Ct. App. 2012) (reversing the trial court’s decision to set aside a deed by a moderately mentally impaired grantor which granted a farm to a longtime friend after his death despite the complexity of the deed where grantor “was capable of understanding and comprehending the purport and effect of giving away property and that he knew what he was doing when he gave the farm to” the donee). *But see* *Stockwell v. Stockwell*, 2010 SD 79, ¶ 26, 790 N.W.2d 52, 62 (applying test for testamentary capacity to *inter vivos* gifts by an adult male grantor “intended . . . to govern the disposition of his . . . property at or near the end of his life”).

22. *See* Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 PENN ST. L. REV. 1061, 1075-77 (2013) (advocating for a uniform capacity test applicable to a set of estate planning documents).

death. The related but distinct doctrine of insane delusions asks whether an irrational delusion affected certain provisions of an otherwise valid will. The doctrine of undue influence considers whether one or more provisions of a will should fail on account of a wrongdoer's interference with the testator's estate plan.

A. WILL [IN]VALIDITY

Testamentary capacity focuses exclusively on an individual's mental faculties and ability to form a meaningful understanding of the relevant aspects of the environment. The individual's internal mental state is the sole issue. The individual is viewed in isolation with an eye towards determining whether she possessed the minimal mental abilities to form an intent to make a testamentary gift. The assessment of whether an individual possessed either testamentary capacity or incapacity is thus a gatekeeping function, but the *outcome* of the assessment is never entirely separated from the assessment itself: if the individual had testamentary capacity, the will instrument operates on her estate, but if an individual lacked testamentary capacity, then her estate will be distributed under the dictates of intestacy. Intestacy is a disfavored outcome, and so, accordingly, is an assessment that an individual lacked testamentary capacity.²³ Because the outcome of intestacy is undesirable, so too is a determination of incapacity. Thus, the law favors a finding of capacity because it disfavors the alternative outcome.

Only after it has been determined that an individual had testamentary capacity will the doctrines of insane delusions and undue influence have any possibility of operating. An individual lacking capacity can never be subject to an insane delusion or undue influence because those doctrines describe invalidating circumstances on all, or portions, of an otherwise valid will; the doctrines of insane delusions and undue influence apply to wills executed by a testator with capacity. This is a significant point that is easy to miss because many reported decisions which discuss testamentary capacity also consider undue influence or insane delusions in the alternative, often allow the doctrines to overlap.²⁴ Some authority even muddily proclaims that “[a] person having an insane delusion is incompetent to make a will,” erroneously collapsing insane delusions into considerations of capacity.²⁵

23. See *In re Estate of Heibult*, 2002 SD 128, ¶ 21, 653 N.W.2d 101, 106 (citations omitted) (providing preference for testacy); *In re Estate of Schnell*, 2004 SD 80, ¶¶ 8-9, 683 N.W.2d 415, 418 (citations omitted) (providing burden of proving testamentary incapacity on will contestant).

24. See, e.g., *Odom v. Hughes*, 748 S.E.2d 839, 845 (Ga. 2013) (upholding jury findings that the decedent lacked testamentary capacity and that the will was the product of undue influence, fraud, and monomania (i.e., an insane delusion)).

25. CIV. CODE OF THE TERRITORY OF DAKOTA § 543 (1883); see also *In re Estate of Millar*, 207 P.2d 483, 488 (Kan. 1949). *Estate of Millar* quoted a prior decision, which proclaimed: “[i]t is familiar law that one laboring under an insane delusion which influences him to make a will in a certain way does not possess testamentary capacity” and criticized it as “leav[ing] no room for distinction between an insane delusion and testamentary incapacity.” *Estate of Millar*, 207 P.2d at 488 (quoting *Harbison v. Beets*, 113 P. 423, 426 (Kan. 1911)).

All three doctrines—testamentary incapacity, insane delusions, and undue influence—require a careful consideration of the individual’s state of mind, so a bleeding at the edges of the doctrines of incapacity and insane delusions in particular is not surprising.²⁶ Incapacity and insane delusions are especially at risk for improper blending when an irrational delusion interferes with an individual’s ability to satisfy one or more of the requisites of testamentary capacity; where, for example, the individual is of limited financial means yet irrationally clings to the belief that he owns the Empire State Building.²⁷ Indeed, all three of the doctrines overlap to some degree as they all involve a consideration of the individual’s mental state. Yet the doctrines of incapacity, undue influence and insane delusions are distinct and their distinguishing hallmarks are important and sometimes determinative of a correct judicial outcome.

For example, in *In re Hargrove’s Will*,²⁸ a fairly typical case from New York, a decedent allegedly suffered from an “insane delusion” that his two children were born of a different father.²⁹ Decedent Hargrove possessed

26. See, e.g., *McGrail v. Rhoades*, 323 S.W.2d 815, 821 (Mo. 1959) (asserting that “notwithstanding full mental capacity in general and in all other respects a testator may lack mental capacity to execute a will by reason of an insane delusion”); ROBERT W. ANDERSEN & IRA MARK BLOOM, *FUNDAMENTALS OF TRUSTS AND ESTATES* 90-91 (4th ed. 2012) (claiming that an individual may lack testamentary capacity on account of “the general lack of ability to put things together” or by reason of “operating under an ‘insane delusion’ over something in particular”); JEFFREY N. PENNELL & ALAN NEWMAN, *WILLS, TRUSTS & ESTATES* 68, 70 (4th ed. 2013) (asserting that there are two types of testamentary incapacity: one where the testator is unable to understand one of the three or four elements of testamentary capacity and another—“derangement”—where the individual suffers from “paranoia, general dementia, or a delusion”). The foregoing authority confirms that testamentary capacity and insane delusions are separate and distinct categories, yet confusingly suggest that insane delusions are a form of testamentary incapacity. This is incorrect as the outcome of testamentary incapacity (setting aside the entire will) is entirely different than an insane delusion (excising only the affected portions of the will). “That an insane delusion or monomania may exist notwithstanding full mental capacity . . . is now universally recognized.” J.E. Macy, Annotation, *Insane Delusion as Invalidating a Will*, 175 A.L.R. FED. 882, 886 (1948).

27. Such a case presents a close call but should result in a finding of testamentary incapacity under a strict application of the three-part test since the decedent lacked the ability to identify the nature and extent of his assets. A proponent of a will in a case like this would be tempted to argue—as one would in an insane delusion case—that the irrational belief about owning the Empire State Building did not necessarily affect the provisions of the will; to argue for a lack of causation. If the decedent left everything to his cousin, the argument would go: “It matters little whether the decedent was worth one billion (as he believed) or merely \$10,000 (as was the case) since he demonstrated that he wished everything he owned to pass to his cousin.” Although it is a compelling argument, the test for testamentary capacity does not consider causation, it simply asks whether the individual had the ability to identify his assets, his family, and how he wished his assets to be distributed. *But see In Re Berrien’s Will*, 5 N.Y.S. 37, 43 (1889) (holding that a testator’s delusion that she was quite wealthy when she had less than \$2,000 did not invalidate her will since it had no relation to the provisions of the instrument); *Benoist v. Murrin*, 58 Mo. 307, 318, 326 (Mo. 1874) (holding that a millionaire’s belief that he was “financially ruined” did not invalidate his will without a showing that the belief influenced the will’s provisions). A better approach would be to argue that the belief was not entirely irrational or delusional by showing some basis for the belief that the decedent owned the Empire State Building. See, e.g., *In re Estate of Berg*, 2010 SD 48, ¶ 32, 783 N.W.2d 831, 839 n.11 (justifying the decedent’s confusion about the identity of his father as based on a statement that the decedent’s father made to a nurse within the decedent’s earshot denying parenthood).

28. 28 N.Y.S.2d 571 (N.Y. App. Div. 1941), *aff’d*, 42 N.E.2d 608 (N.Y. 1942).

29. *Id.* at 572.

testamentary capacity because he could identify the natural objects of his bounty (his children) but harbored an insane delusion concerning the children's background (their parentage).³⁰ The same situation would be present if Hargrove could identify his spouse, but suffered an irrational delusion that she had been untrue to him or had divorced him years before. In either case, the testator can identify his family members (although suffering from a delusion concerning *characteristics* of those family members).

Thus, if Hargrove could also identify the nature and extent of his assets and the disposition he wished to make of them at death, he should qualify as having testamentary capacity.³¹ The question would then—and only then—become whether he nevertheless suffered from an insane delusion.³² In *Hargrove's Will*, the appellate court reversed the jury's verdict that "the testator suffered from an insane delusion that two children born to his wife during their marriage were not his" given that Hargrove exhibited no mental deficiencies and there existed some rational explanation for his delusion about his children's paternity.³³ His delusion, in other words, fell short of an insane delusion since the questioning of his children's parentage was not completely irrational under the circumstances.

The distinctions between incapacity and insane delusions are important since a finding of testamentary incapacity will cause the entire will to fail. Where there are several bequests but not all are tainted by the delusion, a finding of an insane delusion will only cause the affected portions of the will to fail.³⁴ In wills with a single residual bequest, the distinction will be meaningless in terms of outcome for there is only one dispositive provision at issue. But in other cases, distinguishing between the doctrines will allow the unaffected parts of a will to survive (and intestacy to be avoided, to that extent) as the law prefers. Counsel and courts should therefore be vigilant in distinguishing between the doctrines of incapacity and insane delusions and prefer a finding of insane delusion to a finding of testamentary incapacity since intestacy may, to a greater extent, be avoided and freedom of disposition honored. A finding of testamentary incapacity results in a greater berth of assets passing by intestacy

30. See *id.* at 573.

31. See *id.* ("The law is that assuming that decedent was mistaken in his belief that he was not the father of the children of his divorced wife, that fact would not necessarily establish testator's incapacity.") Another example which at first blush seems like an insane delusion might be an individual who suffers from the irrational delusion that his wife is Snow White and his children are the Seven Dwarfs when in fact the individual is unmarried and has three adult sons, and he adheres to this delusion even after being presented with compelling evidence of his sons' identity and parentage. A purported will executed by such an individual would be void for lack of testamentary capacity assuming that the court concluded that the individual was incapable of identifying the natural objects of his bounty. Who exactly constitutes "the natural objects of one's bounty" is itself a difficult question as explained *infra* Part II.A.1.b.

32. *Hargrove's Will*, 28 N.Y.S.2d at 575.

33. *Id.* at 574 (concluding that there was some rational basis for the decedent's alleged insane delusion concerning the parentage of his children). "The belief may be illogical or preposterous, but it is not, therefore, evidence of insanity in the person." *Id.* at 573. See also *In re Estate of Metz*, 100 N.W.2d 393, 398 (S.D. 1960). ("There can be no undue influence of a person devoid of mental competency. The will, in such case, would be invalid because of incompetency.").

34. See *infra* notes 87-90 and accompanying text.

than a more limited finding of insane delusion where a decedent's assets governed by unaffected provisions of the will may avoid intestacy and pass as intended.

The assessment of an individual's testamentary capacity takes place in a kind of abstract vacuum and considers the individual's ability to grasp their assets and family and express a testamentary plan. An insane delusion considers certain circumstances external to the testator's mental state. The factual focus widens when one moves from a consideration of testamentary incapacity to insane delusions. An insane delusion exists when a testator maintains an irrational belief which is not susceptible to correction and which affects a provision of his will. Because an element of an insane delusion is whether the belief was susceptible to correction, courts consider whether the testator was presented with evidence which would lead a reasonable person to reconsider their delusion in light of that evidence.³⁵

For example, a testator (that is, an individual with testamentary capacity) may disinherit his youngest daughter out of a belief that she worships Satan. Of relevance to the question of whether the belief constitutes an insane delusion would be whether the testator had been presented with corrective evidence that his daughter was attending seminary and was, in fact, extremely devout. An insane delusion can be contrasted with testamentary incapacity insofar as an insane delusion assertion will require consideration of external circumstances: the introduction of refuting evidence for the testator's consideration and the testator's response to it. If, in this example, the testator's belief that his daughter worshipped Satan was wholly unfounded, uncorrectable, and a symptom of a "diseased mind" which caused him to make his will in a certain way, the affected provisions would fail.³⁶ With testamentary incapacity, by contrast, the reasonableness or justification of an individual's inability to comprehend their assets and natural objects of their bounty should be irrelevant; the question is simply whether or not they possessed that ability, irrespective of etiology.

Undue influence (the third doctrine explored here in depth) also considers a testator's state of mind, and—to a greater degree than insane delusions—also considers external circumstances. Undue influence is best contrasted with both testamentary incapacity and insane delusions in that it includes a third party actor, a wrongdoer, an individual who intentionally exerted improper influence on the testator.³⁷ Undue influence involves a villain. When a wrongdoer's influence affects the provisions of the testator's will, undue influence is present

35. See *infra* Part II.A.2.b for a discussion regarding the testator being confronted with evidence which refutes their delusion.

36. See, e.g., *In re Estate of Selb*, 190 P.2d 277, 282 (Cal. Ct. App. 1948) (citations omitted) (noting that "an insane delusion is the spontaneous production of a diseased mind . . .").

37. See *Ball v. Boston*, 141 N.W. 8, 12 (Wis. 1913) ("The actor is treated as a wrongdoer,—one bent upon a reprehensible purpose . . ."). But see *Odom v. Hughes*, 748 S.E.2d 839, 844 (Ga. 2013) (quotation omitted) ("There is no requirement that the undue influence be directly attributable to the propounder or to a single beneficiary.").

and the affected provisions may be stricken.³⁸ Like insane delusions, any unaffected provisions of the will stand and intestacy, at least in part, can be avoided. Undue influence includes a consideration of the testator's state of mind, however, since typically only a testator in a weakened or dependent state can be susceptible to a wrongdoer's acts.³⁹ First, however, I will discuss testamentary incapacity.

1. Testamentary Incapacity

To make a will an individual must be of "sound mind" and at least eighteen years old.⁴⁰ South Dakota Codified Laws do not contain a definition of sound mind, but case law has defined the term as being capable, without prompting, "to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty, and the disposition that he desires to make of such property."⁴¹ Thus, testamentary capacity rests on a three-part test which examines the testator's ability to conceptualize the aspects of her environment relative to forming a testamentary plan.⁴² The test requires the testator to have

38. *E.g.*, *Williams v. Crickman*, 405 N.E.2d 799 (Ill. 1980) (invalidating a devisee's option to purchase property because of undue influence).

39. An individual wrongfully influenced to make a will in a certain way (or to avoid revoking a will) who is not in a weakened or dependent state may still be shown to be under duress or fraud in making their will when a wrongdoer's acts are sufficiently connected to the provisions of an otherwise valid will. *See infra* Part II.A.4.a, b for a brief discussion of duress and fraud.

40. S.D.C.L. § 29A-2-501 (2004). The minimum age requirement in South Dakota contains no exceptions. Other states allow individuals younger than eighteen to make a will in certain circumstances. *E.g.*, IOWA CODE ANN. § 599.1 (West 2015) (stating "all minors attain their majority by marriage."); TEX. ESTATES CODE ANN. § 251.001(3) (West 2015) (allowing minors who are members of the U.S. armed forces to make wills); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.2 cmt. i (2003) (noting that an emancipated minor may make a will). Relatively recently, a male as young as fourteen and a female as young as twelve could make testamentary dispositions of personal property if it were proven that they possessed sufficient maturity. GEORGE W. THOMPSON, *THE LAW OF WILLS* 73 (1916).

41. *In re Estate of Dokken*, 2000 SD 9, ¶ 13, 604 N.W.2d 487, 491 (quoting *In re Estate of Podgursky*, 271 N.W.2d 52, 55 (S.D. 1978)). *Dokken*, a case remarkably similar to *Berg*, involved a World War II veteran under a guardianship suffering from dementia praecox and forensic testimony from Dr. Stephen Manlove. *Id.* ¶¶ 3, 21, 604 N.W.2d at 489, 493.

42. Cases are fairly uniform on the general requirements of testamentary capacity but may break the elements into three, four, or even five subparts. *See Macy, supra* note 26, at 885 (articulating a five-part test). Macy provides as follows:

The making of a will requires mental action for the following purposes: (1) to comprehend the nature of the proposed instrument, (2) to decide upon executing it, (3) to recall the nature and extent of the property to be disposed of, (4) to consider existing relations toward those whom the will is to affect, (5) to choose the disposition to be made. If the testator is able to perform these mental duties with rational understanding, the resulting instrument is his will; otherwise it is not. He need not be shown actually to have performed them; it may even appear that he forgot the existence of certain distant relatives, or his ownership of certain property. It is enough if he had the degree of mind and memory needed to perform them.

Id. at 885. Compare this jury instruction approved by the Texas Court of Civil Appeals:

You are instructed that by the term "sound mind" as used in this charge is meant, that the person making the will must at the time of the execution of the will, have had sufficient mental ability to understand the business in which she was engaged, the effect of her act in making it, and the nature and extent of her property; she must be able to know her next of kin and the natural objects of her bounty and the claims upon her; she must have memory sufficient to collect in her mind the

the capacity to form an understanding of her assets, her family (or other individuals closest to her), and the disposition she wishes to make. Although some cases suggest that testators must have an accurate understanding of these basic facts, the more thoughtful judicial opinions simply require that the testators have the capacity or mental ability to know these things.⁴³ (Admittedly, the fact that an individual misapprehends her net worth by a significant margin is strong evidence tending to show that she lacks the ability to identify her assets, but it may simply demonstrate that she is inattentive or unconcerned with her holdings.) In addition, of course, a testator must have testamentary intent⁴⁴ and adhere to the formalities in executing a will demanded by law.⁴⁵

The treatment of testamentary capacity has evolved over time as psychiatric understandings of cognition have deepened and the rights of individuals with disabilities have expanded.⁴⁶ The general trajectory in the law of wills is a liberalization of the requirements for both execution formalities of the will document and the state of mind of the individual making the will.⁴⁷ The

elements of the business about to be transacted, and to hold them long enough to perceive their obvious relation to each other, and to be able to perform a reasonable judgment as to them.

In re Estate of Price, 401 S.W.2d 98, 101 (Tex. Civ. App. 1966).

43. Compare *Russell v. Russell*, 197 S.W.3d 265, 269 (Tenn. Ct. App. 2003) (“The capacity to make a will is the comprehension of ‘the property being disposed of, the manner of its distribution, and the persons receiving it.’”) (quotation omitted) (emphasis added), with *George v. Moorhead*, 78 N.E.2d 216, 219 (Ill. 1948) (citations omitted) (holding that “it is not necessary that the testator actually knew, or recalled, the natural object of his bounty, but . . . whether he had the capacity to know it”).

44. S.D.C.L. § 29A-1-201(52) (Supp. 2014) (defining a will as “an instrument, including a codicil, executed with testamentary intent and in the manner prescribed by this code . . .”). See also *Nelson v. First Nw. Trust Co. of S.D.*, 274 N.W.2d 584, 587 (S.D. 1978). *Nelson* emphasizes that the instrument itself must be of a testamentary character, that is, that it operates to transmit property at death or nominate a personal representative. *Id.* “A will may provide for the passage of all property the testator owns at death . . .” S.D.C.L. § 29A-2-602 (2004); see also S.D.C.L. § 29A-3-203(a)(1) (2004) (providing that a person nominated as a personal representative by a will has priority for appointment). A “conditional will” may fail if the bequests are clearly made contingent on a certain event such as not surviving an imminent operation or returning from a journey, although courts typically declare the contingency to reflect a motive for executing the instrument rather than an actual condition. See, e.g., *In re Estate of Martin*, 2001 SD 123, ¶¶ 6, 19, 635 N.W.2d 473, 475-76 (upholding a holographic instrument prefaced by the words “If anything should happen to me on this trip to Rapid City” even though the decedent passed away at a later date); *In re Estate of Kimmel*, 123 A. 405, 405, 407 (Pa. 1924) (upholding a holographic instrument beginning “If enny [sic] thing happens” as supportive of finding testamentary intent). The letter in *Kimmel’s Estate* contained non-testamentary provisions as well (e.g., “glad you poot your Pork down in Pickle . . . now always poot it down that way & you will not miss it & you will have good pork fore smoking you can keep it from butcher to butcher the hole year round.”) yet was still upheld as a valid will in view of the fact that the author died later the same day. *Estate of Kimmel*, 123 A. at 405. A will executed as a joke fails for lack of underlying testamentary intent. *McGOVERN*, *supra* note 16 at 272; see also *Vickrey v. Vickrey*, 170 So. 745, 746 (Fla. 1936) (invalidating will executed in order to join a fraternal lodge).

45. S.D.C.L. §§ 29A-2-502 to -504 (2004).

46. See generally Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006).

47. See, e.g., S.D.C.L. § 29A-2-503 (excusing deviation from will formality requirements where clear and convincing evidence establishes that the decedent’s instrument constitutes his will); *In re Estate of Ehrlich*, 47 A.3d 12, 15-16 (N.J. Super. Ct. App. Div. 2012) (affirming a lower court’s reasoning that an “unexecuted copy of a purportedly executed original document” adequately represented the “decedent’s final testamentary intent to be admitted into probate” under New Jersey’s “harmless error” statute); UNIF. PROBATE CODE § 2-503 cmt. (1997) (explaining that “[b]y way of dispensing power, this new section allows the probate court to excuse a harmless error in complying

execution formality requirements look to the qualification of the instrument itself; whether the document was properly executed and attested.⁴⁸ The underlying state of mind requirements of the testator speak to the eligibility of the testator himself to make a will; whether he was of sufficient age and mental capacity when the instrument was made.⁴⁹ A third class of requirements for will validity considers the circumstances in which the instrument was made; whether the testator was under duress, was unduly influenced, was the victim of fraud, and so on.

In the relatively distant past, courts struggled with constructing a workable test for the "sound mind" requirement of testamentary capacity.⁵⁰ Some English courts required the testator to be perfectly sane or free from any mental illness.⁵¹ Some courts have undoubtedly been prejudiced by a testator's eccentricities, but even cases from the nineteenth century take care to distinguish incapacity from eccentricity.⁵² The oddest or most repugnant individual may possess testamentary capacity.⁵³ The early thinking of jurists' was "that 'idiots and

with the formal requirements for executing or revoking a will."). New Jersey courts actually impose a two-part evidentiary threshold for so-called harmless error wills:

[F]or a writing to be admitted into probate as a will under *N.J.S.A.* 3B:3-3, the proponent of the writing intended to constitute such a will must prove, by clear and convincing evidence, that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes.

Estate of Ehrlich, 47 A.3d at 16 (quotation omitted). The statute itself, like South Dakota's and the Uniform Probate Code section upon which both the South Dakota and New Jersey statute are based, contains only a single evidentiary requirement: "that the decedent intended the document or writing to constitute" his will. S.D.C.L. § 29A-2-503. No reported South Dakota cases have considered the application of the harmless error rule in the context of wills.

48. See S.D.C.L. § 29A-2-502(b) (witnessed wills); S.D.C.L. § 29A-2-502(a) (holographic wills); S.D.C.L. § 29A-2-503 (writings qualifying as wills if established by clear and convincing evidence); see also S.D.C.L. § 29A-5-420 (2004) (conservator-made wills); *In re Estate of Hobelsberger*, 181 N.W.2d 455, 460-61 (S.D. 1970) (upholding a testator's signature in the form of a mark where he "could not write because he had trouble with his hands."); *In re Estate of Protheroe*, 85 N.W.2d 505, 506-07 (S.D. 1957) (citation omitted) (noting that an order admitting an unsigned will to probate would constitute "a patently void decree.").

49. At common law, an alien was not allowed to make a will. WILLIAM HERBERT PAGE, *A CONCISE TREATISE ON THE LAW OF WILLS* 100 (1901). Nor could a married woman. *Id.* at 101-06. Convicted felons were also not allowed to make a will. See *id.* at 99; see also *Kenyon v. Saunders*, 30 A. 470 (R.I. 1894).

50. PAGE, *supra* note 49, at 108. "The attempt has been made again and again to select some arbitrary test of mental capacity But the new combinations of fact presented by later cases have invariably caused the courts to recede from the tests thus arbitrarily selected as unjust and unreasonable." *Id.*

51. *Id.*

52. *E.g.*, *Bennett v. Hibbert*, 55 N.W. 93 (Iowa 1893) (holding a testator competent despite the fact that he allowed cats and dogs to eat at the same table with him).

53. *E.g.*, *In re Estate of Gorkow*, 56 P. 385 (Wash. 1899) (upholding a testator's will against claims of incapacity and undue influence). The court's description of the testator is worth quoting:

The substantial facts, without controversy, shown, were that the deceased was a man of violent and ungovernable passions; that he was inordinately dissipated; that his acts evinced a total want of moral nature and natural affection; that he had for a number of years preceding his death been the subject of several painful maladies, some of them incurable, and that physically his system was completely wrecked; that he required a body servant for a considerable time constantly in attendance; that his second marriage was eccentric, foolish, and, from every reasonable standpoint, reprehensible. In fact, it may be conceded, from the whole testimony, that deceased,

persons of non-sane memory' should not make wills."⁵⁴ American courts have always held, however, that even "a person not perfectly sane might [have] sufficient mental capacity to make a will."⁵⁵ A person might attempt suicide yet still possess testamentary capacity.⁵⁶ An individual "may be possessed of delusions, and yet be capable of making a valid will . . ."⁵⁷ Individuals with Alzheimer's disease can have testamentary capacity.⁵⁸ For the past one or two hundred years, the test for testamentary capacity—while perhaps not its application—has remained relatively static.⁵⁹ The Restatement (Third) of Property—Wills and Other Donative Transfers articulates the test for testamentary capacity as follows:

[T]he testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.⁶⁰

South Dakota case law phrases the test somewhat differently from the Restatement and collapses its four-part test into a three-part test, holding that a testator has the capacity to make a will "if, without prompting, he is able to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty and the disposition that he desires to make of such property."⁶¹ Few if any cases seem to turn on the third element, since the disposition the testator desired to make of her property is presumably set forth in the instrument in question, yet the capacity to form a specific testamentary intention is clearly a prerequisite.⁶² Indeed, testamentary intent is the theme

as stated in the rather vigorous language of counsel for petitioner, was "a moral leper," and that the inference might reasonably be drawn from all these facts that his mental vigor was impaired.

Id. at 387. See also, e.g., *Hindmarch v. Angell*, 60 P.2d 434, 436 (Cal. 1936) (describing testator who chased children out of his yard with a hose and went around with a blanket wrapped around himself).

54. EUNICE L. ROSS & THOMAS J. REED, *WILL CONTESTS* § 6:11 (2d ed. 2014) (citing Statute of Wills, 1534, 34 & 35 Hen. 7, ch. 5 (1534)).

55. PAGE, *supra* note 49, at 109; see, e.g., *Blough v. Parry*, 40 N.E. 70, 74 (Ind. 1895) (noting that an individual may have "some defect of the mind, some delusion in relation to some subject entirely foreign to the execution of the will, the disposition of the property, the devisees, or those who are the natural objects of his bounty" yet retain testamentary capacity).

56. *Koegel v. Egner*, 35 A. 394, 394 (N.J. Prerog. Ct. 1896).

57. *Bukhart v. Gladdish*, 24 N.E. 118, 119 (Ind. 1890).

58. E.g., *Wilson v. Lane*, 614 S.E.2d 88, 89-90 (Ga. 2005).

59. See PAGE, *supra* note 49, at 118 (noting the test for testamentary capacity "is clear and simple" but "[i]ts application to the various forms of departure from the normal type is very difficult").

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

61. *In re Estate of Long*, 2014 SD 26, ¶ 18, 846 N.W.2d 782, 786 (quoting *In re Estate of Dokken*, 2000 SD 9, ¶ 13, 604 N.W.2d 487, 491); accord *Stockwell v. Stockwell*, 2010 SD 79, ¶ 27, 790 N.W.2d 52, 62 (quoting *In re Estate of Pringle*, 2008 SD 38, ¶ 20, 751 N.W.2d 277, 284).

62. A more cumbersome phrasing of the testamentary capacity test can be found in the book *Concise Treatise on the Law of Wills*, which incorporates a requirement that the testator understand the testamentary act itself:

The testator must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, *the*

underpinning the three primary doctrines considered in this article.⁶³ Testamentary capacity ultimately tries to get at the question of whether an individual was capable of forming testamentary intent. A testator suffering from an insane delusion or acting under undue influence can be said to have been thwarted in forming testamentary intent, despite their sufficient abilities, on account of interference from an irrational delusion or a wrongdoer's pressures.

The test for testamentary capacity in South Dakota case law is well established, as is the presumption in favor of capacity.⁶⁴ The proponent of a will does not bear the burden of establishing each element of the requirements for testamentary capacity (as the phrasing of the requirements might otherwise suggest).⁶⁵ Perhaps this is an overly technical point, but the phraseology of the test for testamentary capacity suggests that it is the will proponent who bears the burden of proving capacity. A more accurate phraseology might be to state that an individual seeking to establish a lack of testamentary capacity may do so by establishing by a preponderance of the evidence that the decedent was *unable*, without prompting, to comprehend the nature and extent of his property, the persons who were the natural objects of his bounty, or the disposition that he desired to make of such property.⁶⁶ But however the test is phrased, the three

nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation towards them.

PAGE, *supra* note 49, at 114 (emphasis added).

63. Testamentary intent typically relates to an intent to dispose of property at death, but it may also, or alternatively, include the intent to name an executor. See *In re Estate of Vasgaard*, 253 N.W. 453, 458 (S.D. 1934).

It is to be borne in mind, however, that the disposition of property according to the specifically expressed desire of the testator is only one of the permissible functions of a will. To be a valid will the instrument executed by the testator must either provide for the disposition of his property after death or nominate an executor. It may and usually does do both, as was the case here, but it is sufficient if it does either.

Id.; see also *In re Estate of Nelson*, 274 N.W.2d 584, 587 (S.D. 1978) (holding that "testamentary intent alone is not sufficient to a document if it lacks testamentary character by failure to dispose of property or appoint an executor.").

64. S.D.C.L. § 29A-3-407 (2004 & Supp. 2014). But see *Voight v. Bauer*, 232 N.W.2d 442, 444 (S.D. 1975) (citing repealed South Dakota Codified Law section 29-2-3 and the prior rule that the burden is on the proponents of a will to establish testamentary capacity).

65. See S.D.C.L. § 29A-3-407. The proponent of a will has only "the burden of establishing prima facie proof of due execution . . ." along with death and venue. *Id.*

66. "Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." *Id.* There are no pattern jury instructions in South Dakota on the issue of testamentary capacity, insane delusion, or undue influence. But see South Dakota Pattern Jury Instructions (Civil) 30-10-150 (2008) (jury instructions for undue influence in a contract matter). References to jury instructions from sister states' case law may be problematic where the other jurisdiction allows for the burden of establishing testamentary capacity to shift to the proponent of the will. See, e.g., *Melson v. Melson*, 711 A.2d 783, 788 (Del. 1998) (holding that where challenger establishes, by clear and convincing evidence, that testator was of weakened intellect, will was drafted by person in confidential relationship with testator, and drafter received substantial benefit from the will, the burden of demonstrating testamentary capacity shifts to will proponent). California's probate code adheres to the South Dakota burden allocation and codifies the test for testamentary incapacity thusly:

An individual is not mentally competent to make a will if at the time of making the will . . . (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

elements of property, family, and formation of a plan are each required; these three elements are separately considered below.⁶⁷

a. Nature and Extent of One's Property

First, to possess testamentary capacity, an individual must be capable of understanding the nature and extent of her property. The requirement that an individual possess the ability to understand both the nature and the extent of her property before making a will is actually a two-part requirement insofar as the nature of one's property can be distinguished from its extent.⁶⁸ The nature of property relates to the type of property owned, whether realty, fixtures, cash, accounts, receivables, personal property, leases, trademarks, goodwill, commercial paper, or intangibles. The extent of property relates to the value or quantity held: how much cash, how many acres, or the number of shares or bonds.⁶⁹

Only a general understanding of one's property is required.⁷⁰ In fact, capacity is correctly assessed by asking whether the individual had the *ability* to understand their property; the *accuracy* of that understanding is only relevant insofar as greater error tends to show impaired mental abilities. The gatekeeping function of assessing an individual's testamentary capacity is achieved by weeding out only those persons who truly lack the ability to conceptualize what

CAL. PROB. CODE § 6100.5(a)(1) (West 2015).

67. *But see* THOMPSON, *supra* note 40, at 465 ("It has been held sufficient if he have capacity to comprehend the nature of the act in which he is engaged at the time he executes the will."). This more streamlined and direct approach to testamentary capacity has a certain appeal. *See also, e.g., In re Estate of Gorkow*, 56 P. 385 (Wash. 1899). In *Estate of Gorkow*, the court noted:

The result of the best-considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction; or, in popular phrase, that the testator should at the time of executing the will know and understand what he was about.

Id. at 387 (quoting 1 ISAAC F. REDFIELD, THE LAW OF WILLS 124 (3d ed. 1869)).

68. *See* Podgursky v. Sorenson, 271 N.W.2d 52, 55 (S.D. 1978); *cf. In re Estate of Fish*, 522 N.Y.S.2d 970, 972 (N.Y. App. Div. 1987) (denying probate of a will where decedent did not know and was incapable of holding in his mind the nature, extent, and condition of his property).

69. In *Estate of Hastings*, a trial court's determination of testamentary incapacity was affirmed based in part on the decedent Jesse Hastings' inability to comprehend (or at least articulate) the nature and extent of his property. *In re Estate of Hastings*, 347 N.W.2d 347, 348, 351 (S.D. 1984). An attorney (who refused to draft a will for Jesse; the wills at issue were ultimately drafted by another attorney) testified how he attempted to assess whether Jesse had testamentary capacity:

I then asked him how many sections of land he had, and I got no response. I then asked him how many acres he had. I got no response. I asked him how many quarters of land he had. I got no response. I asked him where his land was from his home buildings that he was living in. I got no response.

Id. at 348.

70. *See In re Jones' Will*, 85 N.Y.S. 294, 296 (1890) (noting the fact that the decedent's will may have been based on a mistaken idea as to the extent of his property did not invalidate the will).

they own.⁷¹ If one is unable to conceptualize what one owns, it follows that one lacks the ability to form testamentary intent with regard to one's estate.

b. Natural Objects of One's Bounty

Second, to possess testamentary capacity, an individual must be capable of identifying the natural objects of his bounty. In the case of *Estate of Hastings*, for example, a will was set aside based on testimony that when asked about his relatives, the individual would not give direct responses, but merely smile and turn to his brother.⁷² Although black letter law holds that for an individual to have testamentary capacity he must have the ability to identify the natural objects of his bounty, courts across the country have struggled with a workable definition for "natural objects of one's bounty." Some courts have defined "natural objects of one's bounty" objectively by strict reference to one's heirs in intestacy.⁷³ Others have adopted a more subjective analysis and consider who might stand in closest relation to the individual, taking account of their particular friendships and attachments. In South Dakota, no single definition has been articulated.⁷⁴

The "natural objects of one's bounty" element of testamentary capacity first requires the court to determine who the natural objects of the decedent's bounty were before proceeding to an assessment of whether the decedent was capable of identifying those persons. Thus, hidden within this element are two subparts. Rigidly applying an objective inquiry into whether the decedent could identify the individuals who would succeed to his estate in intestacy fails to properly account for those individuals with only remote family members or collateral heirs such as dozens of nieces and nephews that the decedent hardly knew. A rigid intestacy identification inquiry also misfires when applied to an individual with close friendships and relations with non-kin.

Take, for example, an unmarried and childless gay man in a long-term relationship who makes a will leaving his estate to his mother after sustaining a debilitating traumatic brain injury in a car accident. If an objective natural objects inquiry reveals that the man could identify his parents, even though, on account of his brain injury he could no longer recall or identify his partner, a finding of testamentary capacity would follow. A "natural objects" inquiry which simply referenced intestacy statutes would result in a finding of capacity since the man could identify his intestate heirs (his parents) despite the man having lost the ability to identify the single most important person in his life, his

71. See *In re Will of Khazaneh*, 834 N.Y.S.2d 616, 622 (2006) (applying a "test of task specific functionality" to conclude that the decedent's "knowledge" of the value of his estate "is of little or no consequence[]" and concluding that testamentary capacity was shown).

72. *Estate of Hastings*, 347 N.W.2d at 348, 351.

73. See, e.g., *Norris v. Bristow*, 219 S.W.2d 367, 370 (Mo. 1949); *In re Estate of Berg*, 2010 SD 48, ¶ 45, 783 N.W.2d 831, 842 (citing *Norris*, 219 S.W.2d at 370).

74. See *infra* notes 301-310 and accompanying text for a summary of the *Berg* court's reluctance to articulate a more specific definition on the objects of the one's bounty.

same-sex partner. A less rigid application of the prong would reach the more sensible outcome of finding testamentary incapacity. This illustration reveals that framing the identity of the natural objects of one's bounty—before inquiring into the testator's ability to identify them—can itself present a challenging inquiry for the fact-finder in a will contest case. The only real guidepost in conducting this inquiry is to ask which individuals can be fairly said to have constituted the most "natural" successors to the decedent's bounty and "natural" is an imprecise and potentially value-ridden term.⁷⁵

Undue influence cases occasionally examine the "unnaturalness" of a testamentary disposition.⁷⁶ So-called unnatural bequests are one factor which tend to show the operation and effect of undue influence on a testator. In assessing whether an unnatural bequest supports a claim of undue influence, courts consider whether the testator's will benefitted the natural objects of his bounty.⁷⁷ In that context, the South Dakota Supreme Court has held that a decedent's twenty-seven nieces and nephews constituting his heirs at law "because of such relationship alone, are not the natural objects of his bounty."⁷⁸ Similarly, in *Hamm's Estate*, where a testator's son was dead, his wife had been accused of being involved in the son's murder, other distant relatives had no contact with the testator for years, and the nursing home which received a bequest had provided the testator with "comfort and ease", the will was "not so

75. Compare CAL. PROB. CODE § 6100.5(a)(1)(C) (West 2015) (requiring, in connection with this third element of testamentary capacity, that the individual "remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.").

76. E.g., *In re Estate of Anders*, 226 N.W.2d 170, 174 (S.D. 1975); *In re Estate of Swanson*, 222 N.W. 491, 491 (S.D. 1928). The "unnatural" character of a will disinheriting the testator's spouse is not a factor tending to show undue influence where the unnaturalness is explained. In *Estate of Vetter*, the testator had articulated his feelings regarding spousal disharmony thusly: "I am getting all fed up with it. I have made a Will and I have left everything to my mother." *In re Estate of Vetter*, 66 N.W.2d 519, 523 (S.D. 1954). "[W]e cannot commend his action," the South Dakota Supreme Court noted, "but we cannot deny that he was privileged so to act." *Id.* Conversely, the more "natural" a decedent's will, the more likely the courts will be to conclude that the individual had capacity:

If such dispositions be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations—if they be such as might justly have been expected—this is itself said to be persuasive evidence of testamentary capacity. The rationality of the act goes to shew the reason of the person.

F. Philip Manns, Jr., *Testamentary Capacity Litigation in Virginia*, 18 RICH. J.L. & PUB. INT. 159, 223 (2015).

77. *In re Estate of Hobelsberger*, 181 N.W.2d 455, 459 (S.D. 1970). The Alabama Supreme Court attempted to delineate the parameters of an unnatural bequest in the late nineteenth century:

A will is not necessarily unnatural because of a discrimination between heirs of the same degree, or because of the entire exclusion of a part or all of them. The circumstances of the case must determine the naturalness of a donation or bequest. It cannot be said, as a matter of law, that affection for one, though not of kin, raised from infancy by the donor, and who has always been a member of the family of the donor, is unnatural, or that a gift or bequest to such a person is unnatural.

Henry v. Hall, 17 So. 187, 192 (Ala. 1895); see also Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 33 (2006) (concluding that while the test for testamentary capacity suggests the importance of medical evidence relative to cognitive abilities, "the 'moral aspect' of the will, specifically its fairness to family, carries more weight than evidence of cognition *per se*[']").

78. *Estate of Hobelsberger*, 181 N.W.2d at 459 (citing *In re Estate of Rowlands*, 18 N.W.2d 290 (S.D. 1945)).

unnatural as to be important[.]”⁷⁹ Determining what constitutes an unnatural disposition in the context of undue influence may be as difficult as defining the natural objects of one’s bounty in an assessment of testamentary capacity.⁸⁰

c. Disposition One Wishes to Make

The third prong of the test for testamentary capacity—that one must have formed an intent of how to dispose of their property at death—while axiomatic, proves difficult to illustrate with reported decisions. The reason for the lack of cases that turn on the presence or absence of this element lies in the fact that the testamentary plan itself is always contained within the testamentary instrument under challenge.⁸¹ The will, essentially, speaks for itself in this regard.⁸²

2. *Insane Delusions*

An individual with testamentary capacity may nevertheless have her will (or certain provisions of it) set aside on account of an insane delusion.⁸³ An insane delusion is a wholly irrational belief that the testator adheres to and which affects dispositions in a will.⁸⁴ To establish an insane delusion, some courts also require proof that the testator adhered to the irrational belief despite being presented with evidence to the contrary which would have changed a reasonable person’s mind; that the testator’s beliefs were unsuccessfully challenged during

79. *In re Hamm v. Hamm*, 262 N.W.2d 201, 206-07 (S.D. 1978).

80. See, e.g., *Lipper v. Weslow*, 369 S.W.2d 698, 703 (Tex. Civ. App. 1963) (concluding that a testator’s “will did make an unnatural disposition of her property in the sense that it preferred her two children over the grandchildren by a deceased son.”).

81. The test for testamentary capacity articulated in Indiana cases simply omits this third element: Only where the testator lacks mental capacity at the time of executing the will to know (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their deserts, with regard to their treatment of and conduct toward him, will the law in Indiana invalidate a will.

Farner v. Farner, 480 N.E.2d 251, 259 (Ind. Ct. App. 1985) (citation omitted).

82. See *In re Estate of Lillibridge*, 69 A. 1121, 1121 (Pa. 1908) (proclaiming that “[w]here an instrument speaks for itself, and by its terms is a testamentary disposition of property, if legal proofs be furnished of its execution, the law will presume that the maker signed it understandingly, and that he intended it to be his will.”).

83. Stated another way, “[a]n insane delusion is a belief that is so against the evidence and reason that it must be the product of derangement.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (2003).

84. One of the earliest phrasings of an insane delusion can be found in *Dew v. Clark*, 162 Eng. Rep. 410 (1826). When the testator:

[O]nce conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having one so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception [he] is said to be under a delusion

Id. at 414. Compare CAL. PROB. CODE § 6100.5(a)(2) (West 2015) (defining an insane delusion as “a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual’s devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.”).

his lifetime.⁸⁵ If particular provisions of a will are affected by specific beliefs unsupported by any rational explanation, those provisions will fail.⁸⁶ The unaffected provisions will remain since an insane delusion inquiry presumes an otherwise valid will executed by an individual with testamentary capacity.⁸⁷

An insane delusion is not a mere mistake of fact, nor a mere eccentricity, it is a false belief not founded on reason.⁸⁸ If there is a rational basis for the belief it cannot be deemed an insane delusion.⁸⁹ And a delusion, even an irrational one, will not cause a bequest to fail unless it can also be shown that the delusion affected the will; causation, in other words, is a required element with insane delusions.⁹⁰

85. PENNELL & NEWMAN, *supra* note 26, at 71 (“Some states also require that the falsity of the testator’s conclusions were pointed out and the testator continued to believe them nevertheless.”).

86. *E.g.*, *In re Horton v. Hewitt*, 17 P.2d 184 (Cal. 1932). The “delusion necessarily must have operated upon and directly caused the inclusion in the will of the testamentary provision in question . . .” *Id.* “A person who suffers from an insane delusion is not necessarily deprived of capacity to make a donative transfer. A particular donative transfer is invalid, however, to the extent that it was the product of an insane delusion.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (2003). “A person suffering from an insane delusion is not incapacitated from making a donative transfer, but only from making a donative transfer that is the product of the insane delusion.” *Id.* § 13 cmt. s; *see also* Alan J. Oxford II, *Salvaging Testamentary Intent by Applying Partial Invalidity to Insane Delusions*, 12 APPALACHIAN J. L. 83, 83 (2012) (asserting that “if a testator otherwise possesses testamentary capacity and the insane delusion does not affect every provision in the will, then testamentary freedom requires that courts apply the doctrine of partial invalidity to preserve any salvageable piece of the testator’s legitimate testamentary intent” but noting cases which invalidate entire will).

87. *In re Estate of Klein*, 183 P.2d 518, 526 (Wash. 1947). *But see* *Ahmann v. Elmore*, 211 S.W.2d 480, 486 (Mo. 1948) (suggesting that an insane delusion could invalidate the entire will).

88. *Frank v. Greenhall*, 105 S.W.2d 929, 940 (Mo. 1937) (citation omitted); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s.

89. The “insanity” of an insane delusion is sometimes expressed as a “spontaneity” or “causelessness” requirement. *See* Macy, *supra* note 26, at 887-88 (noting that many cases hold “that to be an insane delusion the belief must be shown to have been spontaneously conceived”). The belief, in other words, must be “purely a product of the imagination, based on no evidence, however slight.” *Id.* at 888. The belief must be “incredible” and a “condition of such aberration as indicates an unsound or deranged condition . . .” *In re Estate of Watlack*, 945 P.2d 1154, 1158 (Wash. Ct. App. 1997) (citations omitted). The requirement that an insane delusion “spring from a diseased condition of mind” helps distinguish insane delusions from mere mistakes. *Dibble v. Currier*, 83 S.E. 949, 950 (Ga. 1914).

90. *E.g.*, *Beeden v. Stone*, 992 P.2d 1167 (Colo. 2000) (holding will leaving estate to decedent’s friend valid despite paranoid beliefs concerning listening devices in his car and assassination attempts against him and his dog as they had not been shown to affect or influence the terms of the will). “If an insane delusion is shown, but the delusion did not affect the dispositions, then the will stands. Much of the litigation over insane delusions therefore focuses on causation.” JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS AND ESTATES* 168 (8th ed. 2009). *See also, e.g.*, *In re Estate of Millar*, 207 P.2d 483, 487-88 (Kan. 1949) (upholding will where testator “suffered some abnormal condition when he believed himself to be a proficient linguist (there was no evidence of his proficiency in any foreign language), a knife thrower, a gunman, or when he thought a colored glass window was his wife frozen in ice” because hallucinations did not necessarily affect the provisions of the will). *Estate of Millar* contains an excellent distillation of the doctrine of insane delusions:

A belief does not amount to “an insane delusion, unless it appears that his belief is wholly without any basis whatever, and that the testator has obstinately persisted in it against all argument which may have been employed to dissuade him. If there are any facts, however little evidential force they may possess, upon which the testator in reason may have based his belief, it will not be an insane delusion.”

Id. at 487 (quotation omitted).

Despite its name, which resonates with psychiatric trappings, an insane delusion is a legal concept rather than a scientific one.⁹¹ An individual may suffer from a delusion that elephants are alien beings that are taking over the planet, or that the government has implanted listening devices in his brain. These are probable manifestations of mental illness or emotional disorders. In common parlance, classifying these kinds of beliefs as “insane delusions” might be acceptable. In terms of the assertion of a claim of an insane delusion which seeks to set aside a will (or parts thereof), causation, along with, in some jurisdictions, a showing that the delusion could not be corrected with evidence that would lead a reasonable person to re-examine the belief in question are required, even where the delusion is clearly symptomatic of a serious psychiatric malady. A delusion about elephants or a belief about governmental cranial conspiracies are not insane delusions if the will is unaffected. And they may not be insane delusions if unsuccessful efforts at correcting them cannot be shown.

In 2004, the South Dakota Supreme Court adopted North Dakota’s description of insane delusions in *Estate of Schnell*:

An insane delusion is insanity upon a single subject. An insane delusion renders the person afflicted incapable of reasoning upon that particular subject. He assumes to believe that to be true which has no reasonable foundation in fact on which to base his belief. A person persistently believing supposed facts which have no real existence against all evidence and probability, and conducting himself upon the assumption of their existence, is so far as such facts are concerned, under an insane delusion.

An insane delusion may exist even though there was some evidence from which the person afflicted might have formed his belief of judgment. It is a belief which is not based upon reasonable evidence, or at least without any evidence from which a sane man could draw the conclusion which form the delusion.⁹²

Schnell represents South Dakota’s first contemporary recognition of the doctrine of insane delusions. The *Schnell* opinion suggests that one element of insane delusions is that the testator was presented with evidence contradicting his irrational belief, yet still retained the belief.⁹³ Thus, the doctrine as adopted

91. Compare AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS DSM-IV-TR 821 (4th ed. 2000) (defining a delusion as a belief “not one ordinarily accepted by other members of the person’s culture or subculture . . .”).

92. *In re Estate of Schnell*, 2004 SD 80, ¶ 15, 683 N.W.2d 415, 420 (quoting *In re Estate of Flaherty*, 446 N.W.2d 760, 763 (N.D. 1989)).

93. In *Schnell*, the South Dakota Supreme Court cited the following cases:

See *Breeden v. Stone*, 992 P.2d 1167, 1170 (Colo. 2000) (defining insane delusion as “a persistent belief in that which has no existence in fact, and which is adhered to against all evidence”); *In re Estate of Diaz*, 271 Ga. 742, 524 S.E.2d 219, 221 (1999) (insane delusion is “a delusion having no foundation in fact and that springs from a diseased condition of mind”); *Dixon v. Webster*, 551 S.W.2d 888, 892 (Mo. Ct. App. 1977) (insane delusion is “where a person imagines something extravagant to exist which really has no existence whatever, and . . . is incapable of being reasoned out of his false behalf, he is in that respect insane”); *Melody v. Hamblin*, 21 Tenn. App. 687, 115 S.W.2d 237, 246 (1937) (a person is said to suffer from an insane delusion “when he conceives something extravagant or unreasonable to exist which has no existence except in his

in South Dakota might be encapsulated as (1) an irrational belief without basis in fact; (2) which the testator adheres to despite compelling argument or evidence to the contrary; and (3) which affects certain provisions of a will.⁹⁴

Considering whether an individual's will is a product of an insane delusion presumes testamentary capacity.⁹⁵ Stated another way, an insane delusion can be a legal issue only when it has first been determined that the testator had capacity.⁹⁶ A will contestant may establish that an individual with testamentary capacity nevertheless suffered from an insane delusion that affected the will, or certain portions of it, rendering those affecting provisions invalid.

For example, in a recent Georgia case, *Odom v. Hughes*,⁹⁷ Louise Burton deeded her home to two of her three children and one grandchild, reserving a life estate.⁹⁸ She also executed a will leaving her estate to two children and another grandchild, again excluding her third child, Barbara Odom, because of a large loan from her that Barbara had failed to repay.⁹⁹ Later, Louise came to believe that her relatives had stolen her home. Even when presented with a copy of "the deed memorializing her transfer of the property to them" which showed this was not the case, she clung to the idea.¹⁰⁰ Her subsequent will left her entire estate to Barbara unless her other children re-conveyed their remainder interests in her home; the will was declared invalid by a jury on account of Louise's monomania (or insane delusion).¹⁰¹ Louise's delusion was unfounded, uncorrectable, and

own abnormal imagination, but having once conceived the thing or conditioned to exist, it is impossible to reason him out of it").

Id. ¶ 16, 683 N.W.2d at 420. These citations to the definitions of insane delusion in *Breedon*, *Dixon*, and *Melody* strongly suggest that South Dakota requires, as an element of an insane delusion, that the testator could not be argued out of the falsity of his beliefs with evidence to the contrary.

94. See ROSS & REED, *supra* note 54, at § 6:11 (noting that all the insane delusion formulations by the courts "have the following common elements: If a testator is suffering from an 'insane delusion,' the testator will (1) possess an irrational acceptance of a phenomenon as actual, when it is not actual, and (2) in contemplation of the phenomenon, will subsequently alter testamentary plans."). "An insane delusion is a false belief, for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction, through evidence or argument." *Jackson v. Austin*, No. CA99-34, 1999 WL 760974, at *4 (Ark. Ct. App. Sept. 22, 1999) (citations omitted).

95. See PAGE, *supra* note 49, at 146 (stating that "undue influence presupposes and requires mental capacity as essential to its existence."). "If testator has mental capacity, the question of undue influence may become of vital importance as the only available means of attacking the will, while if the testator has not mental capacity, there is no need of invoking the doctrine of undue influence to overthrow the will." *Id.*

96. An insane delusion may be confused with lack of testamentary capacity. For example, in *Schnell*, the will opponents contended that the decedent failed the test for testamentary capacity because an insane delusion rendered him unable to identify the natural objects of his bounty. *Schnell*, 2004 SD 80, ¶ 13, 683 N.W.2d at 419. The alleged insane delusion was that the decedent's sons wanted to harm him. *Id.* Yet an insane delusion presumes testamentary capacity. The correct argument would have been that the testator knew his sons, but that an insane delusion—that his sons intended to hurt him—caused him to omit his sons from his will.

97. *Odom v. Hughes*, 748 S.E.2d 839 (Ga. 2013).

98. *Id.* at 841-42.

99. *Id.* at 841.

100. *Id.* at 845 (citing *Ashford v. Van Horne*, 580 S.E.2d 201 (Ga. 2003)).

101. See *id.* at 842. As far back as the 1930s, Georgia defined monomania as "a diseased condition of the mind and is to be distinguished from error or bad judgment. It can be caused from a previous illness and from the effects of injury or other conditions of the mind." *Franklin v. First Nat'l Bank*, 200

caused her to make a will she would not have otherwise made and so the doctrine of insane delusions invalidated her otherwise valid will.

Insane delusions were first seemingly recognized by the South Dakota Supreme Court in *Schnell* in 2004, although the court failed to acknowledge a much earlier South Dakota case recognizing insane delusions.¹⁰² In the 1912 decision of *Irwin v. Lattin*, Mary Bumgarner's will bequeathed her estate to the National Spiritualists' Association; five years later, she was institutionalized at the Hospital for the Insane in Yankton, South Dakota.¹⁰³ The trial court found that at the time of the execution of the purported will, Mary held the irrational belief that departed spirits were directing her to leave her estate to the Spiritualists' Association, and that she did so because of these beliefs.¹⁰⁴ Probate of the will was denied. The South Dakota Supreme Court affirmed, but took pains to distinguish between religious beliefs and communications from beyond the grave that impelled the testator and destroyed her free agency.¹⁰⁵ Ninety-two years passed before *Schnell*, the next reported South Dakota decision considering insane delusions.¹⁰⁶ In the eleven years since *Schnell*, insane delusions have been considered in just one other South Dakota reported decision, *Estate of Berg*.¹⁰⁷

Considering reported decisions from other jurisdictions, the recognized elements of an insane delusion—(1) an irrational belief; (2) not susceptible to correction; (3) which affects a bequest—are briefly explored below.¹⁰⁸ While

S.E. 679, 683 (Ga. 1938); see also *Irwin v. Lattin*, 135 N.W. 759, 764 (S.D. 1912) (discussing insane delusions and monomania interchangeably); *McGrail v. Rhoades*, 323 S.W.2d 815, 821 (Mo. 1959) (equating monomania with insane delusions).

102. *In re Estate of Schnell*, 2004 SD 80, ¶¶ 16-17, 683 N.W.2d 415, 420. See also *Irwin*, 135 N.W. at 764.

103. *Irwin*, 135 N.W. at 760.

104. *Id.* at 760, 762.

105. See *id.* at 764. The *Irwin* decision blends the doctrines of insane delusion, testamentary capacity, and undue influence. *Irwin*, in fact, may be the only case where a court endorsed the idea that ghosts could exert undue influence.

A will made under such circumstances is obviously not the will of the testator, and is therefore not admissible to probate. We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or, as held by the trial court, upon the ground of undue influence. It is sufficient to say that a will brought about by an influence which the testator *could not resist is not his will*.

Id. (emphasis in original) (citations omitted) (quoting *O'Dell v. Goff*, 112 N.W. 736 (Mich. 1907)). "In [*Irwin*], there was no evidence of undue influence, unless it was that of the spirits." THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 247 n.43 (2d ed. 1953). See also Jeffrey G. Sherman, *Can Religious Influence Ever Be "Undue" Influence?*, 73 BROOK. L. REV. 579 (2008); Harry Hibschan, *Spooks and Wills*, 64 U.S. L. REV. 471 (1930) (surveying cases surrounding spirits speaking to testator).

106. *Estate of Schnell*, 2004 SD 80, 683 N.W.2d 415.

107. *In re Estate of Berg*, 2010 SD 48, 783 N.W.2d 831.

108. See *infra* Part II.A.2.a-c. See also *Taylor v. McClintock*, 112 S.W. 405, 413 (Ark. 1903). *Taylor* states:

Where one conceives something extravagant and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such [person] is possessed by an insane delusion.

Id.

the elements of an insane delusion are straightforward, the challenging aspects of the doctrine lie in distinguishing an insane delusion from a mistake and also from testamentary incapacity.¹⁰⁹ The courts themselves often contribute to confusingly blending the doctrines, as will be seen below.

a. Irrational Belief

Not all delusions constitute insane delusions. The testator's delusion must be irrational (i.e., "insane") and in some way the product of a mental impairment, a "diseased mind," or mental illness.¹¹⁰ In *Russell v. Russell*,¹¹¹ the testator left a holographic will which devised the majority of his estate to his daughter. His sons contested the will, claiming their father suffered from an insane delusion.¹¹² The testator's sons asserted that their father harbored an irrational belief that he had a property interest in a Nashville building, but in fact it had been awarded to his ex-wife in a divorce proceeding more than twenty years before.¹¹³ The testator had no property interest in the building. The Tennessee court determined that although the testator's chances of claiming the property "might have been tenuous at best," his belief that he might be able to reclaim the building was not irrational.¹¹⁴ Therefore, no insane delusion was present. The belief was unrealistic, but not irrational.¹¹⁵

Other courts reason that for a delusion to constitute an insane delusion, it must lack a basis in fact. In this way, an insane delusion can be distinguished

109. There seems to be less danger in confusing insane delusions with undue influence since the remedy—striking the affected portion of the will—is the same.

110. *E.g.*, *In re Estate of Watlack v. Freeman*, 945 P.2d 1154, 1158 (Wash. Ct. App. 1997) (citation omitted) (noting that an insane delusion is "a condition of such 'aberration as indicates an unsound or deranged condition of the mental faculties'"). An insane delusion is a belief which is "incredible." *Id.* At least in Texas, only delusions "which can be judged true or false by reference to the physical world or to the realm of specific acts and intentions" can constitute insane delusions. *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 412 (Tex. App. 1985) (citing *Rodgers v. Fleming*, 3 S.W.2d 77 (Tex. Comm'n App. 1928)). In *Rodgers*, the testator "believed that astronomers were on the verge of discovering the location of the gates of heaven." *Bauer*, 687 S.W.2d at 412. Because the belief concerned the capacity of University of Texas astronomers to find a specific place (heaven), the delusion qualified as an insane delusion. *Id.* In *Bauer*, the testator wrote a holographic will leaving his estate to his girlfriend, Lai Lee, clarifying in his will that his "primary reason for doing this [is] a near complete lack of family love." *Id.* at 411. The *Bauer* court held that the testator's incorrect view that his family did not love him did not "fall within that class of beliefs about which a judgment as to insane delusion can reasonably be made." *Id.* at 413.

111. *Russell v. Russell*, 197 S.W.3d 265 (Tenn. Ct. App. 2005).

112. *Id.* The first appeal of the will contest can be found at *Russell v. Russell*, No. M2001-00926-COA-R3-CV, 2002 WL 1827661 (Tenn. Ct. App. Jan. 27, 2002).

113. *Russell*, 197 S.W.3d at 269.

114. *Id.* at 270.

115. *Id.* See also *In re Estate of Hetrick*, 822 N.W.2d 123, No. 11-1702, 2012 WL 3860749, at *4 n.1 (Iowa Ct. App. Sept. 6, 2012) (quoting Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 68-69 (2007) ("[I]t is difficult to distinguish between a testator suffering from an insane delusion and a testator who has merely reached a wrong, mean-spirited, or 'stupid' conclusion.")).

from a mistake or error.¹¹⁶ For example, in *Heirs of Goza v. Estate of Potts*, it was argued that insane delusions invalidated the testator's attempt to revoke his will.¹¹⁷ The testator, a childless widower, had a will devising his estate to his wife as the primary beneficiary and her three siblings as contingent beneficiaries.¹¹⁸ He later came to believe—falsely—that his wife had had a tryst with her sister's husband.¹¹⁹ Angrily, he marked "void" over each paragraph of his will, wrote "bastard" and "get nothing" on it, applied Liquid Paper over the names of devisees, and later shredded the document in front of his two insurance agents.¹²⁰

The Arkansas trial and appellate courts agreed that the revocation was effective since no insane delusion had been shown, reasoning that although the testator suffered from a delusional disorder, there was at least some basis in fact for the delusion in question.¹²¹ His wife had dated her future brother-in-law years before and the two remained close.¹²² Evidence clearly demonstrated that the testator "was an irascible, angry, suspicious, controlling, profane, and difficult man[.]"¹²³ The evidence did reveal, however, there was a factual basis on which he could have doubted his wife's fidelity.¹²⁴ Therefore, the revocation of the will was not overturned on the basis of an insane delusion.

b. Not Susceptible to Correction

In order to better distinguish a mistake from an insane delusion, some decisions emphasize the requirement that the delusion not be susceptible to correction by facts or evidence which would convince an ordinary person as to the falsity of their delusion. Some reported decisions also emphasize that the testator could not be reasoned out of her irrational belief. The Missouri Court of Appeals, in *Dixon v. Webster*, for example, reversed a jury verdict setting aside the will of Blanche Robinson based on her lack of capacity and, alternatively, an insane delusion.¹²⁵ Blanche suffered from dementia precox (or

116. "Mere mistake, which does not in effect show a want of execution of the will, or, what is the same thing, a want of testamentary intent as to a portion of it, is not a ground of contest." *In re Estate of Carson*, 194 P. 5, 10 (Cal. 1920).

117. *Heirs of Goza v. Estate of Potts*, 374 S.W.3d 132, 134 (Ark. Ct. App. 2010). Testamentary capacity is required to both make and revoke a will. *In re Estate of Hunter*, 205 A.2d 97, 102 (Pa. 1964) (citation omitted).

118. *Heirs of Goza*, 374 S.W.3d at 133.

119. *Id.* at 136.

120. *Id.* at 133-34.

121. *Id.* at 136-37. The testator also suffered from a delusion that his wife's brother had stolen a gold coin bracelet. *Id.* at 137. There was some basis for this belief as he had observed his wife give the bracelet to her brother-in-law as the testator looked on with "wild eyes" and a "displeased demeanor." *Id.*

122. *Id.*

123. *Id.*

124. *Id.* Arguably, the different outcomes in *Heirs of Goza* and *Irwin* reflect nothing more than jurists' greater willingness to accord rationality to a suspicion of a wife's infidelity than to a belief in ghosts.

125. *Dixon v. Webster*, 551 S.W.2d 888, 894 (Mo. Ct. App. 1977).

schizophrenia).¹²⁶ She came to the false conclusion that her original devisee, Richard Dixon, had stolen from her and proceeded to disinherit him.¹²⁷ But because there was no evidence that “anyone ever attempted to dissuade Blanche from her expressed, non-factual beliefs and that in consequence thereof, she persisted in them ‘and refused to yield to either evidence or reason’” the Missouri court concluded that the testator was “laboring under a mere delusion” as opposed to an insane delusion.¹²⁸

c. Affecting a Bequest: Causation

Finally, even where it can be proved that a testator suffered from an irrational, perhaps bizarre delusion rooted in a mental disorder, which is unfounded in fact and uncorrectable by evidence, the doctrine of insane delusions requires that the will (or part of it) be the product of the delusion before any part of the will is invalidated.¹²⁹ In the case, *In re O’Neil’s Estate*, a divorced testator suffered from a fixed, irremovable “insane delusion of persecution” that one of his daughters was trying to poison him and that his other daughter was a prostitute.¹³⁰ His will, executed in March of 1947, less than a year before his death, disinherited them in favor of Ripton College, Wisconsin.¹³¹ A Washington trial court concluded that by reason of the insane delusions, the testator had omitted his daughters and declared him intestate.¹³² The appellate court reversed.

First, the testator’s succession of wills suggested that he would have disinherited his daughters even in the absence of his delusions.¹³³ A prior will executed in 1920 had also disinherited the daughters in favor of Ripton College.¹³⁴ A will executed in 1938, when the testator and his daughters were on amicable terms, left his estate to his daughters.¹³⁵ A will executed in May of 1947 reinserted Ripton College.¹³⁶ The last will, later in 1947, while making

126. *Id.* at 890. “According to Dr. McDonald, Blanche was a schizophrenic, a split personality, with delusions, negativisms, and she withdrew socially.” *Id.*

127. *Id.* at 891.

128. *Id.* at 894. “A belief that food was poisoned is not an insane delusion if the testator would eat it after other persons had first partaken thereof.” *Id.* at 893. *Dixon* cites *Buford* as an example of when this element of an insane delusion is satisfied. *Id.* (citing *Buford v. Gruber*, 122 S.W. 717 (Mo. 1909)). In *Buford*, the testator responded to a remonstrance that his beliefs were false by becoming “insanely angry” and raving “like a madman” and this conduct continued up until the time of his death. *Buford*, 122 S.W. at 722.

129. See *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 412 (Tex. Ct. App. 1985) (quoting *Gulf Oil Corp. v. Walker*, 288 S.W.2d 173, 180 (Tex. Ct. App. 1956)) (noting that courts regularly sustain a will “when it appears that [the testator’s] mania did not dictate its provisions”).

130. *In re Estate of O’Neil*, 212 P.2d 823, 825 (Wash. 1950).

131. *Id.* at 824.

132. *Id.*

133. *Id.* at 827.

134. *Id.*

135. *Id.*

136. *Id.*

certain revisions, continued to name Ripton College as the residual devisee.¹³⁷ The succession of estate plans demonstrated an inclination to favor the college and disfavor the daughters prior to the manifestation of delusions.

Second, the court noted that the testator was an alumnus of Ripton College.¹³⁸ He held the school in high regard, had been educated for the ministry, and had even once contemplated going to China as a missionary.¹³⁹ His views of morality were strict and he was "a person of strong likes and dislikes."¹⁴⁰ He had little in common with his daughters. They had once "accused their father of an abnormal sex perversion, and", the court intoned, "it can well be inferred that this was never wholly forgiven."¹⁴¹ When the daughter he had accused of prostitution was divorced, the testator's conservative religious sensibilities were undoubtedly offended.¹⁴² Based on these observations, the court concluded that the testator's delusions about his daughters were not "his guide in making his testamentary disposition" and upheld the will.¹⁴³ Causation, in other words, was lacking.

3. Undue Influence

Having considered testamentary incapacity and insane delusions, I turn now to the doctrine of undue influence. With both testamentary incapacity and insane delusions, the focus is directed to the testator's thinking and her ability to understand her environment. In the context of these two doctrines, the factfinder considers the testator's mental abilities and thought processes. With insane delusions, the factfinder will also consider the reasonableness of the testator's beliefs, whether attempts to correct the beliefs were unsuccessful, and the effects of the beliefs on specific provisions of the will in question. But under undue influence and other theories briefly discussed below (specifically duress¹⁴⁴ and fraud¹⁴⁵), the lens of inquiry widens to take account of the actions and behavior of an alleged wrongdoer.¹⁴⁶ When a wrongdoer exerts influence over a testator which overcomes his free will and causes him to make a bequest he would not have otherwise made, the bequest is said to be the product of undue influence

137. *Id.* at 827-28.

138. *Id.*

139. *Id.* at 826.

140. *Id.*

141. *Id.* at 827.

142. *Id.*

143. *Id.* at 828.

144. Both undue influence and duress involve coercion. See PENNELL & NEWMAN, *supra* note 26, at 52-53 (citing *In re Sickles' Will*, 50 A. 577 (N.J. Prerog. Ct. 1901)) (holding that a threat to abandon a paralyzed testator constitutes undue influence).

145. "[U]ndue influence is often confused with fraud because both terms sometimes are used to describe what is in fact undue influence." PENNELL & NEWMAN, *supra* note 26, at 53.

146. See *In re Estate of Blake*, 136 N.W.2d 242, 246 (S.D. 1965) (noting that "general influence, however strong" is not undue influence unless it destroys "the free agency of the testator").

and void.¹⁴⁷ “The clarifying test of the matter . . . is whether the testator’s mind, when he made the will, was such that, had he expressed it, he would have said: ‘This is not my wish, but I must do it.’”¹⁴⁸ Undue influence involves the overmastering of a testator’s willpower.¹⁴⁹ When undue influence is shown, the testamentary intent of an otherwise competent testator has been effectively displaced by the wrongful influence of another person. With insane delusions, an irrational delusion displaces a testator’s ability to form a coherent intent; with undue influence, a wrongdoer overcomes a testator’s attempt to make his own testamentary plan.

Provisions of a will unaffected by improper influence on the part of a wrongdoer can remain intact since undue influence also presumes the testator possessed testamentary capacity.¹⁵⁰ The few cases which hold that the will must be an “entirety” and thus undue influence which renders one provision invalid renders all of the will ineffective are poorly reasoned.¹⁵¹ In some respects, the doctrine of undue influence is a restatement of the requirement of testamentary intent for if the will reflects not the testator’s intent but a wrongdoer’s, the will should fail for lack of testamentary intent.¹⁵² With undue influence, however,

147. See *In re Estate of Linnell*, 388 N.W.2d 881, 885 (S.D. 1986) (stating that “when a testamentary instrument, through undue influence, substitutes the wishes of another for those of the testator, the instrument is invalid.”); *In re Estate of Nelson*, 274 N.W.2d 584, 590 (S.D. 1978) (concluded that “[where] the only bequest in will was to [drafter of will] and that bequest is void because of undue influence, the general scheme of distribution is tainted. The entire will is void . . .”). The Restatement’s description of undue influence provides that to the extent a “wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made,” the will is invalid to that extent. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(a), (b) (2003). See also *In re Estate of Marsh*, 342 N.W.2d 373, 377 (Neb. 1984) (recognizing that although only the specific testamentary gift procured by undue influence is invalid a court may exercise its equitable powers to invalidate the entire will if doing so would better carry out the testator’s intent).

148. *In re Estate of Weeks*, 103 A.2d 43, 48 (N.J. App. 1954) (quoting *Wingrove v. Wingrove*, 11 P.D. 81 (High Court 1885)).

149. *Erickson v. Olsen*, 844 N.W.2d 585, 596 (N.D. 2014). Undue influence considers “whether there was submission to the overmastering effect of such unlawful conduct.” *Id.*

150. See *In re Estate of Borsch*, 353 N.W.2d 346, 349 (S.D. 1984) (noting that testamentary competence is not dispositive of whether the testator was susceptible to undue influence); Alan R. Gilbert, Annotation, *Partial Invalidity of Will: May Parts of Will be Upheld Notwithstanding Failure of Other Parts for Lack of Testamentary Mental Capacity or Undue Influence*, 64 A.L.R. 3d 261 (1975); see also, e.g., *Williams v. Crickman*, 405 N.E.2d 799, 804 (Ill. 1980); *In re Estate of Klages*, 209 N.W.2d 110, 113-14 (Iowa 1973); *In re Estate of Hartz*, 54 N.W.2d 784, 790 (Minn. 1952); *In re Estate of Koller*, 219 N.W. 4, 7 (Neb. 1928).

151. *Barton v. Beck*, 195 A.2d 63, 67 (Me. 1963) (holding that entire will is invalid when court unable “to separate the possibly good from the bad”); *McCarthy v. Fidelity Nat. Bank & Trust Co.*, 30 S.W.2d 19, 21 (Mo. 1930) (rejecting partial invalidity), superseded by statute MO. ANN. STAT. § 473.081 (West 2015) as stated in *Mundwiller v. Mundwiller*, 822 S.W.2d 863, 865 (Mo. Ct. App. 1991).

152. The Kentucky Supreme Court has explained:

Undue influence is a level of persuasion which destroys the testator’s free will and replaces it with the desires of the influencer. In discerning whether influence on a given testator is “undue,” courts must examine both the nature and the extent of the influence. First, the influence must be of a type which is inappropriate. Influence from acts of kindness, appeals to feeling, or arguments addressed to the understanding of the testator are permissible. Influence from threats, coercion and the like are improper and not permitted by the law. Second, the influence must be of a level that vitiates the testator’s own free will so that the testator is disposing of her property in a

both coercion by a wrongdoer and causation must also be shown.¹⁵³ South Dakota distills the doctrine to four elements: “(1) decedent’s susceptibility to undue influence; (2) opportunity to exert such influence and effect the wrongful purpose; (3) a disposition to do so for an improper purpose; and (4) a result clearly showing the effects of undue influence.”¹⁵⁴ While characterized as “elements” a more precise phraseology might label them as “factors.”¹⁵⁵

manner that she would otherwise refuse to do. The essence of this inquiry is *whether the testator is exercising her own judgment*.

Bye v. Mattingly, 975 S.W.2d 451, 457 (Ky. 1998) (emphasis added) (citations omitted).

153. See Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. KAN. L. REV. 245, 248 (2010) (asserting that undue influence “impairs testamentary freedom, fails to comport with psychological realities, forces courts to implement policies properly left to the legislative process, and fails to further the policies ostensibly undergirding it.”); 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, 862-63 (1996) (noting that although “it is the essence of probate doctrine that testamentary gifts are to be enforced no matter how feckless the testator,” undue influence focuses on the acts of a wrongdoer, ignoring the testator’s voluntary act to make a bequest to someone with whom he had a confidential relationship.); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 238 (1996) (arguing that undue influence invalidates valid gifts “to ensure that the testator meets his or her familial duty”); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 572 (1996) (exploring “the tension between the belief that people should be able to dispose of their wealth as they wish and society’s interest in maintaining social stability”). Reasoning from the courts of Indiana clearly places undue influence along with insane delusions within the context of the underlying question of testamentary capacity:

[T]estamentary capacity is consistent, especially in very aged persons, with a great degree of mental infirmity, and some degree of mental perversion or aberration, at times, provided there is satisfactory proof that the testator, at the time of the execution of his will, really did comprehend its import and scope, and was not under the control of any improper or undue influence, or of any deception or delusion.

Bundy v. McKnight, 48 Ind. 502, 514 (Ind. 1874) (citation omitted).

154. *In re Estate of Dokken*, 2000 SD 9, ¶ 27, 604 N.W.2d 487, 495 (quoting *In re Estate of Unke*, 1998 SD 94, ¶ 12, 583 N.W.2d 145, 148 (citing *In re Estate of Elliot*, 537 N.W.2d 660, 662 (S.D. 1995))).

155. Terming the undue influence elements “factors” is consistent, for example, with California’s new statutory definition which lists factors which must be considered but not proven:

(a) “Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.

(2) The influencer’s apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of

Direct evidence of undue influence is frequently unavailable because the testator is (obviously) deceased, the wrongdoer cannot be expected to provide helpful testimony, and most acts of undue influence occur in a private setting where the only observers were the testator and the wrongdoer, one of whom is dead and the other uncooperative.¹⁵⁶ In response, the law has evolved a burden-shifting circumstantial evidence framework similar to those utilized in employment discrimination context.¹⁵⁷ A presumption of undue influence can be generated by showing “a confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom.”¹⁵⁸ The degree of the testator’s susceptibility is directly relevant to a claim of undue influence.¹⁵⁹ Thus again, four factual elements are typically required to establish the presumption: (1) testator susceptibility;¹⁶⁰ (2) a confidential relationship with the wrongdoer;¹⁶¹ (3) active

any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

CAL. WELF. & INST. CODE § 15610.70 (West 2015); see also Mary Joy Quinn, *Defining Undue Influence: A Look at the Issue and at California’s Approach*, 35 No. 3 BIFOCAL 72, 74 (2014).

156. See *Caranci v. Howard*, 708 A.2d 1321, 1324 (R.I. 1998) (“Because the perpetrator of such covert coercion generally applies the forbidden pressure in secret, one seeking to set aside such a will is often unable to produce direct evidence of the undue influence to the factfinder but rather must rely on circumstantial evidence.”). See also *In re Estate of Metz*, 100 N.W.2d 393, 397 (S.D. 1960). “There is no direct proof of undue influence in this case. There seldom is. Undue influence is not usually exercised in the open.” *Id.* Undue influence is “like a snake crawling upon a rock, it leaves no track behind it” *Hyatt v. Wroten*, 43 S.W.2d 726, 728 (Ark. 1931).

157. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (allowing a plaintiff to demonstrate a prima facie employment discrimination case without direct evidence of discriminatory intent and achieve an inference of discrimination).

158. *Estate of Dokken*, 2000 SD 9, ¶ 28, 604 N.W.2d at 495 (quoting *Estate of Unke*, 1998 SD 94, ¶ 13, 483 N.W.2d at 148 (citing *In re Estate of Madsen*, 535 N.W.2d 888, 892 (S.D. 1995))); see also *In re Estate of Duebendorfer*, 2006 SD 79, ¶ 32, 721 N.W.2d 438, 446-47 (noting that the presumption may be overcome if the alleged wrongdoer shows he took “no unfair advantage of the decedent”).

159. *Johnson v. Shaver*, 172 N.W. 676, 681 (S.D. 1919), modified by *In re Estate of Armstrong*, 272 N.W. 799 (S.D. 1937). The court held:

We are therefore of the opinion that, while there might not be in the record before us sufficient from which to conclude that the will was the result of undue influence, provided such record showed [the testator] to have been well and mentally normal at the time he executed this will, yet, in view of his enfeebled condition, both physical and mental, [the testator] . . . was so controlled in his act in making the will in question by the undue influence of his daughter Jean Shaver that the same was not his free act.

Id.

160. See *infra* Part II.A.3.a for a discussion of testator susceptibility in the context of undue influence.

161. “[T]he term ‘confidential relationship embraces three sometimes distinct relationships—fiduciary, reliant, or dominant-servient.’” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003). A fiduciary relationship may exist between the testator and a hired professional or a family member serving as agent under the power of an attorney; a reliant relationship may, for example a doctor-patient relationship; a dominant-servient relationship may exist between a caregiver and a feeble elderly person. *Id.* Compare *In re Estate of Hobelsberger*, 181 N.W.2d 455, 460 (S.D. 1970) (opining that it “appears doubtful” that the relationship of an eighty-year-old individual and his grandniece who lived on a farm two miles from his, rented his farm, and “pretty much looked after him” was a confidential relationship), and *In re Estate of Melcher*, 232 N.W.2d 442, 447 (S.D. 1975) (finding a triable issue of fact as to the existence of a confidential relationship where a relative participated in the selection of an estate planning attorney and engaged in “frequent and

participation by the wrongdoer in the drafting and execution of the will;¹⁶² and (4) “undue profits” under the will.¹⁶³ Once established, the burden of moving forward with the evidence shifts to the will proponent.¹⁶⁴ Care must be taken in relying on cases from jurisdictions other than South Dakota which hold that the effect of an undue influence presumption shifts the burden of proof, not just a burden of persuasion, or that undue influence is subjected to heightened standards of proof.¹⁶⁵

Some jurisdictions have recognized that haste in preparing and signing the will as well as secrecy—that is, keeping the contents of the will from being shared with disinherited family members—as circumstantial evidence which suggests undue influence. Secrecy as circumstantial evidence of undue influence

extended visits” with the testator), *with Hyde v. Hyde*, 99 N.W.2d 788, 792-93 (S.D. 1959) (cited by *Estate of Hobelsberger*, 181 N.W.2d at 460) (upholding a finding, in an undue influence contract case, that a son stood in a confidential relationship to his eight-seven-year-old father where son admitted that the “handling of his father’s business affairs was left largely to him . . .”). “[T]he existence of such a relationship as between parent and child is a question of fact to be determined from the evidence.” *Id.* (citations omitted). Thus, no formal legal fiduciary relationship is required to give rise to the type of confidential relationship targeted in an undue influence case. *But see In re Will of Boyles*, 990 So. 2d 230, 237 (Miss. Ct. App. 2008), *cert. denied*, 994 So. 2d 186 (2008) (table decision) (affirming a finding of no confidential relationship where individual and testator were close friends and that individual helped testator in many aspects of her life); *Scribner v. Gibbs*, 953 N.E.2d 475, 485 (Ind. Ct. App. 2011) (finding no confidential relationship where son was neither a caregiver nor an attorney-in-fact for his father, the testator).

162. See *infra* Part II.A.3.b regarding the participation of the wrongdoer in formulating the testator’s estate plan.

163. Compare *infra* Part II.A.3.c and accompanying text examining the four South Dakota components of undue influence, *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (2003) (articulating a four-part test to raise a presumption of undue influence):

In the absence of direct evidence of undue influence, circumstantial evidence is sufficient to raise an inference of undue influence if the contestant proves that (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an *opportunity* to exert undue influence, (3) the alleged wrongdoer had a *disposition* to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (emphasis added). The Restatement requires a showing of both the wrongdoer’s opportunity and disposition to exert undue influence while South Dakota case law does not. In addition, South Dakota tends to require a showing of a confidential relationship between the testator and wrongdoer as well as active involvement by the wrongdoer in the formulation and execution of the will or codicil. See *supra* note 161.

164. *In re Estate of Dokken*, 2000 SD 9, ¶ 28, 604 N.W.2d 487, 495. For another example, consider *Krueger v. Ary*, 205 P.3d 1150, 1155 (Colo. 2009) (holding that the presumption, once rebutted, does not continue and without additional evidence a claim of undue influence fails).

165. See, e.g., FLA. STAT. ANN. § 733.107 (West 2015) (providing that a presumption of undue influence shifts the burden of proof). *Contra* *Martin v. Phillips*, 369 S.E.2d 397, 401 (Va. 1988) (holding the trial court erred in shifting the burden of proof after the defendant rebutted the presumption of undue influence) *abrogated on other grounds* by *Friendly Ice Cream Corp. v. Beckner*, 597 S.E.2d 34, 39 (Va. 2004). Some jurisdictions also impose a clear and convincing evidence standard on proving undue influence. E.g., *In re Estate of Kamesar*, 259 N.W.2d 733, 737 (Wis. 1977). *But see In re Estate of Bethurem*, 313 P.3d 237, 242 (Nev. 2013) (rejecting clear and convincing evidence requirement in favor of a preponderance requirement). See also W. E. Shipley, Annotation, *Comment note. —Effect of Presumption as Evidence or upon Burden of Proof, Where Controverting Evidence is Introduced*, 5 A.L.R.3d 19 at § 17 (1966) (contrasting undue influence presumption applications in various jurisdictions); Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 6 (2010) (arguing that the clear and convincing evidence standard should also be required of claims of testamentary incapacity).

has not received a warm endorsement in South Dakota. In *Johnson v. Shaver*, the South Dakota Supreme Court described secrecy as a “badge of undue influence,”¹⁶⁶ but in *Fleege’s Estate*, the same court held that secrecy did not raise a presumption of undue influence.¹⁶⁷

The rushing of an estate plan is often consistent with facts tending to show a wrongdoer’s influence in the preparation and execution of a will. But haste in preparing and executing a will as a fact tending to show undue influence should be considered with skepticism.¹⁶⁸ Neither should secrecy shift a presumption. After all, uninfluenced individuals who procrastinate then hastily sign a will in the final stages of a terminal illness and individuals who simply prefer to keep their testamentary plans to themselves are common.

The “unnaturalness” of an estate plan is another relevant factor in an undue influence claim.¹⁶⁹ This factor is especially problematic insofar as it places courts in the position of determining what is natural and what is unnatural, a determination without any developed objective criterion or framework.¹⁷⁰ Should the test of unnaturalness invoke an entirely objective perspective and consider the extent to which a will deviates from the intestacy scheme, or should it adopt a subjective approach and consider whether it was natural for a testator

166. *Johnson v. Shaver*, 172 N.W. 676, 678 (S.D. 1919) (citation omitted), modified by *In re Estate of Armstrong*, 272 N.W. 799 (S.D. 1937).

167. *In re Estate of Fleege*, 230 N.W.2d 230, 231-32 (S.D. 1975); see also *In re Estate of Hobelsberger*, 181 N.W.2d 455, 459-60 (S.D. 1970) (citing *Estate of Armstrong*, 272 N.W. at 799) (noting that the holding of *Johnson v. Shaver* was modified by *Armstrong’s Estate* insofar as keeping a will a secret from those with an equal right to know is not a badge of undue influence in all circumstances). Moreover, the *Berg* decision indirectly supports the proposition that secrecy does not give rise to an inference of undue influence. See *infra* note 297 and accompanying text. But see, *In re Estate of Nelson*, 274 N.W.2d 584, 589 (S.D. 1978) (finding the fact that “[t]he will remained in Theodosen’s safe and was under his control until admitted to probate[]” pointed to undue influence).

168. But see *Sangster v. Dillard*, 925 P.2d 929, 934 (Or. Ct. App. 1996) (citations omitted) (recognizing “‘haste in making the will’” as a relevant factor supporting undue influence).

169. *Estate of Fleege*, 230 N.W.2d at 232 (citation omitted) (providing, essentially, that unless a will contestant is a spouse, descendant or possibly a parent, no presumption of undue influence is available); see also *In re Estate of Churik*, 397 A.2d 677, 679-80 (N.J. Super. Ct. App. Div. 1978) (holding that will contestant, the Saint Vladimir’s Orthodox Theological Seminary, had failed to establish undue influence by a niece, who reconciled with her uncle following a long estrangement, finding it significant that the will did not fund an unnatural bequest, but rather “substituted a close blood relative and her husband for the contestant and related minor beneficiaries who were included in the prior will.”). See also *Sherman*, *supra* note 105, at 620 (“[A] will that ‘unnaturally’ prefers strangers in blood to significant family members may suggest not only the pernicious influence of an outsider (undue influence) but also a failure on the testator’s part to know the identities of the natural objects of her bounty (testamentary incapacity).”).

170. See *In re Estate of Rowlands*, 18 N.W.2d 290, 293 (S.D. 1945) (“[W]here a will is inconsistent with testatrix’s duty to her family and is not made according to the dictates of natural justice, it is a circumstance to be considered with other evidence.”); *Johnson*, 172 N.W. at 678 (noting that “where the will contains unjust or unnatural provisions, it demands close judicial scrutiny; the onus devolves upon the proponent to prove a reasonable explanation of the unnatural character of the will[]”). *Johnson* also refers to “unjust, unnatural, or absurd will[s]” but with little guidance on determining when a will is “absurd.” *Id.* at 677 (citation omitted). Courts may be especially susceptible to imposing personal values on testators who do not share those values in an attempt to separate the natural from the unnatural. See, e.g., *In re Estate of Strittmater*, 53 A.2d 205, 205 (N.J. 1947) (bequest for feminist causes set aside based on testator’s “morbid aversion to men” and “‘feminism to a neurotic extreme’”).

to leave her estate to a beloved friend who meant everything to her?¹⁷¹ The South Dakota Supreme Court has not expressly eschewed a naturalness factor in an undue influence context, but it has been deferential to the intentions and objectives to the testator in most cases.¹⁷² That is, the subjective approach to an unnaturalness analysis is preferred.

To rebut a presumption of undue influence, the alleged wrongdoer must come forward with some evidence that “he took no unfair advantage of the decedent.”¹⁷³ The South Dakota Supreme Court has clarified that “the *ultimate* burden remains on the contestant to prove the [four] elements of undue influence by a preponderance of the evidence.”¹⁷⁴ This statement is consistent with South Dakota Codified Laws section 29A-3-407 which places the burden of showing undue influence on the challenger of a will.¹⁷⁵ Ultimately, the sole question in an undue influence will challenge is simply whether the testator’s intent was displaced by a wrongdoer.

In 2006, in *Estate of Dubendorfer*,¹⁷⁶ the court confused the issue by stating that the burden of proof—and not simply the burden of persuasion—shifted in an undue influence case once a *prima facie* showing had been made by a will contestant.¹⁷⁷ Justice Zinter’s concurring opinion in *Dubendorfer* is convincing. It properly distinguishes the burden of going forward with the evidence from the

171. It seems faulty to measure the validity of a will in part based upon the degree it deviates from the default plan provided by intestacy statutes where the primary reason behind most wills is to provide for a disposition of property other than that provided by the state’s default scheme.

172. *Cf. In re Estate of Nelson*, 274 N.W.2d 584, 589 (S.D. 1978) (citations omitted) (finding undue influence exerted by drafting attorney when prior wills leave bequests to siblings despite the court’s acknowledgement that “these relatives are not considered the natural objects of the testator’s bounty”).

173. *In re Estate of Dokken*, 2000 SD 9, ¶ 28, 604 N.W.2d 487, 495.

174. *Id.* (emphasis added) (citing *In re Estate of Unke*, 1998 SD 94, ¶ 13, 583 N.W.2d 145, 148).

175. S.D.C.L. § 29A-3-407 (2004). “Contestants of a will have the burden of establishing . . . undue influence . . .” *Id.* “Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.” *Id.* The comments to the Uniform Probate Code state: “[t]his section is designed to clarify the law by stating what is believed to be a fairly standard approach to questions concerning burdens of going forward with evidence in will contest cases.” UNIF. PROBATE CODE § 3-407 cmt. (2010). *But see* HAW. REV. STAT. § 560:3-407 (West 2015) (replacing the UPC language with “[u]nless the burden of proof is changed by other provisions of law . . .”). Thus, under Hawaii’s statute, the burden of proof—not just the burden of persuasion—shifts in an undue influence case. *In re Estate of Herbert*, 979 P.2d 39, 52-53 n.10 (Haw. 1999) (citing committee reports from state legislative history confirming the same).

176. *In re Estate of Dubendorfer*, 2006 SD 79, 721 N.W.2d 438.

177. *Id.* ¶¶ 32-35, 721 N.W.2d at 447. The South Dakota Supreme Court’s majority opinion approved a jury instruction on undue influence that read:

[I]f you find that the [wrongdoers] actively participated in the preparation and execution of the will and that they unduly profited there from, then a presumption of undue influence arises. When this presumption of undue influence arises, the burden of proof shifts to the [wrongdoers] to show that they took no unfair advantage of [the testator] in the creation of the will in order to rebut or defeat a finding that undue influence exists.

Id. ¶ 33.

burden of proof.¹⁷⁸ Justice Zinter's rationale should someday be recognized as more consistent with the text of South Dakota Codified Laws section 29A-3-407.

The undue influence burden shifting framework should not be thought of as rigid exercise of required proof. Instead it should be thought of as an acknowledgement that a will contestant may show undue influence by circumstantial evidence, so long as she does so by the greater weight of the evidence.¹⁷⁹ The four requisite "elements" of undue influence (explicated below) are fairly fixed, but the ability to establish a presumption of undue influence should be mutable and depend on the circumstances of the particular case.¹⁸⁰ Indeed, despite the well-established elements of an undue influence claim, the will contestant's success clearly "does not turn on a single issue" and "the question of undue influence is to be determined from all the surrounding facts and circumstances."¹⁸¹ Nevertheless, the four recognized recurring factors of undue influence—susceptibility, opportunity, disposition and result (i.e., causation)—merit closer study.¹⁸²

a. Testator's Susceptibility

In a typical undue influence case, both testamentary incapacity and undue influence will be asserted by the will contestant. In such a case, the court will examine the testator's state of mind relative to assertions of testamentary incapacity before turning to the susceptibility element of an undue influence claim. Many decisions give relatively short shift to re-examining the testator's state of mind under the rubric of undue influence's susceptibility prong, having already completed an assessment of the testator's mental abilities in the context of a capacity analysis. This is unfortunate since whether an individual possesses the mental acuity to identify their property, their family, and the testamentary plan they desire to effect is a question distinct from whether that same individual is susceptible to undue influence. Susceptibility and the elements of testamentary capacity both consider strength of intellect, but susceptibility in the undue influence context specifically considers the testator's risk at being bullied into an estate plan that she did not want. This is not the same thing as the capability of identifying assests and family members.

178. *Id.* ¶¶ 40-47, 721 N.W.2d at 448-51 (Zinter, J., concurring). Justice Zinter concurred rather than dissented in *Duebendorfer* because he concluded that the erroneous jury instruction at issue was not prejudicial. *Id.* ¶ 48, 721 N.W.2d at 452.

179. *See Estate of Dokken*, 2000 SD 9, ¶ 28, 604 N.W.2d at 495 (citations omitted).

180. *See Black v. Gardner*, 320 N.W.2d 153, 158 n.2 (S.D. 1982) (declining to apply the four-part undue influence test in an undue influence case arising out of lifetime gifts: "we are not applying the four-part undue influence test").

181. *In re Estate of Melcher*, 232 N.W.2d 442, 446 (S.D. 1975) (citing *In re Estate of Metz*, 100 N.W.2d 393 (S.D. 1960)).

182. *In re Estate of Herbert*, 979 P.2d 39, 53-54 (Haw. 1999). Hawaii's Supreme Court has called these four elements "the SODR factors." *Id.*

A testator's susceptibility to undue influence considers the weaknesses, dependence, illness, and frailty of the testator.¹⁸³ Stated the other way around, susceptibility to undue influence considers the extent of the testator's firmness, her mettle, tenacity, and willpower.¹⁸⁴ A related factor considered in some decisions is the dominance of the wrongdoer over the testator.¹⁸⁵ It stands to reason that the weaker and more susceptible the testator, the less dominance is required in order to establish undue influence.¹⁸⁶ Conversely, it would seem that in the case of a testator free from any frailties that the kind of influence that would have to be shown (such as convincing threats of bodily harm) would not fall under the category of undue influence, but of duress, which considers more direct and overt acts of genuine coercion.¹⁸⁷

b. Wrongdoer's Opportunity to Influence

Although the alleged wrongdoer's opportunity to exert undue influence is repeatedly recited as an element of an undue influence claim,¹⁸⁸ mere opportunity to assert improper influence is insufficient where there is no evidence that influence was actually asserted.¹⁸⁹ Opportunity may be shown, for example, when the testator and wrongdoer see each other daily, share meals, and the wrongdoer drives the testator to town, or does odd jobs for him, such as mowing his yard.¹⁹⁰ Proximity, emotional ties, and frequent contact are

183. See THOMPSON, *supra* note 40, at 466-67 (conditioning susceptibility on mental and physical conditions).

184. See *In re Estate of Weickum*, 317 N.W.2d 142, 145 (S.D. 1982) (rejecting an undue influence claim where the testator had been found to be "a 'vigorous, strong-willed and mentally alert individual.'").

185. E.g., *In re Ferrill*, 640 P.2d 489, 495 (N.M. Ct. App. 1981) (holding that "dominance by the grantee, when susceptible of direct proof, is merely one factor which raises a presumption that the grantor was unduly influenced, when there is also evidence of a confidential relation . . ."). The idea of a wrongdoer in the doctrine of undue influence "conjures up an image of some kind of Svengali, mesmerizing a person who then makes out a will in some sort of hypnotic trance. Or the image of some poor, weak creature kept in slavery to a dominant personality." LAWRENCE FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 93 (2009).

186. See also *Estate of Weickum*, 317 N.W.2d at 146 (deeming it unnecessary to even consider the other elements of an undue influence claim where contestants had failed to establish the first element of susceptibility). *Estate of Weickum* suggests that summary judgment for the will proponent is appropriate when there is no genuine issue of disputed fact as to the element of susceptibility. *Id.* See also *In re Estate of Swanson*, 222 N.W. 491, 492 (S.D. 1928) (holding no presumption of undue influence is raised where a daughter had "ample opportunity to exert undue influence upon the testator, and that the relations of the testator and this daughter were such that but little effort would be required to constitute undue influence" where the daughter did nothing "whatever to direct or solicit any preference to herself under the will, or even suggested that the testator make a will.").

187. But see *Caranci v. Howard*, 708 A.2d 1321, 1324 n.3 (R.I. 1998) ("Weakness of mind, however, is not an essential element to a finding of undue influence, even though it may be relevant."). See *infra* Part II.A.4.b for a brief discussion of duress. "When undue influence becomes overtly coercive, it is called *duress*." DUKEMINIER, *supra* note 8, at 210 (emphasis in original).

188. E.g., *In re Estate of Rowland*, 18 N.W.2d 290, 293 (S.D. 1945) (describing opportunity as an element of an undue influence claim).

189. *In re Estate of Melcher*, 232 N.W.2d 442, 446 (S.D. 1975) (citing *Ekern v. Erickson*, 157 N.W. 1062, 1066 (S.D. 1916); *In re Estate of Hobelsberger*, 181 N.W.2d 455, 458 (S.D. 1970)).

190. *In re Estate of Borsch*, 353 N.W.2d 346, 350 (S.D. 1984).

synonymous with opportunity.¹⁹¹ In most cases, the will contestant must be prepared to introduce evidence that the wrongdoer not only had the opportunity to influence the testator, but also took advantage of that opportunity.¹⁹² Influencing the testator typically takes the form of overpersuasion or coercion sufficient to destroy the free agency of the testator.¹⁹³ Fraud and false representations are not required.¹⁹⁴

“A different rule applies, however, if a confidential or fiduciary relationship is established.”¹⁹⁵ Where a confidential relationship between the testator and the alleged wrongdoer is shown, the relationship can establish support for both the third element (a disposition of the wrongdoer to exert undue influence) and the fourth element (a result showing the effect of undue influence). The typical confidential relationship involves an alleged wrongdoer serving as the testator’s agent under power of attorney.¹⁹⁶

c. Disposition of Wrongdoer to do Wrong

The “disposition” element is the least coherent in the undue influence rubric and courts interpret this third element of an undue influence claim in several different ways.¹⁹⁷ For instance, disposition may be equated with motive or a

191. *E.g.*, *In re Estate of Metz*, 100 N.W.2d 393, 398 (S.D. 1960) (finding an opportunity to undue influence where “decendent was either at [the wrongdoer’s] home or in hospitals at Rapid City” and the testator “was in strange surroundings away from his usual friends and neighbors” while the wrongdoer “was kind to him and took care of his every need.”).

192. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (2010). “The alleged wrongdoer need not be present when the donative document was executed in order to exert undue influence.” *Id.*

193. THOMPSON, *supra* note 40, at 465-66.

194. *Id.* at 466. “[M]ere advice, argument or persuasion” is insufficient but “fear, or desire for peace, or flattery” may qualify as undue influence. *Id.* (citations omitted).

195. *In re Estate of Melcher*, 232 N.W.2d 442, 446 (S.D. 1975); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. g (noting that traditionally, the “term ‘confidential relationship’ has been used to describe a relationship that gives rise to a presumption of undue influence if coupled with suspicious circumstances.”).

196. *E.g.*, *Parish v. Kemp*, 179 S.W.3d 524 (Tenn. Ct. App. 2005) (power of attorney creates a confidential relationship). *But see Costello v. Hall*, 506 So. 2d 293 (Miss. 1987) (power of attorney alone does not give rise to confidential relationship); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. g (noting that “the term ‘confidential relationship’ embraces three sometimes distinct relationships—fiduciary, reliant, or dominant-subservient.”).

197. *E.g.*, *Erickson v. Olsen*, 2014 ND 66, ¶ 25, 844 N.W.2d 585, 594 (N.D. 2014) (reciting trial court’s finding that a disposition to exert undue influence was shown by the disproportionate bequests in the will). *See also In re Estate of Kamesar*, 259 N.W.2d 733, 738-39 (Wis. 1977). “Disposition to unduly influence means more than a desire to obtain a share of the estate. It implies a willingness to do something wrong or unfair.” *Id.* (citations omitted). *But see Gmeiner v. Yacte*, 592 P.2d 57, 64 (Idaho 1977):

Under [“disposition”], the court “examines the character and activities of the alleged undue influencer to determine whether his conduct was designed to take unfair advantage of the testator.” “Disposition,” in this sense, must mean more than simply the performance of acts of kindness accompanied by the hope of material gain. One factor which assumes critical importance is whether or not the alleged undue influencer took an active part in preparation and execution of the will or deed. . . .

Another broad area of judicial concern in dealing with the element of “disposition” is the alleged influencer’s attempts at undermining bequests to the natural heirs. The court will look

reason to exert improper influence.¹⁹⁸ In this sense, disposition would consider, for example, whether the wrongdoer had a plan to exert undue influence by reason of the wrongdoer's financial need. Alternatively, disposition may be defined as intent and examine the wrongdoer's *mens rea* to pressure the testator into favoring the wrongdoer in the testator's estate plan.¹⁹⁹ Disposition, however, has also been employed to described an individual with a predisposition to do wrong, to take advantage of the frail, to gain advantage over the elderly and the meek.²⁰⁰ Someone who has repeatedly pressured the elderly for financial gain in the past might be said to have a disposition to do wrong in an undue influence case. South Dakota case law has not clearly articulated the contours of the disposition element of an undue influence claim.²⁰¹ Case law has established, however, that a disposition to exert undue influence exists when there are "persistent efforts to gain control and possession of testator's property."²⁰² Disposition might be said to reference a past pattern of wrongdoing behavior.

In establishing the disposition of the wrongdoer to exert undue influence, other courts have considered evidence such as enjoying property of the testator rent-free and receiving gifts from the testator over time, especially when the testator may be easily influenced or unable to properly care for himself financially.²⁰³ In the Pennsylvania case of *Estate of Lakatosh*, the wrongdoer unlawfully converted over \$100,000 of the testator's funds including transferring \$72,000 to the wrongdoer's female friend who was unknown to the testator.²⁰⁴ Meanwhile, the testator "was living in squalor and filth and had fallen behind in the payment of certain household bills including water/sewer bills, and County

closely at situations where the recipient of a deed or bequest has apparently been responsible for alienating the affections of the testator-grantor from the other members of his or her family. The situation is further exacerbated if the grantee has isolated the grantor from all contact with family or with disinterested third parties.

Id.

198. See *In re Probate Proceeding, Will of Tagliagambe*, 2011 NY Slip Op 50362(U), 2011 WL 873502, at *3 (N.Y. Surr. Ct. Mar. 8, 2011) (table decision) (affirming a finding of no undue influence where no motive to exercise undue influence was present given that "the petitioner would have taken in the decedent's estate through intestacy even if there was no will.").

199. See *In re Estate of Herbert*, 979 P.2d 39, 53 (Haw. 1999) (quotation omitted) ("[D]esire . . . to control him in the disposition' is the disposition to exert undue influence.").

200. See BLACK'S LAW DICTIONARY 471 (6th ed. 1990) (defining disposition as "an attitude, prevailing tendency, or inclination"). In *Metz' Estate*, the South Dakota Supreme Court opined that a wrongdoer's "persistent efforts to gain control and possession of testator's property—by guardianship proceedings, power of attorney, gift, and finally, by will" demonstrated that the wrongdoer had a disposition to unduly influence the testator. *In re Estate of Metz*, 100 N.W.2d 393, 398 (S.D. 1960).

201. See, e.g., *In re Estate of Hamm*, 262 N.W.2d 201, 206 (S.D. 1978) (finding no evidence of a drafting attorney's disposition to exert undue influence by reason of his withdrawing from a criminal representation in order to pursue estate representation).

202. *In re Estate of Borsch*, 353 N.W.2d 346, 350 (S.D. 1984) (quoting *Estate of Metz*, 100 N.W.2d at 398).

203. *Id.*

204. *Estate of Lakatosh*, 656 A.2d 1378, 1382 (Pa. Super. Ct. 1995).

and City property taxes.”²⁰⁵ A disposition for wrongdoing by the wrongdoer was thus established.²⁰⁶

The “disposition” element of undue influence claims is unique. Arguably, if disposition is defined as the wrongdoer’s past pattern of similar schemes, it runs counter to the rule of evidence that bars considerations of a defendant’s “bad acts.”²⁰⁷ Under Federal Rule of Evidence 404(b), evidence of prior bad acts is inadmissible to establish the bad character of the defendant; however, it is admissible for some other relevant purpose assuming its prejudicial effect is not excessive.²⁰⁸ Under 404(b), the courts will review the evidence to see how similar the other act evidence is to the act in question in assessing its admissibility.²⁰⁹ Although character evidence is generally inadmissible to prove conduct, it is admissible if character is an element of a claim.²¹⁰

Recognition of the propensity of the wrongdoer to do the act in question as an element of undue influence—presumably by way of prior bad acts of a similar nature—seems to give the green light to admissibility without requiring that the bad acts be probative to some other factual issue such as motive or intent.²¹¹ In other words, the wrongdoer’s character is an issue in an undue influence claim if an element of undue influence is the disposition of the wrongdoer to commit wrongs.²¹² Few courts, however, have directly considered whether the propensity or disposition element of undue influence softens the 404(b) bar on

205. *Id.*

206. *Id.* at 1385.

207. See S.D.C.L. § 19-12-5 (2004 & Supp. 2014) (modeled after Federal Rule of Evidence 404(b) and provides that evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith” but “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”). Prior bad acts can be admitted after passing a two-part test: “(1) is the evidence relevant to an issue other than character? and (2) is the probative value substantially outweighed by the danger of unfair prejudice?” *State v. Boe*, 2014 SD 29, ¶ 21, 847 N.W.2d 321 (citations omitted).

208. *Boe*, 2014 SD 29, ¶¶ 20-21, 847 N.W.2d at 320-21.

209. *Id.* ¶ 20, 847 N.W.2d at 320 (quoting *State v. Wright*, 1999 SD 50, ¶ 16, 593 N.W.2d 792,797).

210. *State vs. Bazan*, 561 P.2d 482, 487 (N.M. Ct. App. 1977) (citing FED. R. EVID. 404 advisory committee’s note), *cert. denied*, 561 P.2d 1347 (1977).

211. See, e.g., *Peck v. Boehning (In re Estate of Skulina)*, No. 196020, 1998 WL 1991235, at *3 (Mich. Ct. App. June 9, 1998) (ruling other bad acts of alleged wrongdoer inadmissible under 404(b) where evidence was admitted not to show motive but rather that the wrongdoer had acted on that motive). See also, e.g., *In re Estate of Schisler*, 316 S.W.3d 599 (Tenn. Ct. App. 2009). *Schisler* undertakes a 404(b) analysis of evidence of an alleged wrongdoer’s criminal convictions for abusing farm animals and misbranding food. The decedent’s estate plan allowed the wrongdoer to operate a farm, and the convictions were relevant to motive since the wrongdoer might be legally prohibited from operating a farm. See *id.* at 608 n.7. Texas law, however, does not include among the factors of undue influence a wrongdoer’s propensity to exert undue influence. See *id.* at 610.

212. See *In re Ferrill*, 640 P.2d 489, 497-98 (N.M. App. 1981) (holding that character evidence of the alleged wrongdoer is admissible under 404(b) even where “the disposition to exert undue influence is not considered an element of the claim [for undue influence]”). *Contra In re Will of Boyles*, 990 So. 2d 230, 235 (Miss. App. 2008) (holding that character evidence is inadmissible in undue influence cases), *cert. denied*, 994 So. 2d 186 (Miss. 2008).

evidence of prior bad acts in order to show bad character and subsequent action in conformity with such character.²¹³

d. Results of the Influence: Causation

Finally, to prove undue influence, a will contestant must show causation; an effect of the wrongdoer's influence in the testamentary instrument. Causation is an element of both insane delusions and undue influence, but not testamentary incapacity which simply considers cognitive abilities in the abstract. In case law, clarity with regards to the causation element of an undue influence claim has been proven difficult to achieve.

As noted above, some decisions consider whether a bequest was "unnatural."²¹⁴ The naturalness of a bequest might be considered impersonally (asking whether a typical testator would deviate from a disposition consistent with intestacy statutes)²¹⁵ or, more appropriately, in a subjective context (and query the testator's particular circumstances). For example, in *Hobelsberger's Estate*, a testator suffering from senility with twenty-seven nieces and nephews left his entire estate to a grandniece, otherwise the grandniece's husband, otherwise the grandniece's son.²¹⁶ The grandniece clearly had an opportunity to influence the testator; she referred her own attorney to the testator to make his will and was present during the signing of the will.²¹⁷ But the South Dakota Supreme Court found that it was only natural that the will would prefer "a grandniece and her husband who have been helpful to him during the years when he had need of such concern."²¹⁸ Causation was lacking. The bequest was "natural" in the subjective context of the testator's circumstances.

In *Imel v. Metz*, by contrast, the South Dakota Supreme Court upheld a finding of undue influence where the testator's successive wills consistently disinherited a man claiming to be the testator's illegitimate son.²¹⁹ When

213. See *Black v. Gardner*, 320 N.W.2d 153, 158 n.2 (S.D. 1982) (failing to reach the issue of whether evidence of misappropriation of partnership funds was wrongfully admitted under 404(b) in an undue influence gift case); *In re Estate of Duebendorfer*, 2006 SD 79, ¶ 19, 721 N.W.2d 438, 443-44 (rejecting, in a testamentary undue influence case, a challenge under 404(b) to evidence of a wrongdoer's attempted termination of a lease and alteration of payable-on-death accounts when the issue was waived). Perhaps the issue can be framed as whether a disposition to do wrong (as phrased in the undue influence rubric) can be equated with character, as that term is used in 404(b).

214. See 95 C.J.S. WILLS § 392 (West 2015) (noting that "the fact that a testamentary act is unnatural, unreasonable or unjust is a circumstance to be considered along with other evidence bearing on the question whether it is the result of undue influence.").

215. For justly criticized opinions which appear to consider the element of the results of undue influence by applying outdated assumptions of "normal" against the testator's intentions see *In re Moses' Will*, 227 So. 2d 829, 833 (Miss. 1969) (setting aside a bequest of an older woman to a younger man on the basis of undue influence when she "entertained the pathetic hope that he might marry her"). See generally *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964) (voiding a bequest to a homosexual lover as undue influence), *aff'd*, 205 N.E.2d 864 (N.Y. 1965).

216. *In re Estate of Hobelsberger*, 181 N.W.2d 455, 456-58 (S.D. 1970).

217. *Id.* at 456-57, 459.

218. *Id.* at 459 (citing *In re Estate of Swanson*, 222 N.W. 491 (S.D. 1928)). "What could be more natural in view of his feelings that he did not have enough to remember all of his heirs?" *Id.*

219. *Imel v. Metz*, 100 N.W.2d 393 (S.D. 1960).

confronted with the young man's assertion, the testator replied: "[T]hat's a demn [sic] lie" and "He ain't no such damn thing."²²⁰ A will executed near the end of the testator's life removed an \$8,000 bequest to a beloved housekeeper, replacing it with a bequest of only \$1,000 and inserted the alleged illegitimate son as a devisee to the exclusion of all other relatives.²²¹ This evidence clearly reflected the effect of the wrongdoer's (the alleged son's) influence, the court concluded.²²² The causation element of undue influence was established.

4. Other Roadblocks to Will Validity (or Theories for the Will Contestant)

Several other available, but less popular, will contest theories merit a brief discussion here. Fraud, duress, and tortious interference with an expectancy constitute additional potential theories for a will contestant. These theories are briefly highlighted below to properly situate these theories within the related doctrines of testamentary incapacity, insane delusions and undue influence.

a. Fraud: Intentional Trickery and Deception

A will can be set aside on account of fraud. There are two recognized types of fraud: fraud in the inducement and fraud in the execution.²²³ With fraud in the inducement, an intentional misrepresentation causes the testator to make a bequest.²²⁴ In fraud in the execution, the character or contents of the will are intentionally misrepresented to the testator.²²⁵ In either, the testator has capacity, but a misrepresentation causes her to make and execute a testamentary plan inconsistent with what her true intentions would have been, had she known the truth.²²⁶ Fraud is unique in requiring that the will contestant establish that the individual that articulated the false statement did so with the intent to deceive

220. *Id.* at 396.

221. *Id.* at 398.

222. *Id.* "In the light of all the surrounding facts and circumstances the contested will speaks for itself in this regard." *Id.*

223. PAGE, *supra* note 49, at 143-44. Fraud can be "practically impossible to distinguish" from undue influence. *Id.* at 143. "Undue influence is essentially overpowering the will; fraud is deceit." *Id.*

224. See *Walker v. Carson*, 194 P. 5, 7 (Cal. 1920) (examining the case of a bequest to an individual the testator believed was her husband based on a sham ceremony).

Fraud in the inducement of a will consists of false statements of fact willfully made by a beneficiary to a testator, which are made in bad faith or with the intent of deceiving the testator, and which do deceive him and induce him to make a will he would not otherwise have made.

In Re Estate of Weickum, 317 N.W.2d 142, 146 (S.D. 1982) (citations omitted).

225. See *Waite v. Frisbie*, 47 N.W. 1069, 1070 (Minn. 1891) (invalidating will signed ten minutes before death which did not contain provisions testator had requested); *Baker v. Baker*, 78 N.W. 453, 453 (Wis. 1899) (involving a sickly testator whose stated intentions to leave his wife a life estate were not reflected in will prepared for him).

226. In *Walker v. Carson*, for example, the court had to construe the testator's probable intent in light of the fact that she had remained married to the "marital adventurer" for twenty years following their sham marriage ceremony and concluded that the bequest may have been made not so much out of the supposed legal marital relationship but out of "their long and intimate association." *Walker*, 194 P. at 8.

the testator.²²⁷ Fraud can be contrasted with other theories of the will contestant as giving special relevance to the state of mind of the wrongdoer.

For example, in *Weickum's Estate*, Anna Weickum, a widow, had ten children.²²⁸ Following a bitter dispute involving her husband's estate, she executed a new will which left her estate to four of her children, excluding the other six.²²⁹ The disinherited children, as will contestants, claimed fraud in the inducement.²³⁰ They claimed, among other things, that the will proponent had told Anna Weickum that one of the disinherited children's spouses had verbally attacked her during her husband's estate dispute.²³¹ The South Dakota Supreme Court affirmed dismissal of the fraud claim, the contestants having failed to establish that "the misrepresentation caused decedent to act on the fraud."²³²

b. Duress: Amped-up Undue Influence

Duress is another variety of wrongdoing associated with the execution of a will by an individual with testamentary capacity. Arguably, duress is not a theory or doctrine independent of undue influence, but rather a certain type of undue influence where the influence of the wrongdoer is overtly coercive. Outright threats can constitute duress. A bequest is procured by duress when a wrongdoer carries out or threatens a wrongful act that causes a testator to make a bequest she would not have otherwise made.²³³ Fraud and duress were popular theories of will contestants in previous years, but undue influence has now surpassed them both.²³⁴

c. Tortious Interference with an Expectancy: A Nascent Tort Theory

The nascent tort known as tortious interference with an expectancy²³⁵ has not to date been recognized or considered for recognition in South Dakota, either

227. THOMPSON, *supra* note 40, at 467 (citing *In re Estate of Benton*, 63 P. 775 (Cal. 1901)); *Hannah v. Anderson*, 54 S.E. 131 (Ga. 1906)).

228. *Estate of Weickum*, 317 N.W.2d at 144.

229. *Id.* at 145.

230. *Id.* at 146.

231. *Id.*

232. *Id.* at 146-47. "There is no showing that decedent changed her will as a result of the alleged false statements." *Id.* at 146.

233. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(c) (2003).

234. Madoff, *supra* note 153, at 580 (noting that "undue influence is much easier to prove [than fraud or duress], requiring no direct evidence of malfeasance by (or on behalf of) the named beneficiary").

235. RESTATEMENT (SECOND) OF TORTS § 774B (1979). "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* Section 774B of the Restatement states in comment b:

[T]he rule stated here applies when a testator has been induced by tortious means to make his first will or not to make it; and it applies also when he has been induced to change or revoke his will or not to change or revoke it. It applies also when a will is forged, altered or suppressed.

Id. cmt. b.

legislatively or by judicial fiat. The elements of the claim include “(1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages.”²³⁶ The tort is an attractive alternative to undue influence where *res judicata* or a statute of limitations might bar a direct challenge to a will or where federal diversity jurisdiction might be desired.²³⁷ There appears to be a trend towards recognition of the tort.²³⁸

5. *The Uncertain Status of Mistakes*

The prevailing view is that a mere mistake of fact does not affect the validity of a will.²³⁹ It can be difficult to distinguish a mistake from a component of testamentary incapacity. How are the courts to determine if an individual lacked the ability to identify the natural objects of his bounty—in which case the will fails—or was merely mistaken about the identity of the natural objects of his bounty—in which case the will is unaffected?

The doctrine of insane delusions can present similar conundrums. Is an individual who wrongly concludes that her spouse is being unfaithful to her and proceeds to disinherit him mistaken or suffering from an insane delusion? The irrationality component of an insane delusion is intended to function as a distinguishing inquiry. It is not entirely clear, however, why the law would frown on a will motivated by an irrational conclusion but not one founded on a rational but ultimately erroneous conclusion.

South Dakota Codified Laws section 29A-3-407 states a will challenger has “the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, *mistake* or revocation.”²⁴⁰ The placement of the word

236. *Schilling v. Herrera*, 952 So. 2d 1231, 1234 (Fla. Dist. Ct. App. 2007) (citations omitted); *see also Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978) (“[W]e are persuaded that an independent cause of action for the wrongful interference with a bequest does exist . . .”).

237. *See In re Estate of Ricard*, 2014 SD 54, ¶ 17, 851 N.W.2d 753, 759 (holding that a petition to set aside a will on the basis of undue influence was barred by *res judicata* following the entry of an order for complete settlement). If the tort were recognized in South Dakota, the will challengers in *Ricard* could still arguably pursue a collateral claim for tortious interference with an inheritance expectancy. *See DeWitt v. Duce*, 408 So. 2d 216, 219 (Fla. 1981) (citation omitted) (“[i]f the defendant’s fraud is not discovered until after probate, plaintiff is allowed to bring a later action for damages since relief in probate was impossible.”); *see also Harmon v. Harmon*, 404 A.2d 1020, 1025 (Me. 1979) (allowing a claim of undue influence to proceed while the testator was still living).

238. *See* Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Mountain States*, 45 IDAHO L. REV. 1, 2 (2008); Diane J. Klein, “*Go West, Disappointed Heir*”: *Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209, 210 (2009). *But see* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with an Inheritance*, 65 STAN. L. REV. 335 (2013) (arguing convincingly against the soundness of the tort).

239. PAGE, *supra* note 49, at 140–41. A mistake can be distinguished from an insane delusion because an insane delusion is not based on evidence or facts—or at least without any evidence from which a sane man could draw the conclusion which forms the delusion.” *Id.* at 127. “A further test of the insane delusion is that it can not [sic] be removed, or at least permanently removed, by evidence.” *Id.* at 128.

240. S.D.C.L. § 29A-3-407 (2004) (emphasis added).

“mistake” here suggests that South Dakota courts may grant a remedy for mistake just as for lack of capacity or undue influence; the remedy for a mistake, however, is not typically to eject the will or the affected provisions of the will.²⁴¹ The statutes fail to outline any remedies. Revisions to the Uniform Probate Code after South Dakota’s adoption include the following section, which would, if adopted by South Dakota as a statute, clarify the situation:

The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.²⁴²

Mistakes can sometimes be corrected by means of a court-ordered reformation of the will.²⁴³ In South Dakota, however, will reformations are disfavored.²⁴⁴ The South Dakota Supreme Court has noted that “equity will not reform a will because of mistakes or omissions and reformation will not be granted under the guise of construction.”²⁴⁵ When provisions of a will are invalidated under the doctrine of undue influence, reformation cannot be relied

241. The recent case of *Hyde Trust* seems to demonstrate that the remedy of a mistake (so long as a mistake is proved by clear and convincing evidence) is will reformation. *In re Donald Hyde Trust*, 2014 SD 99, 858 N.W.2d 333. There, the South Dakota Supreme Court affirmed Circuit Judge Macy’s finding that a codicil did not modify a trust. *Id.* ¶ 28, 858 N.W.2d at 342. The Supreme Court imposed a clear and convincing evidence showing of intent to permit a codicil to modify a trust. *Id.* The Supreme Court also applied a clear and convincing evidence threshold to reform the decedent’s revocable trust. *Id.* ¶ 29, 858 N.W.2d at 342. The application of this heightened evidentiary standard in the context of a trust reformation seems inconsistent with the statutory requirement of simply requiring evidence of a mistake where “the trustor’s intent can be established.” *Id.* (quoting S.D.C.L. § 55-3-28 (2004)).

242. UNIF. PROBATE CODE § 2-805, 8 U.L.A. 335 (2013) (amended 2010). This section was added to the Uniform Probate Code in 2008. UNIF. PROBATE CODE § 2-805 cmt., 8 U.L.A. 336 (2013). A “governing instrument” includes a will. UNIF. PROBATE CODE § 1-201(18), 8 U.L.A. 47 (2013) (amended 2008). See also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003). “Recent cases and statutes have begun to recognize that wills can be reformed.” *Id.* cmt. c. According to the Restatement:

In order to support the equitable remedy of reformation [of a will], the extrinsic evidence must establish, by clear and convincing evidence, (1) that a mistake of fact or law affected the expression, inclusion, or omission of specific terms of the document, and (2) what the donor’s actual intention was in a case of mistake in expression or what the donor’s actual intention would have been in a case of mistake in the inducement. A petition for reformation can be brought under this section by any interested person, before or after the donor’s death.

Id. cmt. g.

243. See generally John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

244. E.g., *In re Estate of Nelson*, 274 N.W.2d 584, 590 (S.D. 1978) (reversing the trial court’s will reformation order); see also *Hines v. Hines*, 2014 SD 32, ¶ 13, 851 N.W.2d 184, 188 (denying reformation of a deed based on a purported mistake).

245. *In re Estate of Hoisington*, 291 N.W. 921, 926 (S.D. 1940).

[A] court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid.

Id. (citation omitted).

on to repair the document.²⁴⁶ By contrast, trust reformations—even testamentary trust reformations (i.e., trusts contained within wills)—are more freely available.²⁴⁷ Thus, when a trust is involved, reformation may be an acceptable alternative to invalidation through undue influence or another theory available to the contestant.

B. ESTATE OF BERG: AN ILLUSTRATION OF FREEDOM OF DISPOSITION

1. The Facts and Background

Fred Berg was born in 1919 and was the youngest of nine children.²⁴⁸ Although he grew up in North Dakota, most of his life was spent in South Dakota.²⁴⁹ During World War II, Fred served in the United States Army, but he was discharged in 1943 on account of service-connected schizophrenia.²⁵⁰ He suffered from hallucinations, underwent electroshock therapy as well as a prefrontal lobotomy, and received psychotropic medications for the rest of his life.²⁵¹ The scars from the lobotomy procedure were still visible forty-five years later when he first met with attorney Tom Foye, who would draft Fred's will.²⁵² Fred's physicians generally considered him to be incompetent.²⁵³

Following the lobotomy procedure, Fred tried living with his sister Helen Manns and her husband, but he tended to start small fires while smoking and did not function well outside of a care facility so he soon returned to the Veterans Administration (VA) Hospital at Fort Meade, South Dakota outside the town of Sturgis.²⁵⁴ In 1964, he moved to the Ox Yoke Ranch, a residential facility serving disabled veterans in nearby Nemo.²⁵⁵ Fred stayed there until the facility closed in 1991 and then he returned to the VA Hospital at Fort Meade.²⁵⁶ The next year, he relocated to the Good Samaritan Center, a nursing home located in

246. *Estate of Nelson*, 274 N.W.2d at 590 (citing *In re Estate of Lloyd*, 189 N.W.2d 515 (S.D. 1971)); see also *Hines*, 2014 SD 32, ¶ 13, 851 N.W.2d at 188 (denying relief in attempt to reform warranty deed).

247. See S.D.C.L. § 55-3-24 (2004). But see *In re Donald Hyde Trust*, 2014 S.D. 99, 858 N.W.2d 333 discussed *infra* note 241. A trust may be reformed for any reason if the trustor and all beneficiaries consent or in the absence of the trustor's consent so long as "continuance of the trust on its existing terms is not necessary to carry out a material purpose." *Id.* Where one or more beneficiaries do not consent, reformation is still permissible by court order "if the rights or interests of the beneficiaries who do not consent are not significantly impaired or adversely affected." S.D.C.L. § 55-3-25 (2004); Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 263-70 (2010).

248. *In re Estate of Berg*, 2010 SD 48, ¶ 2, 783 N.W.2d 831, 833.

249. *Id.* ¶¶ 2-10, 783 N.W.2d at 833.

250. *Id.* ¶ 2, 783 N.W.2d at 833.

251. *Id.* ¶¶ 3-4, 783 N.W.2d at 833.

252. Appellant's Brief, at *6-7, *In re Estate of Berg*, 2010 SD 48, 783 N.W.2d 831 (No. 25429), 2009 WL 6692400 [hereinafter Appellant's Brief].

253. *Estate of Berg*, 2010 SD 48, ¶ 3, 783 N.W.2d at 833.

254. *Id.* ¶ 5, 783 N.W.2d at 833.

255. *Id.* ¶ 6, 783 N.W.2d at 833.

256. *Id.* ¶¶ 9-10, 783 N.W.2d at 834.

New Underwood, South Dakota, and he remained there for eight years. In 1999, with declining health, Fred moved back to Fort Meade where he passed away in 2006 at age eighty-seven.²⁵⁷

Fred Berg received ongoing pension benefits arising out of his service-connected disability for most of his life and in 1967, U.S. Bank was appointed as his guardian to manage his financial affairs.²⁵⁸ The initial appointment of a guardian was premised on the Veteran's Administration having found Fred incompetent.²⁵⁹ U.S. Bank's role as a fiduciary responsible for managing Fred's financial affairs continued for the rest of his life.

Beginning in 1991, Fred developed a friendship with Roger Berg, one of his nephews.²⁶⁰ Roger was also a veteran, having served in Vietnam.²⁶¹ For the next sixteen years, the two talked face to face and over the telephone frequently. Roger would visit his uncle once or twice every year and they took trips together to family reunions, to Washington State, and around South Dakota's Black Hills.²⁶² Roger was the only member of the family who routinely visited Fred.²⁶³

In 1995, upon the suggestion of another relative, Fred and Roger discussed the idea of powers of attorney for Fred.²⁶⁴ Roger contacted respected Rapid City attorney Tom Foye to schedule an appointment and took his uncle to Mr. Foye's office.²⁶⁵ In Roger's presence, Fred signed a durable power of attorney appointing Roger as his agent for financial and business purposes as well as a power of attorney for health care purposes.²⁶⁶ Thereafter, the Good Samaritan staff would call Roger to update him on his uncle's medication changes and other issues that might require Roger's input or approval.²⁶⁷ Roger also began

257. *Id.* ¶¶ 1, 10, 783 N.W.2d at 833, 834.

258. *Id.* ¶ 8, 783 N.W.2d at 834. U.S. Bank was the successor to American National Bank & Trust Company which was initially appointed guardian in 1967. *Id.* Initially, U.S. Bank served as a guardian. *Id.* (citing S.D.C.L. § 29A-5-103 (2004)) (providing for internal citation of "SDC 1960 § 35. 1907"). Statutory changes in 1993 altered the terminologies in guardianship matters and U.S. Bank thereafter served as conservator. *See* S.D.C.L. § 29A-5-102(2) (2004) (defining a conservator as one appointed "to be responsible the estate and financial affairs" of a protected person); S.D.C.L. § 29A-5-102(4) (defining a guardian as one appointed "to be responsible for the personal affairs" of a protected person); *see also* S.D.C.L. § 33A-3-1 (2011) (defining both guardians and conservators as a "fiduciary" when appointed for veterans). After the statutory changes, no guardian was appointed for Fred. *Estate of Berg*, 2010 SD 48, ¶ 8, 783 N.W.2d at 834.

259. *Id.* ¶ 8, 783 N.W.2d at 834 (citing 38 C.F.R. § 3.353). A VA determination of incompetence is made for the limited purpose of disbursement of VA benefits. *Id.* ¶ 8, 783 N.W.2d at 834 n.4.

260. *Id.* ¶ 11, 783 N.W.2d at 834-35.

261. *Id.* ¶ 19, 783 N.W.2d at 836.

262. *Id.* ¶ 13, 783 N.W.2d at 835.

263. *Id.* ¶ 14, 783 N.W.2d at 835.

264. *Id.*

265. *Id.* ¶ 15, 783 N.W.2d at 835.

266. *Id.*

267. *Id.* Roger's appointment of an agent for financial matters under the durable power of attorney instrument executed in attorney Tom Foye's office in 1995 did not affect the powers or responsibility of Berg's conservator. *See* S.D.C.L. § 29A-5-501 (2004) (providing that the appointment of a conservator continues until the death, resignation, or removal of the conservator or the termination of the proceedings); *see also* S.D.C.L. § 29A-5-118 (2004) (stating that a conservator has no power to revoke or amend a durable power of attorney absent prior court authorization).

receiving copies of U.S. Bank's annual accountings, and it was then that he first learned that the bank was managing about half a million dollars for Fred as his conservator.²⁶⁸ Roger did not reveal Fred's financial information to the rest of the Berg family, but he did schedule another appointment for Fred with attorney Foye, this time to talk about a will, and once again, he drove his uncle to the law office.²⁶⁹

On that day, Roger met Tom Foye in the law office lobby, and Mr. Foye met privately with Fred while Roger waited in the lobby.²⁷⁰ They talked for about twenty minutes.²⁷¹ Mr. Foye asked Fred about his assets. Fred replied that he had \$100,000 in bank accounts.²⁷² Mr. Foye asked him about his family and Fred explained that he had two living sisters, Helen Manns and Anne Hunt, and some twenty nieces and nephews.²⁷³ Mr. Foye asked him how he wanted his will to read and Fred stated he wanted his estate to be distributed to Roger, or his two living sisters if Roger predeceased him and that he wanted Roger to serve as his personal representative, with U.S. Bank as a successor if Roger were unable to serve in that capacity.²⁷⁴ Tom Foye wrote the will accordingly, sending Fred a draft in all capital letters on account of Fred's failing eyesight and supervised the execution of the will on March 26, 1998.²⁷⁵

Fred passed away eight years later whereupon Roger learned that he was named as the residual heir and nominated as the estate's personal representative.²⁷⁶ Roger promptly disclaimed any right to an inheritance.²⁷⁷ With Fred's sister Anne having predeceased, this left Helen Mann, Fred's only

268. *Estate of Berg*, 2010 SD 48, ¶ 16, 783 N.W.2d at 835-36; see also S.D.C.L. § 29A-5-408 (2004) (requiring annual accountings from a conservator).

269. *Estate of Berg*, 2010 SD 48, ¶¶ 16-18, 783 N.W.2d at 835-36. Roger claimed that he kept his uncle's financial information to himself on account of his position of trust as Fred's agent under power of attorney and also "his concern that despite the few visits family were able to make over the past twenty years, some family members might begin visiting Fred in order to obtain access to the money or in an attempt to inherit." *Id.* ¶ 16, 783 N.W.2d at 836.

270. *Id.* ¶ 18, 783 N.W.2d at 836.

271. *Id.* ¶ 20, 783 N.W.2d at 836.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* ¶ 21, 783 N.W.2d at 836-37. Tom Foye had called Good Samaritan to schedule the second will appointment with Berg. *Id.* When the Good Samaritan staff took the call, they were concerned that Berg might lack the capacity to execute a will. *Id.* ¶ 24, 783 N.W.2d at 837. Jeff Denison, conservator U.S. Bank's trust officer, was contacted and he assured them that "Attorney Foye would have asked questions to ascertain Fred's capacity to sign the will and that Attorney Foye was very experienced and well respected in the legal community." *Id.* An activities director from Good Samaritan drove Fred to Foye's office when the will was signed. *Id.* ¶ 21, 783 N.W.2d at 837. Roger had admitted himself to a VA hospital in Kansas shortly after the initial will appointment with attorney Foye and did not return to see Fred until several months after the will had been signed. *Id.* ¶ 19, 783 N.W.2d at 836.

276. See *id.* ¶ 28, 783 N.W.2d at 838.

277. *Id.*; see also S.D.C.L. § 29A-2-801 (2004) (detailing the procedures and effects of disclaimers of property interests). Roger executed a disclaimer just over four months after Fred's death, well within the nine month deadline for disclaimers. *Estate of Berg*, 2010 SD 48, ¶ 28, 783 N.W.2d at 838; S.D.C.L. § 29A-2-801; 26 U.S.C. § 2518 (2012).

sibling to survive him, as the sole contingent devisee under the will.²⁷⁸ If the will were invalid, Helen would receive 1/8 with the other 7/8 distributed among numerous nieces and nephews.²⁷⁹ One of those nieces, Carol Opdahl, filed a petition challenging the will on the basis of testamentary incapacity and undue influence.²⁸⁰ Great Western Bank was appointed as the estate's special administrator.²⁸¹

2. *The Procedure and Trial*

A court trial was held lasting three days.²⁸² Among those called to the witness stand were staff from Good Samaritan, Roger Berg, Carol Opdahl, U.S. Bank trust officer Jeff Denison, and attorney Tom Foye.²⁸³ Opdahl's counsel called one of Fred Berg's former treating physicians at the VA, Dr. Pablo Faustino, as well as a forensic psychiatrist, Dr. Stephen Manlove, who opined that there was overwhelming evidence that Fred "was probably thought disordered and psychotic on the day the will was made."²⁸⁴ Dr. Manlove concluded that "he could not have defended the will signing under the South Dakota three-part test for testamentary capacity" and that Fred's schizophrenia rendered him "more susceptible to undue influence"²⁸⁵

During the trial, it came to light that Fred had suffered from delusions and confusion about the identity of certain family members. In 1988, Fred "claimed several relatives such as a non-existent sister Hattie, a non-existent niece Murtle Nash, a common-law-son Eugene Blackburn, and in 1992 a non-existent brother

278. *Estate of Berg*, 2010 SD 48, ¶ 28, 783 N.W.2d at 838. Fred's contingent bequest to his two sisters was conditional upon survival. It read:

In the event my nephew, Robert E. Berg, predeceases me, I devise all of the rest, residue, and remainder of my estate, whether real, personal or mixed, wherever situated, which shall remain after payment of debts, expenses, and taxes to my sister, Anne Hunt, of Yakima, Washington, and my sister, Helen Mann, of Ypsilanti, North Dakota, equally, share and share alike. If either of them predecease me, I devise said residue to the survivor of them.

Appellee Special Administrator's Brief at Ex. 1-2, *In re Estate of Berg*, 2010 SD 48, 783 N.W.2d 831 (No. 25429) (available at the Univ. of S.D. McKusick Law Library) [hereinafter Special Administrator's Brief]. The final version of the will, like the draft, was printed in all capital letters for Fred to better be able to read and review it.

279. *Id.*; see also S.D.C.L. § 29A-2-103(3) (2004) (providing that under intestacy when there is no surviving parent, spouse, or descendants, that the estate passes "to the descendants of the decedent's parents or either of them by representation").

280. *Estate of Berg*, 2010 SD 48, ¶¶ 29-40, 783 N.W.2d at 838-39.

281. *Id.* ¶ 43, 783 N.W.2d at 841. See also S.D.C.L. §§ 29A-3-614 to -618 (2004) (outlining the appointment and powers of special administrators).

282. *Estate of Berg*, 2010 SD 48, ¶ 30, 783 N.W.2d at 839 (showing that the first day of the trial was held on May 20, 2009, the trial then resumed six weeks later and concluded after two additional days of testimony); Appellee's Brief at 2, *Opdahl v. Manns*, 2009 SD 48, 783 N.W.2d 831 (No. 25429), 2010 WL 2917216.

283. *Estate of Berg*, 2010 SD 48, ¶¶ 30, 34, 36, 783 N.W.2d at 839-40.

284. *Id.* ¶¶ 30, 32, 783 N.W.2d at 839.

285. *Id.* ¶¶ 31-32, 783 N.W.2d at 839. Dr. Manlove refrained from testifying whether he believed that Berg had actually been unduly influenced when the will was executed. See *id.* ¶ 31, 783 N.W.2d at 839.

Charles.”²⁸⁶ At some point, Fred also believed that a German doctor (who apparently did not exist) was his father.²⁸⁷ Significant, especially in Dr. Manlove’s view, was the static delusion that Hollywood actor Fred MacMurray was Fred’s father.²⁸⁸ Dr. Faustino agreed that this delusion, as well as Fred’s statements late in life that he wanted to go to medical school and become a physician, “indicated unrealistic thought processes” that were “indicative of a benign psychosis.”²⁸⁹ Opdahl testified that Fred’s doctors had told her that Fred “could not think, could not reason, and could not reach valid conclusions” and that, in her view, her uncle was “essentially a human robot” whose activities had to be directed by someone else.²⁹⁰ Opdahl’s counsel also emphasized Fred’s belief that his estate was valued at \$100,000 when, in fact, it was nearly five times that amount.²⁹¹

Judge Eckrich’s findings and conclusions indicated the Good Samaritan staff and Roger Berg were credible witnesses.²⁹² The court found attorney Foye a credible witness in that he had appropriately explored Fred’s testamentary competency when he met with him in late 1997 and early 1998.²⁹³ Mr. Foye had asked questions of his client designed to elicit responses directly relevant to the three-part testamentary capacity test.²⁹⁴ Judge Eckrich gave weight to the testimony of Drs. Manlove and Faustino, but gave greater weight to those individuals who had seen Fred on a more frequent basis over the years.²⁹⁵ Rejecting Opdahl’s assertions of testamentary incapacity and undue influence, the court concluded that the 1998 will was valid and that Helen Mann was therefore the sole devisee.²⁹⁶ Opdahl appealed.

3. *The Opinion and its Quiet Legacy*

In unanimously affirming Judge Eckrich’s ruling, the South Dakota Supreme Court quickly disposed of the undue influence claim, finding the claim untenable especially since Roger had disclaimed his rights to inherit under his

286. *Id.* ¶ 32, 783 N.W.2d at 839.

287. *Id.* ¶ 32 n.11, 783 N.W.2d at 839.

288. *Id.* ¶ 32, 783 N.W.2d at 841. Fred MacMurray (1908-1991) is best known for starring in the film noir classic *Double Indemnity* and the long-running television series *My Three Sons*. *Id.* ¶ 25 n.9, 783 N.W.2d at 838; *DOUBLE INDEMNITY* (Paramount Pictures 1944); *My Three Sons* (ABC television broadcasts Sept. 29, 1960 - May 20, 1965); *My Three Sons* (CBS television broadcasts Sept. 16, 1965 - Aug. 24, 1972).

289. *Estate of Berg*, 2010 SD 48, ¶¶ 32-33, 783 N.W.2d at 839.

290. *Id.* ¶¶ 34-35, 783 N.W.2d at 839.

291. *Id.* ¶ 16, 783 N.W.2d at 835-36. Appellant’s Brief, *supra* note 252, at *6.

292. *Estate of Berg*, 2010 SD 48, ¶ 36, 783 N.W.2d at 840.

293. *Id.* ¶¶ 20-21, 36, 783 N.W.2d at 836-37, 840.

294. *Id.* ¶ 36, 783 N.W.2d at 840. The South Dakota Supreme Court would agree: “Attorney Foye’s testimony was based on over fifty years of experience in assessing and determining the competency of testators and on his contemporaneous notes and billing records.” *Id.* ¶ 51, 783 N.W.2d at 843. His testimony “remained consistent throughout.” *Id.* ¶ 51, 783 N.W.2d at 843-44.

295. *Id.* ¶ 37, 783 N.W.2d at 840.

296. *Id.* ¶¶ 38-40, 783 N.W.2d at 840-41.

uncle's will.²⁹⁷ Turning to the issue of testamentary incapacity, the court focused on the first two elements: whether Fred had been capable of knowing the nature and extent of his property and of identifying the natural objects of his bounty.²⁹⁸ While not specifically endorsing the trial court's findings with regards to the first element, the court implicitly approved Judge's Eckrich's reasoning that "Fred was aware he had a sizeable estate, but because he did not spend a significant amount of money Fred had no reason to know or care about the exact amount."²⁹⁹ Fred was capable of identifying both the nature (cash and liquid investments at U.S. Bank) and the extent (at least insofar as describing it as "sizeable") of his property.³⁰⁰

The more troubling aspect of the record was Fred Berg's rather startling belief that Fred MacMurray was his father, a belief which apparently persisted over a long period of time.³⁰¹ In view of this delusion (and other less colorful delusions concerning non-existent siblings, a niece, a "common-law-son" and a German doctor he also believed to be his father), could Fred be said to have been capable of identifying the natural objects of his bounty?³⁰² Never having previously phrased a legal definition of the natural objects of a testator's bounty, the court noted approaches from sister jurisdictions.³⁰³ Nebraska and Missouri, the Court observed, take the approach that to possess testamentary capacity, an individual must be capable of identifying those individuals who would comprise their heirs in intestacy.³⁰⁴ North Dakota and California take a more flexible approach when the next of kin are collateral heirs, considering who has "peculiar or superior claims to the decedent's bounty. . . ."³⁰⁵ The court then reasoned:

We need not settle the matter of who are the natural objects of a testator's bounty today other than to say that an imaginary father, or other fictitious relative, who is not named in the will qualifies under neither definition. Fred did not attempt to devise his estate to Fred MacMurray; his claimed German father; or the non-existent niece, brother, or common-law-son. Fred devised his estate to Roger, a nephew with whom he had a loving and

297. *Id.* ¶¶ 55-56, 783 N.W.2d at 844. Opdahl claimed that Helen Mann's daughter Virginia and Roger had entered into an agreement to share Mann's inheritance if Roger's testimony helped uphold Berg's will, but offered no evidence in support of the claim other than Roger's secrecy regarding Berg's finances. *Id.* ¶¶ 35, 55, 783 N.W.2d at 840, 844. Opdahl also accused Roger of "two 'felonies' including making a fraudulent will for his own benefit and creating the power of attorney." *Id.* ¶ 35, 783 N.W.2d at 840. The trial court had also rejected the suggestion "that Roger contemplated or designed, or would benefit from, some conspiracy, subterfuge, fraud, or other machination to bypass the legal effect of the formal disclaimer as contended by Opdahl." *Id.* ¶ 39, 783 N.W.2d at 841.

298. *Id.* ¶¶ 44-46, 783 N.W.2d at 841-42.

299. *Id.* ¶ 38, 783 N.W.2d at 840.

300. *Id.* ¶¶ 44-53, 783 N.W.2d at 841-44 (examining Fred's testamentary capacity to execute his will).

301. *See id.* ¶ 32, 783 N.W.2d at 839 (describing Fred's delusion concerning Fred MacMurray as "static").

302. *Id.* ¶¶ 32, 43, 783 N.W.2d at 839, 842 n.11.

303. *Id.* ¶ 45, 783 N.W.2d at 842.

304. *Id.* (citing *Norris v. Bristow*, 219 S.W.2d 367, 379 (Mo. 1959); *In re Colman's Estate*, 137 N.W.2d 822, 824 (Neb. 1965)).

305. *Id.* (quoting *Stormon v. Weiss*, 65 N.W.2d 475, 505 (N.D. 1954)).

long-term relationship in the last sixteen years of his life and, at the time he executed the will, his two living sisters Helen and Anne.³⁰⁶

The court thus stopped short of offering a workable definition for the natural objects of one's bounty.³⁰⁷

Arguably, however, under the bright-line rule which defines those objects by reference to intestacy statutes, Fred knew at the time of his 1998 will that he had no children, two living sisters, and numerous nieces and nephews.³⁰⁸ Under the looser approach followed in North Dakota, the closest family members and blood relations in Fred's life in 1998 were clearly his nephew Roger and his two living sisters, individuals that he could not only identify, but directed his attorney to benefit as devisees under his will.³⁰⁹ Indeed, when Fred met with attorney Foye, he identified all of his collateral relatives including the numerous nephews and nieces (though not by name, except for Roger) and evidenced no fantasies about Fred MacMurray, Germans, or common-law sons.

As to the natural objects of one's bounty issue, *Berg* is best read as declining to identify the precise natural objects of Fred Berg's bounty given the determination that the circuit court's ruling could be properly affirmed regardless of how those persons should be determined. If the natural objects of Fred's bounty were his then living siblings and numerous nieces and nephews, he identified those individuals adequately to Tom Foye; if the natural objects of Fred's bounty were those closest in his life—Roger, Helen, and Anne—he identified them to attorney Foye as well. After confirming that Fred's confusion about the identity of his father and other relatives did not undermine his testamentary capacity, the court turned briefly to the doctrine of insane delusions.³¹⁰

306. *Id.* ¶ 46, 783 N.W.2d at 842.

307. The "natural objects of one's bounty" issue can arise in connection with both testamentary capacity as well as undue influence insofar as undue influence may consider, as one factor, whether a will's disposition of assets was "unnatural." *E.g.*, *Johnson v. Shaver*, 172 N.W. 676, 677 (S.D. 1919) ("[W]hile seemingly unjust and unnatural bequests . . . are not alone sufficient evidence of mental incapacity or undue influence, they are circumstances entitled to consideration . . ."), *modified by In re Estate of Armstrong*, 272 N.W. 799 (S.D. 1937); *Reddaway v. Reddaway*, 329 P.2d 886, 892 (Or. 1958) (en banc) (citation omitted) (noting that "[t]he 'disregard of natural objects of testator's bounty' is listed as one of the indicia of undue influence"). South Dakota Supreme Court decisions do suggest, in this context, (1) that charities and institutions can never be the "natural objects of one's bounty;" and (2) that collateral relatives are not the natural objects of one's bounty. *Laby v. Thompson*, 226 N.W.2d 170, 174 (S.D. 1975). *See also* *Nelson v. First Nw. Trust Co. of S.D.*, 274 N.W.2d 584, 589 (S.D. 1978) (holding that although siblings and a nephew "are not considered the natural objects of the testator's bounty" their gradual disinheritance in successive wills drafted by the purported wrongdoer "demands close judicial scrutiny"); *In re Estate of Heibult*, 2002 SD 128, ¶ 23, 653 N.W.2d 101, 106 ("Ronald was a natural object of Anna's bounty, given he was the only child to remain in South Dakota, actively farm with his father, and care for his parents."). Overlaying this kind of reasoning to testamentary capacity suggests that an individual like Fred Berg could not be found to lack testamentary capacity if he failed to identify collateral relatives such as his many nieces and nephews.

308. *See* Special Administrator's Brief, *supra* note 278, at 22. Fred Berg's parents had both predeceased him at the time of the 1998 will. *Id.* Therefore, his intestate heirs would have been his two living sisters and the numerous nieces and nephews of his predeceased siblings. S.D.C.L. § 29A-2-103(3) (2004).

309. *See supra* note 308.

310. *Estate of Berg*, 2010 SD 48, ¶ 47, 783 N.W.2d at 842.

Will contestant Opdahl had not specifically argued that an insane delusion could void part or all of her uncle's will and failed to cite to South Dakota precedent which outlines the doctrine.³¹¹ Instead, perhaps anticipating the difficulty with the causation requirement of an insane delusion, she had argued that Fred's fixed delusion concerning the identity of his father resulted in Fred's inability to satisfy the natural objects of one's bounty prong of the test for testamentary capacity.³¹² The court nevertheless touched on the insane delusions doctrine in two important respects.

First, the court noted that Fred Berg's delusions concerning the identity of his father—having at times indicated that he believed Fred MacMurray was his father and at other times that a non-existent German doctor was his father—had some reasonable basis in fact and that Fred's confusion was, at least to some degree, susceptible to rational explanation. Fred Berg's actual father was a man named Gilbert.³¹³ In 1946, Gilbert visited his son at the VA hospital in Fort Meade.³¹⁴ For reasons unknown, when a doctor asked Gilbert about his relationship to his son, he responded, perhaps playfully, "I'm not the father. I'm only Gilbert Berg."³¹⁵ Asked to explain the strange remark, Gilbert replied, "Well, that woman over there says I'm the father."³¹⁶ Fred overheard Gilbert making these statements and Dr. Manlove believed that the remarks may have been the origin of Fred's confusion about the identity of his father. "It could have provided," the court explained, "the impetus for Fred to declare Fred MacMurray was his father and on another occasion that a German doctor, who Fred claimed had taken his hand after the lobotomy and helped him off the operating table, was his father."³¹⁷ The court concluded that the odd remarks of Gilbert Berg overheard by his son constituted "an adequate explanation for why Fred may have developed the delusion regarding who his father was."³¹⁸ The court demonstrated just how sympathetic the law can be in identifying the possible origins of the delusions of an individual struggling with mental illness, and thereby defeat the efforts of a will contestant to advance the doctrine of insane delusions.

311. See Appellant's Brief, *supra* note 252, at *20-23. Opdahl argued:

Fred's fixed delusion (and other delusions) were not merely *about* objects of his bounty, such as whether an heir treated him well or was abusing him, but they touched on the *existence* of his objects of bounty (whether his father or brother, or sister, or common law son even existed.) If one is deluded as to the existence of an object of his bounty, one can't be said to *comprehend* the objects of his bounty.

Id. at *22.

312. *Id.* at *20-22.

313. *Estate of Berg*, 2010 SD 48, ¶ 14, 783 N.W.2d at 835 n.6.

314. *Id.* ¶ 32, 783 N.W.2d at 839 n.11.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* ¶ 47, 783 N.W.2d at 842 n.12.

Second, the court noted that a delusion could only result in part of all of a will being set aside when the will was affected by the delusion in some way.³¹⁹ In *Berg*, this element of causation was absent. The court adopted Helen Manns' argument that "Fred's delusions did not touch his testamentary capacity because he never sought to name Fred MacMurray, or any other fictitious relatives, in his last will and testament."³²⁰ The will contestant could not show that Fred's belief that his father was a television star had any effect on the provisions of his will. Alternatively, it might have been argued that the evidence demonstrated that at the time Fred met with his estate planning attorney, Fred correctly identified his family members; there was no evidence that Fred was suffering from the delusions outlined by his doctor and Dr. Manlove at the time Fred formed the testamentary intent set forth in his will.³²¹

Berg illustrates the ease with which courts and counsel can confuse and coningle the doctrines of testamentary incapacity, insane delusion, and undue influence. The starting point is always testamentary capacity: it must first be ascertained whether the individual was capable of understanding his family and his assets and forming a testamentary plan in his mind. Different sorts of impairments can interfere with, diminish, and even destroy an individual's ability to conceptualize their property and their loved ones.³²² One individual's memory may be impaired; they may forget their loved ones and be unable to recall that they own a house.³²³ Another individual, afflicted with delusions, may become convinced that scheming aliens from Saturn are his closest kin.³²⁴ Yet another, suffering from paranoia, might come to the baseless conclusion that

319. *Id.* ¶ 47, 783 N.W.2d at 842 (citing *In re Estate of Schnell*, 2004 SD 80, ¶ 17, 683 N.W.2d 415, 420; *In re Estate of Walther*, 163 P.2d 285, 292 (Or. 1945); *In re Estate of Killen*, 937 P.2d 1368, 1372 (Ariz. Ct. App. 1996)).

320. *Id.* ¶¶ 43, 46-47, 783 N.W.2d at 841, 843.

321. *Id.* ¶ 7, 783 N.W.2d at 834 n.4 (noting, in the context of the Department of Veteran's Affairs rules regarding incapacity: "An insane person might have a lucid interval during which he would possess testamentary capacity.") (quoting 38 C.F.R. § 3.355(c) (2015)); see also *In re Estate of Gentry*, 573 P.2d 322, 325 (Or. Ct. App. 1978) (citations omitted) (noting that "[a] will made by an insane person may be valid if made during a lucid interval."). Oregon case law proclaims that "[m]ental competency to make a will is determined at the *precise moment* the will is executed." *Id.* (emphasis added) (citations omitted). South Dakota cases suggest *contra*: "Testamentary capacity is not determined by any single moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed." *In re Estate of Dokken*, 2000 SD 9, ¶ 14, 604 N.W.2d 487, 490 (citations omitted).

322. See Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177 (1994) (examining various mental disorders); Daniel C. Marson, Justin S. Huthwaite & Katina Hebert, *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 LAW & PSYCHOL. REV. 71 (2004). The test of testamentary capacity may apply where it is argued that the testator suffered from "mental illness, physical infirmity, senile dementia, and general insanity." *In re Estate of Breeden*, 992 P.2d 1167, 1171 (Colo. 2000) (en banc) (citation omitted).

323. See *Kramer v. Weinert*, 1 So. 26, 27 (Ala. 1887) (emphasizing that "[t]he failure of memory, unless it be entire, or extend to the immediate family and property" of the deceased testator, or be such that the testator "is unable to recall and retain the constituents of the business sufficiently long for its completion, is not of itself a legal standard of testamentary capacity").

324. See *In re Estate of Stitt*, 380 P.2d 601, 601 (Ariz. 1963) (en banc) (affirming the capacity of a testator who practiced black magic, believed she could cast spells, and "watched the neighbors' children from a peephole or stalked up and down along the fence between their property, glaring and gesturing to them and sticking out her tongue, in her efforts to get them to leave.").

her children have been stealing from her or that her spouse has been unfaithful.³²⁵ The first instance of failing memory sounds like a classic case of testamentary incapacity, the second, and especially the third sound more like insane delusions (and therefore subject to a causation analysis that may save the will, or at least portions of it). But in fact, in each of these cases, an appropriate application of testamentary incapacity considerations must precede any question of insane delusion or undue influence.

The *Berg* decision came close to—but ultimately eschewed—this kind of erroneous analysis that fuses insane delusions' causation element with a capacity inquiry. Fred Berg had delusions about the identity of his family, apparently suffering from confusion about a non-existent sister and a non-existent brother, and believing that both Fred MacMurray and a non-existent German man were his father, though perhaps he was not confused at the time he met with attorney Foye.³²⁶ There was testimony that at least with regard to the Fred MacMurray misconception, Fred Berg's confusion was static and not just an aberration at some point during his long clinical history.³²⁷ Yet there was also testimony that Fred retained the ability to discuss his natural parents.³²⁸ Additionally, at the time Fred met with his attorney, he correctly identified his two living siblings (his parents were then deceased) and "somewhere around twenty nieces and nephews including Roger" and did not mention any delusions regarding non-existent family members.³²⁹ It was clear that Fred correctly identified his family members without prompting since Roger was not allowed into the attorney's conference room. Thus, there was sufficient evidence on which the trial court could find that under any definition of the natural objects of Fred Berg's bounty, Fred was capable of identifying them, and did identify them to his attorney—meeting the first prong of testamentary capacity.

Turning to the second prong of testamentary capacity—the nature and extent of one's property—Fred believed that he had about \$100,000 in bank accounts when the actual amount was closer to five times that.³³⁰ Fred clearly identified the *nature* of his property (i.e., accounts managed by his conservator) but was off by a factor of five as to the *extent* of his property. If Fred was simply mistaken about the extent of his property, the mistake would not invalidate his will.³³¹ If, on the other hand, Fred's mathematical error reflected that he lacked the capability of understanding the extent of his wealth, he could

325. See generally *Benjamin v. Woodring*, 303 A.2d 779 (Md. 1973) (setting aside a will which disinherited a spouse where the testator suffered from paranoid schizophrenia as well as the uncorrectable irrational belief that she had been unfaithful to him, but then equating insane delusions with the issue of testamentary capacity).

326. *In re Estate of Berg*, 2010 SD 48, ¶ 32, 783 N.W.2d 831, 839.

327. *Id.*

328. *Id.* ¶ 25, 783 N.W.2d at 838. A Good Samaritan employee "testified that Fred would claim that the late actor Fred MacMurray was his father, but also could and did discuss his natural parents with her." *Id.*

329. *Id.* ¶ 20, 783 N.W.2d at 837.

330. *Id.* ¶ 16, 783 N.W.2d at 837.

331. See *supra* Part II.A.5 regarding mistakes.

not qualify as possessing testamentary capacity. The trial court correctly concluded that “Fred was aware he had a sizeable estate, but because he did not spend a significant amount of money Fred had no reason to know or care about the exact amount.”³³² The South Dakota Supreme Court agreed.³³³ Fred, in other words, was simply mistaken about the extent of his property.

No analysis was devoted to the third prong of testamentary capacity since Fred’s ability to form a plan about the disposition of his estate was preserved in the will his attorney had drafted. Like most cases, little attention was devoted to whether Fred could articulate the disposition he wished to make of his property. Thus, the conclusion was that Fred Berg had testamentary capacity.

Having concluded that the will contestant had failed to establish that Fred lacked testamentary capacity, the question became whether undue influence invalidated any portion of the will. Largely on account of attorney Tom Foye’s cautious representation, the undue influence claim also failed.³³⁴ There was simply no evidence Roger had influenced the way that the will had been drafted. Engaging in the burden-shifting exercise utilized in other undue influence cases was not even necessary.

The claim of an insane delusion merited a closer analysis. Were particular provisions of Fred’s will affected by specific beliefs unsupported by any rational explanation? The Fred MacMurray delusion was irrational and troubling; it

332. *Estate of Berg*, 2010 SD 48, ¶ 38, 783 N.W.2d at 840. The analysis in *Berg* with regard to Fred’s capability of identifying his wealth is consistent with the Colorado decision of *Romero* which contains a more detailed analysis in a strikingly similar fact pattern. *Romero v. Vasquez (In re Estate of Romero)*, 126 P.3d 228 (Colo. Ct. App. 2005). There, Robert Romero could not identify the amount of his estate, but understood that his assets derived from VA benefits were managed by a guardian. *Id.* at 232. The court also considered testimony from a VA field examiner that although VA guardians are required to file annual accountings, “veterans would not usually be in a position to know the exact value of their estates because they were not furnished copies of their annual accounts.” *Id.* Romero’s will was upheld. *Id.* See also *In re Estate of Dokken*, 2000 SD 9, ¶ 20, 604 N.W.2d 487, 493 (upholding will of testator who one witness claimed “had no knowledge of his actual income and estate” where assets were managed by a VA conservator which was “satisfactory with him”); *In re Bush*, 446 N.Y.S.2d 759, 760-61 (N.Y. App. Div. 1981) (upholding will where decedent understood the nature of his property—“that it consisted of bank accounts and money on deposit at the Veterans’ Administration”—although perhaps not the extent of his property since “there was some question as to whether he knew the precise size of his estate”). “[T]he ‘capacity to know or understand, rather than the actual knowledge or understanding, is sufficient.’” *Weeks v. Drawdy (In re Estate of Weeks)*, 495 S.E.2d 454, 461 (S.C. Ct. App. 1997) (quoting 94 C.J.S. WILLS § 15(c) (1956)).

333. See *Estate of Berg*, 2010 SD 48, ¶¶ 46-47, 783 N.W.2d at 842-43. The South Dakota Supreme Court summarized and implicitly endorsed the trial court’s reasoning with regards to the second prong of testamentary capacity but did not undertake a separate analysis of its own. *Id.*; accord *Romero*, 126 P.3d at 231 (quotation omitted) (“A perfect memory is not an element of testamentary capacity. A testator may forget the existence of part of his estate . . . and yet make a valid will.”). For another case holding that the test for testamentary capacity does not require an exact understanding of one’s family (i.e., the first prong) see *Moraity v. Moraity*, 65 N.W. 964, 964 (Mich. 1896) (citation omitted) (“It is not required that a testator should know and understand the number and condition of his relatives, nor their relative claims upon his bounty, nor that he should know and understand the reason for giving or withholding his bounty as to any and every relative . . .”).

334. *Estate of Berg*, 2010 SD 48, ¶ 51, 783 N.W.2d at 843. Where a testator receives independent and objective legal advice, the presumption of undue influence can be overcome. *Henrich v. Silvernail*, 500 N.E.2d 835, 842-43 (Mass. App. Ct. 1986) (citation omitted). See also *Imel v. Metz*, 100 N.W.2d 393, 398 (S.D. 1960) (emphasizing testator’s lack of independent counsel in successful undue influence challenge).

reflected the terrible impact of schizophrenia on Fred Berg's mind. The court noted, however, there was in fact "an adequate explanation for why Fred may have developed the delusion."³³⁵ Fred's natural father Gilbert had once denied being Fred's father, possibly joking, but Fred himself may have taken the jest seriously.³³⁶ The delusion could be said to have a basis in fact; it was not therefore necessarily an "insane" delusion. Moreover, the court emphasized, a causative link was absent.³³⁷ Even assuming that Fred suffered from an insane delusion ungrounded in fact, there was no indication that the delusion had any impact on the provisions of his will.³³⁸ Thus, the claim of an insane delusion also failed.

C. READING AND ASSESSING *BERG*

Although two important undue influence and testamentary capacity decisions have been issued in South Dakota since *Berg* was decided in 2010, neither cited *Berg* as authority.³³⁹ Nor, it appears, has any other reported decision from any other jurisdiction. This strange silence constitutes a quiet legacy for the *Berg* decision. One might argue that the absence of citations to *Berg* might be read as diminishing its authority.³⁴⁰ Case law has consistently emphasized that the three-part test for testamentary incapacity is to be applied liberally and that undue influence is notoriously difficult to establish, the artificial rubric of burden-shifting notwithstanding.³⁴¹ The rationale of *Berg* is not inconsistent with precedent stretching back many decades.³⁴² Thoughtful consideration of the *Berg* decision illustrates just how difficult the outcome in any given will challenge case can be to predict, unless the boundaries of undue influence, insane delusions, and testamentary capacity are faithfully marked.

335. *Estate of Berg*, 2010 SD 48, ¶ 47, 783 N.W.2d at 842 n.12.

336. *Id.* ¶ 32, 783 N.W.2d at 839 n.11.

337. *Id.* ¶ 47, 783 N.W.2d at 842.

338. *Id.* ¶ 46, 783 N.W.2d at 842. "Fred did not attempt to devise his estate to Fred MacMurray . . ." *Id.*

339. *See In re Estate of Long*, 2014 SD 26, 846 N.W.2d 782 (considering testamentary capacity and undue influence); *Stockwell v. Stockwell*, 2010 SD 79, 790 N.W.2d 52 (discussing undue influence and testamentary capacity in connection with the delivery of deeds which were testamentary in nature).

340. *But see* RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 72 (1990) (acknowledging "[t]he imperfections of citation counts as a measure of judicial quality . . .").

341. *See, e.g., Morairity v. Morairity*, 65 N.W. 964, 964 (Mich. 1896) (citation omitted) ("It is not required that a testator should know and understand the number and condition of his relatives, nor their relative claims upon his bounty, nor that he should know and understand the reason for giving or withholding his bounty as to any and every relative"); *Roller v. Kling*, 49 N.E. 948, 950 (Ind. 1898) (noting that while the testator must have the ability to remember the necessary facts, it is not required that he actually remembered them all); *Henry v. Hall*, 17 So. 187, 191 (Ala. 1895) (emphasizing that a testator may forget the existence of part of his estate or some who have natural claims to it yet still possess testamentary capacity); *see also Salter v. Ely*, 39 A. 365, 367 (N.J. Prerog. Ct. 1898) (holding that misrepresentations such as telling one's father that his daughters being married do not need additional gifts, do not amount to undue influence).

342. In fact, throughout this article, many nineteenth century cases have been cited which are clearly not at odds with the reasoning and tenor of the *Berg* decision, or the deference to an impaired testator intentions found in *Berg*.

Although the *Berg* decision devoted very little ink to the challenger's undue influence assertion, a straightforward application of the typical circumstantial evidence which can support a claim demonstrates that the challenger's claim would have almost certainly survived a motion for summary judgment. Recall that a presumption of undue influence can be generated by showing the testator's susceptibility along with "a confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom."³⁴³ Fred's susceptibility to undue influence was easily established: he had a lifelong mental and psychological impairments. Fred had a confidential relationship with his nephew, Roger, on account of Roger serving as his agent under financial and health care powers of attorney. Roger participated in his uncle's will, suggested that he make a will, scheduled an appointment with an attorney apparently selected by Roger, and drove his uncle to and from the meetings with the attorney. Finally, a triable issue of fact with regards to whether Roger "unduly profited" seems easily established insofar as he was named as the sole heir to the exclusion of then living siblings as well as approximately twenty other nieces and nephews.³⁴⁴

The *Berg* decision disposed of Opdahl's undue influence claim in short order without undertaking an assessment or application of the burden-shifting framework outlined in prior cases.³⁴⁵ The court emphasized there was an absence of direct evidence of Roger attempting to exert influence over the drafting of the will. In fact, Roger seemingly remained ignorant of the will's provisions until his uncle's death, and then was surprised by them.³⁴⁶ Although Roger had some involvement in sending Fred to an estate planning attorney, he distanced himself from suggesting or pressuring Fred into making his will in a way that would benefit Roger. Another strong factor that can also be gleaned from the opinion, which successfully refutes any presumption of undue influence, is that of Tom Foye's independent counsel during his representation of Fred and his effective testimony during the trial.³⁴⁷

343. *In re Estate of Dokken*, 2000 SD 9 ¶ 28, 604 N.W.2d 487, 495 (citation omitted).

344. *Berg* could be read to suggest that Roger did not "unduly profit" as a matter of law on account of his disclaimer of any inheritance. See *Berg*, 2010 SD 48, ¶ 39, 783 N.W.2d at 841 (summarizing the trial court's conclusion that "there was no evidence that Roger unduly profited from Fred's will because Roger made a reasonable and credible decision to formally disclaim before the will contest was filed"). A better reading is that Roger's disclaimer supported the trial court's finding that he was a credible witness.

345. Perhaps this suggests the limited utility of the rather awkward and contrived undue influence burden shifting framework.

346. See *Berg*, 2010 SD 48, ¶ 28, 783 N.W.2d at 838 (suggesting that Roger first learned he was Fred's sole heir upon receiving a copy of the will after Fred's death). But see Appellant's Brief, *supra* note 252, at *8 (alteration in original) (citing transcript) (reciting the testimony of a Good Samaritan employee "testified that on the day Roger and Fred visited Attorney Foye, Roger told her he was 'kind of embarrassed by this,' because '[i]t was apparent that Roger was going to be the heir on that will.'").

347. Compare *Black v. Gardner*, 320 N.W.2d 153 (S.D. 1982) (setting aside lifetime gifts and affirming an award of punitive damages). *Black* involved the successful challenge of lifetime gifts under the rubric of undue influence. The impaired donor had had consultations with a Rapid City, South Dakota attorney. *Id.* at 159. "This court has recognized that the cloud of undue influence may be removed by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory." *Id.* (citing *Davies v. Toms*, 63 N.W.2d 406 (S.D. 1954)). But the donor

Berg can be a useful teaching tool and framework for thinking about how an estate planning attorney should conduct a representation in order to minimize the possibilities of a will challenge or to defeat a challenge if it inevitable. Attorney Tom Foye's representation of Fred Berg and the testimony he later offered in support of his client's will are a model for estate planning attorneys.³⁴⁸ Tom Foye independently undertook to ascertain his client's testamentary capacity and, by excluding Roger from his discussions with Fred, ensured that his client's responses would qualify as having been given without prompting. Attorney Foye also took steps to explore concerns that his client's capacity might be questioned by consulting the conservator. Tom Foye's standard practices in assisting a client with his or her estate planning objectives helped fill any gaps in the attorney's or legal assistants' memory years later. In many ways, Mr. Foye's lifelong reputation in the legal community helped defend his client's will when it was challenged.³⁴⁹

III. CONCLUSION

Although the outcome in *Estate of Berg* initially may be startling, a close reading of precedent from the past one hundred fifty years reveals that there is nothing truly earthshattering about the South Dakota Supreme Court's allowance of a will executed by an impaired individual who had only a rough idea of his assets and who evidenced confusion about the identity of some of his family members. Courts have never been particularly strict when it comes to applying the test for testamentary capacity, and there was no evidence that Fred Berg's delusions had any impact on the manner in which his intentions were expressed in his Last Will and Testament. *Berg* can be seen as a fairly standard will contest where the individual testator, while certainly impaired, nevertheless satisfied the basic requirements for testamentary capacity.

had "neither requested nor was given advice regarding the propriety of specific gifts." *Id.* The attorney's role "was not as a counselor but rather as a draftsman." *Id.* Therefore, the attorney-client consultations did not rebut the presumption of undue influence. *Id.*

348. See Appellant's Brief, *supra* note 252, at *8 (citing transcript) (summarizing the testimony of the legal assistants who witnessed the will of Fred Berg when asked to describe attorney Foye: "Both testified that Attorney Foye was thorough, detail oriented, meticulous and even demanding.").

349. Compare *Walsh v. Shoulders*, 206 N.W.2d 60, 68 (S.D. 1978) (setting aside *inter vivos* gifts on the basis of undue influence where "[t]he attorney who prepared the instruments was relatively inexperienced, having been in the practice just over two years"), with *In re Estate of Fleege*, 230 N.W.2d 230, 232 (S.D. 1975) (concluding that the trial court was justified in giving considerable weight to testimony of attorney who prepared and executed will in a will contest proceeding). The will contestant's counsel in *Berg* reflects:

I am certain that the involvement by Tom Foye in the estate planning was a significant factor in the trial court's determination that Mr. Berg had sufficient testamentary capacity. I believe this to be the case because of Mr. Foye's superb and long-standing reputation as a legal professional. However, it remains my opinion that Mr. Foye, due to no fault of his own, was not fully informed of all the salient facts relating to Mr. Berg's mental state, history, treatments, and other crucial background information. Had this information been provided to Mr. Foye prior to his rendering professional services then I believe he would have in fact handled the matter entirely differently.

E-mail from Stephen Wesolick, attorney-at-law, to Thomas E. Simmons, Assistant Professor of Law, Univ. of S.D. School of Law (July 3, 2014, 15:24 CST) (on file with author).

Berg also illustrates the difficulties that counsel and courts have had and continue to have in resisting blending the doctrines of testamentary incapacity and insane delusions. Fred Berg had testamentary capacity because he identified those individuals closest to him by blood or friendship, articulated an approximate description of his estate, and formed a plan about who he wanted to receive his estate. Fred might not have been sane in the eighteenth or nineteenth century sense of the word. In fact, he suffered from schizophrenia and irrational delusions which included non-existent and unrelated family members. If he had expressed to his attorney at the time of the preparation of execution of his will that those closest to him were a common-law son, a sister named Hattie and a television star father, perhaps the assessment of Fred Berg's testamentary capacity might have had a different outcome. But he didn't. Instead, he correctly identified his family members to his attorney.

Following the determination that Fred Berg had testamentary capacity, the analysis turns to the assertions of insane delusions and undue influence. While Fred Berg had an irrational static delusion about actor Fred MacMurray that psychiatrists had been unsuccessful in undoing, the delusion of which could be said to constitute an insane delusion if it had caused Fred Berg to make out his will in a way he otherwise would not have, there was no evidence that suggested that the Fred MacMurray delusion had affected Fred Berg's will. And so the assertion of an insane delusion was also properly dismissed.

Finally, undue influence over Fred Berg merited consideration. Certainly, given their close friendship, Roger Berg had an opportunity to influence his uncle and stood in a confidential relationship to his uncle as his agent for financial and healthcare decisions. Moreover, Fred could be properly categorized as being a susceptible individual given his serious mental health problems. The result of Roger's proximity and closeness to his uncle could be discerned in the will which named Roger as devisee. Only Roger's relative detachment from the estate planning process and, more importantly, the professional care with which Tom Foye undertook his representation of his client, refuted the claim of undue influence, and, with that, resulted in the judicially decreed validity of Fred Berg's Last Will and Testament.