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Incompetence to Maintain a Divorce Action: When Breaking Up Is Odd to Do

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INCOMPETENCE TO MAINTAIN A DIVORCE ACTION: WHEN BREAKING UP IS ODD TO DO

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ABSTRACT

The law has well-established provisions for handling divorce actions initiated on behalf of persons already adjudged incompetent or by competent individuals against incompetent spouses. But how should a court respond if a mentally ill petitioner who is competent to manage most personal affairs seeks to divorce a spouse for bizarre, very odd, or crazy-sounding reasons?

Whether to allow a divorce action when the petitioner is motivated by psychotic ideas about a spouse is a matter addressed in just a few published cases, and then only indirectly. Largely unanswered are questions about whether domestic relations courts have the authority to stop such divorce actions, investigate competence of mentally ill petitioners, or order mental health examinations of petitioners. Yet several factors—better psy-

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chiatric treatment, social acceptance of divorce, population trends, and the advent of "no-fault" and unilateral divorce laws—have made it more likely that mentally ill petitioners will seek divorces for delusional reasons.

This Article recommends that domestic relations law recognize incompetence to maintain a divorce action as a distinct form of legal incapacity. We review existing rulings that bear on whether a mentally ill person may be barred from pursuing a divorce because of a specific lack of competence to divorce. We explain how requiring parties to be competent to maintain a divorce action is consistent with existing case law and with existing doctrine concerning other legal competencies. We then offer a model statute that articulates a standard for incompetence to divorce and that would authorize courts to adjudicate the issue with the aid of expert testimony. We also give examples of evaluation questions that might help courts or mental health examiners discern whether a psychiatric disorder has compromised a petitioner’s competence to divorce.

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I. INTRODUCTION

If a married person who has not been adjudicated incompetent\(^1\) seeks a divorce for reasons that sound very odd, bizarre, or crazy,\(^2\) how should

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\(^1\) This Article focuses on the circumstances of legally competent persons—persons, that is, who have not been adjudicated incompetent to handle their own affairs and finances. An adjudication of incompetence has traditionally placed limits on whether an individual may initiate divorce proceedings; we discuss this briefly infra, Part IV.B.

\(^2\) Here, we use “crazy” with the same intent and for the same reasons as has Prof. Stephen Morse:

I use the word “crazy” advisedly and with no lack of respect for either disordered persons or the professionals who try to help them...
the trial court respond? If the trial court knows a husband is seeking to divorce his wife for reasons that represent symptoms of a severe mental illness, but the husband understands the key factual implications of obtaining a divorce—ending the marriage, separating lives and property—should the trial court allow him to proceed? If not, how should the trial court respond to the husband’s petition, and under what authority? In an era when “no-fault” and unilateral divorce laws offer unhappy spouses wide latitude to dissolve their marriages, when—if ever—should a psychotic motivation for seeking divorce justify a trial court’s blocking the individual’s desire?

Because a concrete example may help acquaint readers with the types of situations and mental symptoms addressed in this Article, we present the following fictional case history.

A. Case Vignette

John Doe, a retired 71-year-old architect, met his wife Jane when they were both in their early twenties. For the first four decades of their 44-year marriage, they had struck all who knew them as a loving, happy couple. When their two daughters reached college age, Mrs. Doe wished to reenter the work force full time. With her husband’s enthusiastic support, she started her own jewelry business. By the time Mrs. Doe reached

chose the word “crazy” because I believe that it is the best generic term to describe the type of behavior that leads to a diagnosis or label of mental disorder. At the same time, it avoids begging questions about whether the crazy person was capable of behaving less crazily... I prefer to use a nonjargon word to describe the type of behavior—crazy behavior—with which the law is concerned in insanity defense cases.


Although this Article does not deal with the insanity defense, the term “crazy”—an everyday word that does implicate exercise of any clinical expertise—still has the advantage of holding diagnostic judgment in abeyance. We have used “odd” in this Article’s title with similar intentions and for similar reasons. However, subsequent parts of this Article suggest that the odd or crazy beliefs that might produce incompetence to divorce would be those of persons who suffer from severe mental illnesses.

3. Here and throughout, “trial court” refers generally to a court of appropriate jurisdiction with power to decide divorce actions. In various states this is the court of common pleas (see, e.g., S.C. Code Ann. § 20-3-50 (Supp. 2008)), family court (see, e.g., HAWAII CODE ANN. § 580-41), the district court (see, e.g., IDAHO CODE ANN. § 32-715), or domestic relations court (see, e.g., INDIANA CODE § 31-12-1-4).

4. This case vignette, though fictional, describes the plausible development of a psychotic disorder and its possible behavioral consequences. The first author bases this assertion on his more than three decades of clinical experience.
early 60s, her company had more than 20 employees. Mr. Doe admired her success and regularly told friends how fortunate and proud he was to have a wife who was such an accomplished businesswoman.

Mrs. Doe continued to run her company after her husband retired. Two years into retirement, Mr. Doe started expressing resentment about how much time his wife spent away from home, though she was working shorter hours and had delegated many business responsibilities to employees so she and her husband could take long vacations together. A few months later, Mr. Doe was openly angry each time his wife left for work. One evening, Mrs. Doe asked her husband why his feelings about her working had changed. Mr. Doe angrily responded, “You know exactly why; do you think I don’t know what you do there all day?” Mr. Doe then told his wife that he knew she was seducing the young men she hired as managers. He could tell what she had been up to by the way her make-up and hair looked when she came home each afternoon. When Mrs. Doe laughed at what sounded like a ridiculous statement, her husband—previously a very even-tempered man—berated her for mocking him and screamed nasty epithets at her.

The couple’s relationship deteriorated over the next six months. Mr. Doe previously had let Mrs. Doe handle their money matters because she was much better at this than he. Now, Mr. Doe spent hours going over the couple’s checkbook and finances. He often claimed that funds were missing. When Mrs. Doe showed that this was not true and pointed out arithmetic errors that her husband had made, Mr. Doe accused her of tricking him and of establishing secret “trusts for trysts” where she stashed funds to support her lovers.

For years, Mrs. Doe had received a few business-related calls at home during the late afternoon or evenings. Mr. Doe began insisting that he answer the phone at all times, and once he even pushed her aside so he could get to the phone first. He made copious notes about the phone calls’ times and sources, and he asked rude questions of callers when they asked to talk to Mrs. Doe. Eventually, Mr. Doe began refusing to let callers speak with his wife at all, telling her, “I love you, Jane, but if this continues, I’ll have no choice but to call the IRS and the FBI.”

When Mrs. Doe asked what her husband was talking about, Mr. Doe told her he had finally “put two and two together”: for some time, he had “heard rumors” that his wife’s business success came from her participation in an international “diamond cartel,” “back alley” cash dealings, and hiding income through money laundering. The previously week, he had obtained “proof,” because he had followed Mrs. Doe and had seen her meet with “smugglers disguised as Orthodox Jews.” Mrs. Doe explained that the men really were Jewish diamond merchants from New York City. “Those black hats and beards may fool the U.S. government,” replied Mr. Doe, “but they don’t fool me.”
Two weeks later, Mr. Doe’s older daughter Susan answered her back doorbell at 6:30 a.m. Standing there was Susan’s frightened-looking father. Mr. Doe carried an old army duffle bag filled with clothes, and he had stuffed his sport coat’s pockets full of cash. He pleaded with his daughter to let him in. Susan saw that her father had parked his car on the grass in her backyard where it could not be seen from the street. Mr. Doe told Susan that Mrs. Doe wanted to have him locked up in a psychiatric hospital because he was planning to “go to the authorities.” He asked his daughter to let him stay with her for a few days while he liquefied his assets and found himself an apartment. Not knowing what to think, Susan let her father come in, but she secretly called her mother. Mrs. Doe was frantically wondering why her husband had abruptly driven off without speaking to her. Susan told her mother that her father seemed “frightened but coherent.”

Within 36 hours, Mr. Doe left Susan’s home. As he headed out the door with clothing and a newly purchased suitcase full of cash, he quickly thanked Susan for sheltering him, adding that “for our mutual safety,” Susan should not ask where he was going or to follow him. He would stay in touch by mail. A few days later, Susan received an envelope with no return address postmarked from a large, nearby city. Inside was a note from Mr. Doe saying he was “all right,” but advising Susan to tape record any phone calls and watch for signs that she was being followed.

A week later, Mrs. Doe received notice from an attorney in the nearby city informing her that Mr. Doe had filed for divorce. Mrs. Doe retained her own attorney, described what had happened, and asked her attorney to get the domestic relations court to recognize that her husband was mentally ill and needed help. The attorney suggested that Mrs. Doe go to the probate court and file papers to have her husband civilly committed. Mrs. Doe said she had tried this, but because her husband was looking after himself adequately, was not suicidal, and had threatened no one, the probate court would not act on her affidavit. Ms. Doe also had considered getting her husband a guardian, but this was not possible either: he would not see a doctor for the necessary examination. Besides, Mr. Doe was carrying for himself properly, and though Mrs. Doe worried that someone might take advantage of her husband for financial gain, she had no evidence that Mr. Doe was misusing his funds.

B. Aims of This Article

For centuries, the law has made provision for divorces initiated on behalf of a person previously adjudged incompetent to manage personal affairs who wishes to leave his spouse or against an incompetent spouse by
a competent individual.\footnote{We discuss this infra, Part IV.A.} By contrast, cases that address persons like Mr. Doe—an individual who, despite his mental illness, is competent to manage his own person—appear to be rare.\footnote{We have found just seven published U.S. cases that deal with this matter, which we review infra, Part IV.B. To our knowledge, the scholarly literature contains just one four-page discussion of this topic: Michael L. Perlin et al., Competence in the Law: From Legal Theory to Clinical Application 276-79 (2008). Two authors have given a related topic, competence to participate in divorce mediation, more extensive treatment. See Connie J. A. Beck and Lynda E. Frost, Defining a Threshold for Client Competence to Participate in Divorce Mediation, 12 Psychology, Public Policy, and Law 1 (2006), and Connie J. A. Beck and Lynda E. Frost, Competence as an Element of Mediation Readiness, 25 Conflict Resolution Quarterly 255 (2008).} Yet a confluence of events and social developments over the past half-century have created a legal and social environment in which cases like Mr. Doe’s have become much more probable:

- Recent legal developments, including the widespread availability of “no-fault” and unilateral divorce provisions in statutes, courts’ acceptance of the notion that individuals should be found lacking in specific legal competencies (rather than globally \textit{non compos mentis}), and changes in commitment law that restrict involuntary hospitalization;
- Social developments, especially the vastly increased social acceptability of seeking a divorce to resolve marital distress;
- Trends in medical care, including the move to much shorter psychiatric hospitalizations, the availability of pharmacological treatments that produce temporary resolution of psychoses, and treatment of mentally ill outside hospitals);
- Epidemiological developments, including a larger older population susceptible to mental illnesses that generate paranoia without more global psychiatric impairment.\footnote{We discuss these further infra, Part II.}

Given the increasing possibility of that divorce petitions may be initiated by individuals like Mr. Doe, this Article suggests that domestic rela-
tions law should recognize a distinct, potential form of legal incompetence: incompetence to maintain a divorce action. In Part II, we review the just-mentioned social and legal trends that may make incompetence to divorce a more likely phenomenon in the twenty-first century than would have been the case in previous times. Part III explains what types of psychiatric conditions might generate the mental problems experienced by Mr. Doe, conditions that might profoundly affect a sufferer’s judgment about certain specific matters while leaving most mental functioning intact. Part IV reviews currently limited existing case law related to this issue that could be a source for legal standards or criteria by which courts would determine whether a petitioner might be barred from suing for divorce on ground of specific incompetence to divorce.

In Part V, we suggest a rationale for requiring competence of divorcing parties that is consistent with existing divorce case law, with existing laws and decisions governing other specific competencies, and with a widely used framework that mental health professionals use to evaluate and conceptualize competencies. Part VI describes a model statute on competence for divorce that legal decision-makers might use to address the problems we identify, accompanied by examples of evaluation questions that might help courts or mental health examiners discern whether certain “crazy” motivations reflect judgment-distorting mental illnesses have indeed impaired an individual’s competence to divorce.

II. A CHANGING SOCIAL CONTEXT

A. More Divorce-Eligible Individuals

Through the middle of the twentieth century, much of the psychiatric care received by severely mentally ill individuals took place in hospitals.

8. This Article uses “divorce” as a general term that includes the legal termination of a marriage and the legal annulment or voiding of a marriage. See 27A C.J.S. § 2 (“In its common and wider use, the term [divorce] includes the dissolution of a valid marriage and the annulment of a marriage”). In various jurisdictions, the terms “dissolution” and “annulment” are used instead of or in addition to “divorce.” See, e.g., CONN. GEN. STAT. § 46b-40(a) (2008) (“A marriage is dissolved only by (1) the death of one of the parties or (2) a decree of annulment or dissolution of marriage by a court of competent jurisdiction.”).

For simplicity of exposition, this Article’s examples and terminology assume that the divorce proceedings involve a man and woman who have been legally tied by a marriage relation. Although we do not consider the matter in detail here, we recognize that some states allow marriages or civil unions between two persons of the same sex. We believe that the points made in this Article concerning competence to divorce would apply, mutatis mutandem, to proceedings that terminate civil unions or marriages involving same-sex couples.
In 1955, when the total U.S. population stood at 166 million, approximately 550,000 persons were confined in public psychiatric institutions (often termed “state hospitals”). Two decades later, this number had fallen to under 200,000, and today, fewer than 50,000 persons are committed to state and county psychiatric hospitals despite a near-doubling of the U.S. population over the same period. Several factors have contributed to this decrease:

- The mid-1950s witnessed the development and first use of psychotropic medications stabilized many persons who previously would have suffered from devastating mood and thought disorders, which allowed them to manage community successfully.
- The 1963 passage of the Mental Retardation Facilities and Community Mental Health Centers Construction Act signaled a growing belief that mentally disabled persons should be provided with community services that would allow them to receive treatment as outpatients rather than only in hospitals.
- In the 1960s, Congress enacted changes in Medicare, Medicaid and Social Security laws that created financial support for mentally ill persons to receive care in community hospitals.

10. Ronald W. Manderscheid et al., Changing Trends in State Psychiatric Hospital Use From 2002 to 2005, 60 PSYCHIATR. SERV. 29, 30-31 (2009) (Table 1 states 49,947 persons residing in state and county hospitals in 2005; Figure 1 shows number of residents equaled 550,000 in the mid-1950s and was well below 200,000 by 1980).

In July 2005, the U.S population was estimated at 295,560,549. U.S. Census Bureau, National and State Population Estimates, http://www.census.gov/popest/states/NST-ann-est.html (last accessed January 18, 2009). Thus, over 50 years, the U.S. per capita rate of public sector psychiatric hospitalization fell nearly 95%, from 3.3 to 0.17 persons per 1,000 population.

14. For example, the Social Security Amendments of 1965 (P.L. 89–97) added Title XIX, Medicaid, to the Social Security Act. This act meant that Medicaid would fund psychiatric treatment in general hospitals for indigent persons in categorical assistance programs, and it improved Medicare coverage for psychiatric illnesses. See also Mossman, supra note 11, at 1064-65.
• In the late 1960s and 1970s, court decisions and legislative alterations changed involuntary psychiatric hospitalization from a putatively benevolent, paternalistic enterprise guided by medical professionals’ judgments about need for treatment to a court-controlled mechanism that responds primarily to manifestly dangerous behavior.  
  
• In the 1990s, managed care contributed forcefully to the perception that persons should be hospitalized for much shorter times than doctors had previously thought wise, and also made it more likely that any hospitalization would take place in local facilities offering rapid treatment.

The combined effect of these changes in medical care—the move to much shorter psychiatric hospitalizations, the availability of pharmacological treatments that produce temporary resolution of psychoses, and treatment of mentally ill patients outside hospitals—is that most persons with conditions that would formerly have led to lengthy hospitalization now remain in the community despite their severe psychiatric illnesses. They thus have more and better opportunities to do the things other adults do, including meet others, marry, and—if things “don’t work out”—file for divorce.

2. Legal Categorizations of Individuals with Mental Illness

We just noted that changes in commitment laws have led to a focus on risk and dangerous as justifications for commitment, rather than a need for treatment. From a legal standpoint, involuntarily hospitalization is “a massive deprivation of liberty,” and notwithstanding any psychiatric impairment, a person with mental illness retains rights enjoyed by everyone else. This was not always true. Until relatively recently, persons hospitalized

15. For example, an express purpose of California’s Lanterman-Petris-Short Act, passed in 1969, was “to promote the legislative intent … [t]o end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons…” and [t]o safeguard individual rights through judicial review.” CAL. WELF. & INST. CODE § 5001 (g). Key legal decisions of the 1970s that affected civil commitment include Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972) (persons facing involuntary civil commitment entitled to procedural safeguards similar to those guaranteed criminal defendants); Donaldson v. O’Connor, 422 U.S. 563, 575 (1975) (state may not “constitutionally confine without more [justification] a non-dangerous individual who” can live in community safely with “help of willing and responsible family members or friends”); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment requires proof by clear and convincing evidence).


because of a mental impairment lost many of their civil rights. Further, courts were likely to regard persons with mental illnesses as simply non componens, that is, globally incompetent for all purposes, including management of financial and personal affairs. A formal adjudication of incompetence led to appointment of a guardian who made decisions on behalf of the individual.

Contemporary statutes now expressly preserve many or all of a person’s customary civil rights state during hospitalization, including inter alia the right to make personal decisions (such as getting married). Moreover, courts now may make competence adjudications concerning specific incapacities (e.g., incompetence to make treatment decisions or to stand trial) rather than simple plenary adjudications about all legal capacities. A person who is adjudicated incompetent to manage financial affairs is not necessarily deemed incompetent to make personal decisions. Even if a person is adjudicated incompetent for several discrete purposes, a court’s order listing these purposes preserves the respondent’s rights in other areas of decision-making. Thus, having a severe mental illness is no longer the legal barrier to marriage it was a half-century ago.

3. Divorce: More Common, More Acceptable

During the last third of the twentieth century, divorce became more common and much more socially acceptable. Between 1960 and 1981,

18. Gillis v. Cameron, 324 F.2d 419, 423 (D.C. App. 1963) (“without any inquiry or finding as to actual competence in the given area, a patient [who was civilly committed in Washington DC] … may apparently be deprived of the right to vote, to drive an automobile, to enter into binding legal arrangements and to exercise other civil rights” [citations omitted]); for a summary of laws as they existed in 1960, see Frank T. Lindman and Donald M. McIntyre, Jr., eds., The Mentally Disabled and the Law 220-23 (1961).
21. See, e.g., Ohio Rev. Code §5122.301 (protecting employment rights and rights to contract, hold licenses, marry, divorce, make wills, vote, sue, and be sued).
22. Meisel, supra note 19, at 613.
23. Id. “Personal decisions” can include medical, social, marital and other types of decisions
25. For a fascinating discussion of this phenomenon, the factors contributing to it, and its international and historical context, see William J. Goode, World Changes in Divorce Patterns 135-182 (1993).
the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons. Rates have decreased steadily since, and in 2006, the divorce rate was 3.6 per 1,000 persons. However, this rate is still well above the 1960 rate, and the drop in divorce rates has been accompanied by a much lower marriage rate. Thus, over the last half-century, the probably that a marriage will end in divorce has doubled.

The rapid rise in U.S. divorce rates between 1960 and 1980 was “unprecedented” and coincided with more favorable—or less disapproving—societal view of divorce. In 1945 and 1966, “not strict enough” was the most popular response to public survey questions about state divorce laws. Between 1968 and 1974, however, the fraction of survey respondents who favored easier access to divorce rose substantially, and the fraction wanting stricter rules declined. These changes in attitude did not cause increasing divorce rates; rather, attitudinal changes appear to have followed and in some sense ratified what everyone could observe. Nonetheless, in contrast to the situation that existed in the two decades after World War II, couples who, for whatever reason, feel distressed by their marriages are no longer confronted by a social taboo against divorce.

4. A Larger Vulnerable Population

As we explain further in Part IV, persons above age 60 years are particularly vulnerable to new-onset mental illnesses that can generate paranoia without causing more global psychiatric impairment—the clinical constellation that Mr. Doe’s case exemplifies. Over the past half-century, the fraction of the U.S. population age 60 years and older has grown enormously. In 1950, average life expectancy was 65.6 years for men and 71.1 years for women; by 1980, life expectancy had risen to 77.4 years for women and 70.0 years for men; in 2005, U.S. life expectancy was 77.8 years overall (80.4 years for women and 75.2 years for men). These in-

27. Id.
28. In 1950 to 1965, the annual U.S. marriage rate ranged from 8.5 to 11.1 per 1,000, and the divorce rate ranged from 2.2 to 2.6 per 1,000. Thus, the ratio of marriages to divorces was around 4:1. In 1970, this ratio was 10.6:3.5 (about 3:1), and since 1976, the ratio has consistently was hovered around 2:1. 2003 Statistical Abstract of the U.S. http://www.census.gov/prod/2004pubs/03statab/vitstat.pdf page 72, exhibit No. 83 (accessed October 11, 2008).
30. Id. at 46-49.
creases have resulted in a much larger aging population currently living in
the United States. Between 1950, the U.S. population roughly doubled, but the population over age 65 years tripled. By 2030 (when all the “baby boomers” will have reached age 65 years), the population age 65-74 years will have grown from 6 percent to 10 percent of the total U.S. population. The susceptibility of elderly persons to mental problems is demonstrated by the finding that, in 2005, approximately 4 million persons aged 65 and over suffered from some type of mental disability.

* * *

Social changes may have created a larger population of individuals who might seek divorce and who are susceptible to the kinds of mental impairments that severely distort thinking about one’s spouse while leaving other aspects of functioning intact. However, a key factor enabling persons to divorce for delusional reasons has been the advent of more liberal

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33. NATIONAL CENTER FOR HEALTH STATISTICS, supra note 31, at 16.

34. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2008, Table 35, Persons 65 Years Old and Over—Living Arrangements and Disability Status: 2005, http://www.census.gov/compendia/statstab/tables/08s0035.pdf. Note that these numbers exclude the populations housed in institutions and only account for persons within the household population.

35. That is, reasons based on delusions. Here and throughout, the words “delusion” or “delusional” refers to an idea that is

[a] false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person’s culture or subculture (e.g., it is not an article of religious faith).


An additional feature of Mr. Doe’s clinical presentation is his lack of insight with regard to the delusions. That is, Mr. Doe is unaware that he ill and that he is experiencing symptoms—here, delusional ideas—of his illness. In many patients with severe mental disorders, “[t]he rational faculty ..., although they are quite capable in other arenas, seems to stop short at the line where their diagnosis is made.” S. NASSIR GHAEMI AND PAUL R. MCHUGH, THE CONCEPTS OF PSYCHIATRY 231 (2007). The relationship between delusions and lack of insight is complex, and the two phenomena are not cotermious. Nonetheless, studies suggest that approximately two-thirds of patients with schizophrenia and manic-depressive (bipolar) illness have some impairment in their capacity for insight. Id. at 232.
grounds for divorce and the removal of requirements to prove a legally recognized justification a divorce. To understand this, we review “traditional” grounds for divorce that existed prior to 1969, underscoring the need for credible proof that these grounds required.

B. “Traditional” Grounds for Divorce

Although the advent of “no-fault” grounds altered divorce law substantially during the last third of the twentieth century, most states have preserved at least some of the traditional fault-based grounds for divorce that had existed previously.36 Fault-based grounds have always been regulated by the state legislatures.37 Statutes typically have included adultery, abandonment or desertion, and cruelty or inhuman treatment as fault-based grounds for divorce;38 other fault-based grounds available in some states include insanity, conviction of a crime, habitual drunkenness, and drug addiction.39

Obtaining a divorce on fault-based grounds requires statutorily specified levels of proof and corroboration.40 When the marriage is of long duration, substantial evidence may be required to dissolve it. In the

37. “Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated.” Pomraning v. Pomraning, 13 Ark. App. 258, 260 (Ark. Ct. App. 1985); “[i]t is not within the power of the parties to terminate [a marriage] at pleasure, or for any cause. Its dissolution can only be declared by a court of competent jurisdiction, for some specified cause prescribed by law.” Adams v. Adams, 25 Minn. 72, 77-78 (Minn. 1878).
39. Various broad fault categories included in 24 Am Jur 2d Divorce and Separation are voluntary separation (§§ 25-34), cruelty (§§ 35-58), adultery (§§ 59, 60), desertion (§§ 61-92), conviction of crime (§§ 93-95), habitual drunkenness or drug addiction (§§ 96-100), nonsupport (§§ 101, 102), and indignities (§§ 103-108).
40. “[A] marriage should not be lightly terminated. A plaintiff is required to prove a statutory cause for divorce by competent evidence.” Lowrance v. Lowrance, 31 Ill. App. 3d 682, 685 (Ill. App. Ct. 2d Dist. 1975). The court must also find corroboration of claims, and “[c]orroborating testimony may not consist of mere generalities or opinions, beliefs and conclusions on the part of the witness but must be directed toward specific language, acts and conduct.” Pomraning, 13 Ark. App. at 261. Traditionally, admissions or confessions alone are insufficient, and proof traditionally requires at least a preponderance of evidence, 24 Am. Jur. 2d Divorce and Separation § 351.
following paragraphs, we summarize the types of evidence required to support fault-based divorce actions.

1. Cruel and inhuman treatment

Proof of cruel and inhuman treatment typically requires “something more than unkindness or rudeness or mere incompatibility or want of affection,”\(^{41}\) isolated acts of mistreatment, or a single physical assault.\(^{42}\) Proof that the marriage is acrimonious or strained usually is not sufficient,\(^{43}\) if the alleged cruel and inhuman treatment has a causal relation to the separation request.\(^{44}\)

To dissolve long-term marriages on grounds of cruel and inhuman treatment, trial courts generally must find that the accused party’s actions would endanger the physical or mental well-being of the spouse seeking divorce\(^{45}\) and must hear testimony from the accusing spouse that the defendant’s calculated cruelty renders cohabitation inappropriate.\(^{46}\) Courts have recognized, however, that even without physical displays of violence, atrocious conduct alone may constitute cruelty\(^{47}\) and “may more punitively affect health and life than bodily bruises.”\(^{48}\)

Requirements concerning the types, precise duration, and number of acts of cruelty differ from jurisdiction to jurisdiction. Cruelty claims have been sustained when

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41. Smith v. Smith, 614 So. 2d 394, 396 (Miss. 1993); see also Steen v. Steen, 641 So. 2d 1167, 1170 (Miss. 1994)
42. Palin v. Palin, 213 A.D.2d 707, 624 N.Y.S.2d 630 (2nd Dept. 1995). See, however, Rojek v. Rojek, 234 A.D.2d 1011, 651 N.Y.S.2d 813 (4th Dep’t 1996) (one severe beating or other violent episode may suffice to prove “cruel and inhuman treatment”); McKee v. Flynt, 630 So. 2d 44, 48 (Miss. 1993) (one incident may be so violent and of sufficient gravity to establish grounds).
43. See e.g., Walczak v. Walczak, 206 A.D.2d 900, 614 N.Y.S.2d 835 (4th Dep’t 1994) (despite limited communication, sleeping in separate bedrooms, and some arguments, parties talked to each other in a civilized manner and committed no physical violence; these strained relations were insufficient to end 25-year marriage).
44. See, e.g., Morris v. Morris, 804 So. 2d 1025, 1031 (Miss. 2002) (when wife was only person who testified that husband acted in a cruel and inhuman manner, husband’s conduct did not meet court’s interpretation of cruel and inhuman treatment).
evidence established a substantial risk of violence or harm,\textsuperscript{49} conduct that threatens to impair health,\textsuperscript{50} substance abuse,\textsuperscript{51} deviant sexual behavior,\textsuperscript{52} threats of violence,\textsuperscript{53} cursing, hollering, throwing things, and mean behavior toward the other spouse and children.\textsuperscript{54}

Notwithstanding any formal evidentiary requirements, cruelty had become the most popular ground for a fault-based divorce by the mid-twentieth century\textsuperscript{55} in the absence of grossly obvious events, such as abandonment. Thus, appellate decisions on what constitutes cruelty may not fully reflect how strictly trial courts applied evidentiary requirements in most cases heard prior to the advent of no-fault divorce options.

2. Adultery

Because adultery\textsuperscript{56} is often committed in private, eyewitness testimony is not needed to corroborate a claim. But the evidence submitted must create more than a “mere suspicion” of guilt; “proof must be suffi-

\begin{itemize}
\item \textsuperscript{49}See e.g., Brown v. Brown, 704 S.W.2d 528 (Tex. App. Amarillo 1986) (discussing what constitutes a reasonable apprehension of violence or conduct that impairs or threatens another’s health permanently).
\item \textsuperscript{50}See e.g., Rheinheimer v. Rheinheimer, 652 N.Y.S.2d 410 (Third Dep’t 1997) (discussing verbal and physical abuse that made cohabitation unsafe).
\item \textsuperscript{51}Routhier v. Routhier, 514 A.2d 825, 826 (N.H. 1986) (excessive drinking formed part of substantiation).
\item \textsuperscript{52}Cherry v. Cherry, 593 So.2d 13 (Miss. 1991) (husband’s impotence and cross-dressing could constitute cruel and inhuman treatment).
\item \textsuperscript{53}See, e.g., Stoothoff v. Stoothoff, 640 N.Y.S.2d 553 (1st Dep’t 1996) (pattern of threatening violent acts occurring met standard of proof for divorce); McKee v. Flynt, 630 So.2d 44 (Miss. 1993) (risk of life, limb, or health must be real, rather than imaginary).
\item \textsuperscript{54}Smith v. Smith, 613 N.Y.S.2d 866 (1st Dep’t 1994) (constant denigration met standard); Eppling v. Eppling, 537 So.2d 814 (La. Ct. App. 5th Cir. 1989) (regarding cursing and similar behavior as proof); Moro v. Moro, 589 N.E.2d 416 (8th Dist. Cuyahoga County 1990) (refusing to speak to spouse for periods of time met standard).
\item \textsuperscript{55}The adaptability of cruelty to various fact patterns made it “the dazzling success story of family law.” Lawrence M. Friedman and Robert C. Percival, \textit{Who Sues for Divorce? From Fault through Fiction to Freedom}, 5 J. LEGAL STUDIES 79-80 (1976). One-eighth of all divorces in the 1860s were based on cruelty; by 1950, cruelty had become the stated ground for more than half of divorces. J. HERBIE DIFONZO, \textit{BENEATH THE FAULT LINE}, 53-54, Table 3 (1997). In 1937, a \textit{Time} magazine article noted that cruelty was easier to prove than other grounds; also, many couples in adulterous relationships asserted cruelty to avoid having to admit adultery. \textit{Id.} at 54-55.
\item \textsuperscript{56}“Voluntary sexual intercourse between a married person and a partner other than the lawful spouse.” \textsc{Webster’s II New Riverside University Dictionary} 80 (1988).
\end{itemize}
iciently definite to identify the time and place of the offense and the circumstances under which it was committed.”

When circumstantial evidence is used, the burden of proof may be similar to, though not as high as, the proof of guilt required for criminal conviction. An accused party’s admission may be evaluated under a clear preponderance standard and should be supported by independent proof establishing when, where, and under what circumstances the adulterous act occurred. Overcoming the presumption of innocence takes more than showing that the accused party had the opportunity to commit adultery; additional matters to be considered include the parties’ inclinations, the amount of time they spent together, whether their relationship was open, surreptitious, or openly amorous, and whether others were present when the alleged adultery occurred.

3. Desertion or abandonment

Proof of desertion or abandonment involves showing that one spouse has resolved not to live with the other—for example, that one spouse has left the state without saying when he will return, or has made an “unjustified or nonconsensual departure” from the home. A plaintiff may also demonstrate desertion or abandonment by showing that the accused party has ceased sexual relations without explanation or reason and has neglected of “marital duties” (laundry, cleaning, and cooking), even though

58. See, e.g., Billington v. Billington, 531 So. 2d 924 (Ala. Civ. App. 1988) (circumstantial evidence proving adultery must be “such as would lead the guarded discretion of a reasonable and just man [sic] to conclude that the act of adultery has been committed”); accord, Rowe v. Rowe, 575 So. 2d 584, 587 (Ala. Civ. App. 1991); Sibley v. Sibley, 693 So.2d 1270, 1271 (La. App. 1 Cir. May 9, 1997) (circumstantial proof “must be so convincing that it establishes” adultery by “the party accused to the exclusion of any other reasonable hypothesis”).
60. However, circumstantial evidence showing the opportunity and inclination to commit adultery establishes a prima facie case. Panhorst v. Panhorst, 390 S.E.2d 376, 377 (S.C. Ct. App. 1990).
61. Sibley, 693 So.2d at 1271.
62. See, e.g., Hage v. Hage, 112 A.D.2d 659, 661 (N.Y. App. Div. 3d Dep’t 1985) (“evidence must show a ‘hardening of resolve’ by one spouse not to live with the other”).
63. Id. See, e.g., Sanchez v. Sanchez, 490 So.2d 434, 437 (La. App. 5 Cir. 1986) (mere friction, dissatisfaction, or incompatibility are not enough to justify a withdrawal from the common dwelling); Sprott v. Sprott, 233 Va. 238, 242 (Va. 1987) (gradual breakdown in the marital relationship does not legally justify one spouse’s leaving the other).
they continue to reside together.\textsuperscript{64} However, single instances of denying sexual relations or neglecting marital duties do not constitute abandonment, and if an accused party’s action appears justifiable, a trial court usually will not grant a divorce on grounds of abandonment.\textsuperscript{65} States that permit divorce on grounds of desertion usually require that the desertion or abandonment have occurred for a specified period.\textsuperscript{66}

4. Mental incapacity or insanity\textsuperscript{67}

Though mental incapacity or insanity is an independent ground for divorce in some jurisdictions,\textsuperscript{68} in others, mental incapacity precludes a suit for divorce against the mentally incapacitated respondent on other statutory grounds.\textsuperscript{69} However, in some states where insanity is not an independent ground for divorce, a divorce on other grounds may be commenced against a mentally ill person where certain requirements are met.\textsuperscript{70} Generally, divorce will not be granted because of insanity unless the statute specifically provides for divorce on this ground.\textsuperscript{71} In some older cases, insanity could be a defense to a divorce action if the behavior of the


\textsuperscript{65} Caprise v. Caprise, 143 A.D.2d 968, 970 (N.Y. App. Div. 2d Dep’t 1988) (single refusal of sex insufficient; accusing party should submit evidence of repeated requests).


\textsuperscript{67} We note that a suit for divorce predicated on the respondent’s mental illness presents the opposite circumstance of this Article’s main subject.

\textsuperscript{68} In 1949, 26 U.S. states and territories allowed divorce on grounds of mental illness. Dribin v. Superior Court of Los Angeles County, 37 Cal. 2d 345, 351 (1951). For examples of currently valid statutes, see Ind. Code § 31-15-2-3(4) (grounds for a dissolution decree include “[i]ncurable insanity of either party for a period of at least two (2) years”); N.C. Gen. Stat. § 50-5.1 (divorce to be granted if couple have lived apart for three consecutive years without cohabitation because of one spouse’s “incurable insanity”; specifying requirements to demonstrate incurability).

\textsuperscript{69} A. Della Porta, Requisites of Proof of Insanity as a Ground for Divorce, 15 A.L.R.2d 1135, 1 (2008) (insanity of one spouse precludes divorce sought by the other spouse on other grounds because divorce should be grounded on fault, not misfortune).

\textsuperscript{70} See, e.g., 13 DEL. CODE § 1505(b)(3) (permitting divorce upon showing of separation caused by respondent’s mental illness). In some states, however, insanity of a respondent may imply that he could not consent or acquiesce to a separation. Cox v. Cox, 268 Ala. 572, 573 (Ala. 1959) (“[a]n insane person cannot be said to have or maintain … an intention” to abandon a spouse).

\textsuperscript{71} Dribin, 37 Cal. 2d at 351.
accused emanated from an illness so severe that it would satisfy the insanity test as applied to alleged criminal acts.\(^{72}\)

Proving “insanity” for purposes of divorce typically requires that the respondent suffer from a very severe form of mental illness that meets specific statutory criteria.\(^{73}\) For example, the Idaho statute permits divorce on grounds of “permanent insanity” only if the mentally ill person has been “confined in an insane asylum” for three years prior to commencement of the divorce action and it appears “that such insanity is permanent and incurable.”\(^{74}\) Statutes have often been strictly scrutinized by courts and may be strictly construed.\(^{75}\)

5. Conviction of crime

\(^{72}\) “Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under such a defect of reason as not to know the nature of his acts or that they were wrong.” Dankers v. Dankers, 172 N.W.2d 318, 320 (Minn. 1969), quoting Longbotham v. Longbotham, 119 Minn. 139, 142-143 (Minn. 1912). See also Kunz v. Kunz, 171 Minn. 258, 259 (Minn. 1927) (noting that this test “is the statutory one for mental responsibility for criminal acts”).

\(^{73}\) Idaho Code § 32-801. See also Ala. Code 1975 § 30-2-1(a)(8) (allowing divorce from spouse after hospitalization for at least 5 successive years if the spouse is “hopelessly and incurably insane”); A.C.A. § 9-12-301 (b)(6)(A) (allowing divorce from spouse who has been hospitalized for at least 3 years); C.G.S.A. § 46b-40(c)(10) (allowing divorce after confinement based on mental illness totaled a period of five years within six years of filing); West’s F.S.A. § 61.052(1)(b) (allowing dissolution following three consecutive years of incapacitation); Ga. Code Ann. § 19-5-3(11) (citing “incurable mental illness” as a ground for total divorce and requiring institutionalization for at least 2 years before divorce proceedings); Glisson v. Glisson, 1967, 237 A.2d 393 (interpreting 13 Del.C. § 1522(10) requiring five years of institutionalization in addition to adjudication of insanity).

\(^{74}\) “[F]or humanitarian reasons, the statutes making postnuptial insanity ground for divorce seem to have been subjected to a strict construction,” C. C. Marvel, Insanity as Substantive Ground of Divorce or Separation, 24 A.L.R.2d 873, 6 (2008). See, e.g., Finkelstein v. Finkelstein 88 Cal. App. 2d 4, 198 P.2d 98 (1948) (divorce not granted because wife had been released from the hospital at various intervals and had lived with her mother, which did not meet statutory requirement of a three-year hospitalization).

Other states do not require specific time periods of institutionalization or evidence of hospitalization, but only a showing of “incurable insanity” at the time of the divorce complaint. See, e.g., West’s Ann. Cal. Fam. Code § 2312 (no requirement concerning duration of institutionalization, but only evidence of incurable insanity continuing from the time of filing for divorce).
Conviction of a felony or imprisonment for a determined period of time constitutes grounds for divorce in some states.\footnote{76}{See, e.g., LA. CIV. CODE Art. 103(3) (permitting divorce if “other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor”).} If a state lacks a statute specifically delineating conviction or imprisonment as a ground for divorce, however, relief may not be granted based on these circumstances.\footnote{77}{Sitterson v. Sitterson, 191 N.C. 319, 322, 131 S.E. 641 (N.C. 1926) (“[t]o hold that a separation brought about by imprisonment … would constitute a cause of action for absolute divorce, would in effect constitute a judicial enactment of a new ground for divorce in North Carolina”).} If a statute which provides only for divorce against an imprisoned spouse, an imprisoned spouse may not seek divorce from the other spouse on the grounds of his own imprisonment.\footnote{78}{Anderson v. Anderson, 300 A.2d 186 (N.J. Ch. Div. 1973) (statute provides for divorce against, not by, imprisoned spouse)\footnote{79}{Tauzier v. Tauzier, 466 So.2d 565 (La. App. 5th Cir. 1985) (divorce may be granted because of a spouse’s felony conviction even if conviction is on appeal or the sentence is suspended).}} It may not be necessary that the convicted spouse be serving a sentence.\footnote{79}{Tauzier v. Tauzier, 466 So.2d 565 (La. App. 5th Cir. 1985) (divorce may be granted because of a spouse’s felony conviction even if conviction is on appeal or the sentence is suspended).} Many statutes do not create a distinction between state or federal and civil or military convictions, and offer the right to divorce on this ground in all cases.\footnote{80}{Clark v. Clark, 54 A.2d 166 (N.H. 1947)\footnote{81}{Nickels v. Nickels, 347 So.2d 510 (La. Ct. App. 2d Cir. 1977)\footnote{82}{Ferrin v. New York State Dept. of Correctional Services, 517 N.E.2d 1370 (N.Y. 1987).}} It is not necessary, under some statutes, to wait until all delays for appeal have expired to seek divorce based on a spouse’s criminal conviction.\footnote{81}{Nickels v. Nickels, 347 So.2d 510 (La. Ct. App. 2d Cir. 1977)\footnote{82}{Ferrin v. New York State Dept. of Correctional Services, 517 N.E.2d 1370 (N.Y. 1987).}} A sentence does not end a marriage automatically, but will require legal action.\footnote{82}{Ferrin v. New York State Dept. of Correctional Services, 517 N.E.2d 1370 (N.Y. 1987).}

6. Habitual intoxication or substance dependence

Currently, around half of U.S. jurisdictions allow for divorce based on “habitual intemperance”\footnote{83}{Defined as “[t]hat degree of intemperance from the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party. Habitual or excessive use of liquor.” Black’s Law Dictionary 727 (Rev. 5th ed. 1979).} or substance dependence (more commonly called “addiction”).\footnote{84}{LAURENCE C. NOLAN & LYNN D. WARDLE, FUNDAMENTAL PRINCIPLES OF FAMILY LAW, SECOND EDITION 647 (2006).} Generally, to grant a divorce based on the respondent’s habitual intoxication, a court must hear testimony showing that the episodes of intoxication occurred frequently (more than two or three
A Louisiana appeals court sustained a divorce based on habitual intoxication where the respondent consumed several beers every night and underwent a violent personality change when drunk. However, in a case in which the respondent drank frequently but had a doctor and psychologist testify that he showed no signs of alcohol or substance abuse, an appeals court concluded that the trial judge had erred in finding habitual intemperance.

C. “No-fault” Divorce

In 1969, California enacted the United States’ first “no-fault” divorce statute. By 1987, all states effectively had laws that allowed a couple to obtain a divorce without ascribing fault to one party.

Though no-fault options are available to couples throughout the U.S., some states make obtaining a no-fault divorce more difficult than do others. Strictly speaking, New York State does not have a no-fault law. Residents may divorce through conversion of a separation judgment or through a mutually acknowledged separation agreement after living apart for a year or more. In Illinois, a couple may obtain a no-fault marital dissolution only if the court finds that they have lived apart for two years, “irreconcilable differences have caused the irretrievable breakdown of the marriage,” and “efforts at reconciliation have failed” or “would be impracticable and not in the best interests of the family.” By contrast, California requires only that “[i]rreconcilable differences … have caused the irremediable breakdown of the marriage,” where such differences need only “be
substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.\textsuperscript{92}

Though scholars debate the reasons why, no-fault divorce arrived at a period in U.S. history when divorce rates were already increasing.\textsuperscript{93} Some researchers suggest that the availability of no-fault divorce accelerated this trend.\textsuperscript{94} Others believe that no-fault statutes were largely redundant. Even before no-fault laws were enacted, many judges were using fault grounds (\textit{e.g.}, cruelty\textsuperscript{95}) as “de facto no-fault grounds” for anyone “who wanted to divorce and who was willing to pay the social and economic costs.”\textsuperscript{96}

D. Unilateral Divorce

During the 1970s and 1980s, most legislatures took steps to permit one spouse to unilaterally petition for and obtain a divorce.\textsuperscript{97} In some jurisdictions, these laws permit one spouse to initiate and obtain a divorce upon showing that the couple have lived apart for a certain time period.\textsuperscript{98} In other states, no time period is necessary.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{92} \textit{Calif. Fam. Code} §§ 2310-11.
\item \textsuperscript{93} See \textit{supra}, notes 25-28 and accompanying text (discussing marriage and divorce rates).
\item \textsuperscript{94} \textit{See, e.g.}, Thomas B. Marvell, \textit{Divorce Rates and the Fault Requirement}, 23 L. SOC’Y REV. 543, 544 (1989), (finding that “on the average, the no-fault laws increased divorces by some 20 to 25 percent”); Joseph Lee Rodgers, et al., \textit{Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No}, 61 J. MARRIAGE & FAM. 803, 804 (1999) (in states that implemented no-fault divorce between 1965 and 1974, “a substantial number of divorces [took place] that would not have occurred otherwise”).
\item \textsuperscript{95} \textit{See supra} note 55 and accompanying text.
\item \textsuperscript{96} Norval D. Glenn, \textit{Further Discussion of the Effects of No-Fault Divorce on Divorce Rates}, 61 J. MARRIAGE & FAM. 800, 802 (1999). Ira Mark Ellman, \textit{Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles}, 34 FAM. L.Q. 1, 3 (2000) (“the divorce rate began climbing long before no-fault divorce was adopted, and that no durable acceleration in the rate of increase followed its adoption”).
\item \textsuperscript{98} \textit{See, e.g.}, \textit{Ohio Rev. Code} § 3105.01(J) (permitting court to grant divorce “[o]n the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation”).
\item \textsuperscript{99} Thus, California’s divorce law is both a no-fault and a unilateral divorce statute without a separation requirement. \textit{See Calif. Fam. Code} §§ 2310-11.
\end{itemize}
Over the last two decades, a series of economic analyses has suggested that unilateral divorce statutes—rather than no-fault laws—bear responsibility for the increased likelihood of divorce observed in the U.S. during the last third of the twentieth century. The basic thesis behind these studies is that, in combination with other legal changes that affected property distribution, unilateral divorce laws altered the economic incentives to stay married as well as the bargaining positions of spouses. \(^{100}\) Initial work using this perspective applied a “contract-theoretic framework” to marital bargaining structures under the assumption of symmetric information, and concluded that unilateral divorce laws had not affected divorce rates. \(^{101}\) Subsequent work in the 1990s reached different conclusions, with some of the discrepancies accounted for by disagreements about what constitutes a “unilateral” divorce law, \(^{102}\) and some explained by differences in statistical models. \(^{103}\) Leora Friedberg concludes that wide adoption of unilateral divorce laws “accounted for 17 percent of the increase in divorce rates” between 1968 and 1988, and “that the effect of unilateral divorce on divorce behavior was permanent, not temporary.” \(^{104}\) Some recent economic scholarship has disagreed, suggesting that unilateral divorce laws raised divorce rates about eight years after their adoption but that thereafter, the impact of these laws was minimal. \(^{105}\)

E. Comment

Given the trends in U.S. divorce rates that were taking place before 1970, it is difficult to know whether the changes in divorce laws that occurred in the 1970s and 1980s have much statistical impact on the current likelihood of divorce in the twenty-first century. What is clear, however, is that the widespread availability of unilateral and unilateral/no-fault divorce makes it far easier for individuals to maintain divorce actions for irrational reasons and—particularly if they can successfully separate and live independently from their spouses—to obtain a divorce.

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103. Friedberg, *supra* note 97, at 608 (analysis using time-series data, state- and year-specific fixed effects models, and linear and quadratic time trends).

104. Id. at 608.

To be able to initiate a divorce action, a delusional litigant like Mr. Doe would need to retain the cognitive and behavioral competencies that permit independent living and coherent articulation of his wishes, despite having a mental illness that generated irrational beliefs about his spouse. Whether courts should allow persons with focal but serious mental impairments and delusional motivations to divorce is a matter that we address in later Parts of this article. In the next Part, we provide short descriptions of mental illnesses that answer the question, “What might be wrong with Mr. Doe?”

III. PSYCHIATRIC CONDITIONS THAT MIGHT PRODUCE INCOMPETENCE TO DIVORCE

Many individuals suffer from mental disorders. Though these conditions (by definition) cause dysfunction or discomfort, relatively few affected persons experience alteration in judgment severe enough to be incompetent in any legal sphere. Moreover, research suggests that even among those persons who have mental disorders that might potentially impair competence, in only a minority of cases is competence actually impaired. From the standpoint of psychiatric diagnosis, this Article focuses on a minority within that minority: individuals whose mental con-

106. In medical jargon, we are presenting a “differential diagnosis” of Mr. Doe. Psychiatrist Michael First and co-authors describe the process of generating a differential diagnosis thus: “Confronted with one (or a couple) of specific symptoms, it is our job to cull from the wide universe of [psychiatric] conditions those that could possibly account for them.” Michael B. First et al., DSM-IV-TR HANDBOOK OF DIFFERENTIAL DIAGNOSIS xiii (2002).

107. According to one authoritative recent estimate, 26.2 percent of American adults suffer from mental disorder in any given year, and 6 percent have a serious mental illness. Ronald C. Kessler et al., Prevalence, Severity, and Comorbidity of Twelve-month DSM-IV Disorders in the National Comorbidity Survey Replication (NCS-R), 62 ARCH. GEN. PSYCHIATRY 617 (2005).

108. Psychiatrists define a mental disorder as “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress[,] … disability[,] … increased risk of suffering death, pain, disability[,] or an important loss of freedom.” DSM-IV-TR, supra note 35, at xxxi. In the U.S. and Canada, mental disorders are the leading cause of disability among persons aged 15-44 years. WORLD HEALTH ORGANIZATION, THE WORLD HEALTH REPORT 2004: CHANGING HISTORY, Annex Table 3 (2004).

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ditions deprive them of mental competence to initiate a divorce without incapacitating them in other aspects of their lives. In other words, psychiatric conditions that could conceivably create specific incompetence to maintain a divorce action must be those that leave their sufferers ineligible for civil commitment, able to care for themselves, and capable of managing day-to-day finances well enough to avoid harm. Candidate diagnoses also would have to leave individuals sufficiently mentally intact to communicate with attorneys who might take their cases after accepting as factually based the stated explanations for wanting to divorce. At the very least, a mental illness could not be so severe as to render a petitioner unable to pursue a divorce pro se.110

In this Part, we describe four psychiatric illnesses that could produce symptoms that might induce sufferers to seek a divorce, leave their communication and day-to-day functioning relatively unimpaired, yet induce specific impairments in judgment and perception that, in our view, should make them ineligible to maintain divorce actions. Other psychiatric conditions might, under the right combination of circumstances, produce similar gaps in an individual’s functioning. However, the conditions we describe are those most likely to produce specific thoughts and perceptions that would impair competence to divorce while sparing most mental faculties.

A. Incipient Dementia

The term “dementias” refers to a group of neurological disorders that cause a loss of various intellectual functions, especially memory. Although dementias can occur at any age, they typically are disorders that affect the elderly. The best known of these conditions—“dementia of the Alzheimer’s type,” more commonly termed “Alzheimer’s disease”—afflicts roughly 1.5 percent of persons in their late 60s; in persons over age 85 years, the incidence is 20 percent or more.111 Many other disease and degenerative processes can lead to dementia, however. Alzheimer’s disease is one of the “primary dementias,”112 that is, a dementia that results

110. All kinds of resources are available to help delusional litigant who could not convince an attorney to take his case to file for a divorce pro se. On January 12, 2009, a Google search using the phrase “pro se divorce” (including the quote marks) turned up 18,000 hits offering help and information, including websites sponsored by government organizations in Wisconsin (http://www.wicourts.gov/services/public/prose.htm), North Carolina (http://www.nccourts.org/County/Durham/Courts/Family/Domestic/Divorce.asp), Texas (www.co.travis.tx.us/dro/pro_se_litigants.pdf), and Wyoming (http://courts.state.wy.us/DandCS.aspx).

111. DSM-IV-TR, supra note 35, at 152.

112. Other primary dementias besides Alzheimer’s disease are frontal lobe dementia, Pick’s disease, and Lewy body dementia. As the name implies, frontal
from deterioration of or damage to brain cells that is not attributable to some other external cause. Dementia may also follow repeated small blood vessel occlusion in the brain,\textsuperscript{113} exposure to chemicals,\textsuperscript{114} infectious diseases,\textsuperscript{115} structural brain damage,\textsuperscript{116} metabolic abnormalities,\textsuperscript{117} and other neurological diseases.\textsuperscript{118}

lobe dementia is an often-genetic disease affecting brain’s front portions. Pick’s disease is accompanied by progressive deterioration of social skills, language, memory, personality, and (sometimes) moral judgment. Lewy bodies, which are accumulations of alpha-synuclein protein inside neuronal nuclei in those parts of the brain that control certain aspects of memory and movement, are present in Alzheimer’s and Parkinson’s diseases. \textit{See generally} National Institutes of Health, National Institute of Neurological Disorders and Stroke, http://www.ninds.nih.gov/disorders/disorder_index.htm (accessed September 2, 2008). Scientists think Lewy bodies may be related to or a variant form of Alzheimer’s or Parkinson’s disease, or that they may simply co-occur. David Weisman & Ian McKeith, \textit{Dementia with Lewy Bodies}, 27 SEMIN. NEUROL. 42 (2007) (discussing neuropathological findings).

113. This syndrome is often called multi-infarct dementia or vascular dementia, and results from multiple blockages of small blood vessels in the brain, often caused by clots. (In general, an “infarct” is an area of dead organ tissue caused by a loss of circulation to the affected portion of the organ.) The infarcted areas are relatively small, are distributed in various areas of the brain, and do not individually cause the gross, abrupt losses of specific functioning (e.g., ability to speak) observed in “strokes.” Rather, their cumulative impact is to cause deterioration in cognitive functions, such as memory, that involve coordinated activity across multiple brain regions. For a recent review, see Kurt A. Jellinger, \textit{The Pathology of “Vascular Dementia”: A Critical Update}, 14 J. ALZHEIMERS DIS. 107 (2008).

114. For example, alcohol, inhaled organic compounds (such as toluene, found in airplane glue), and heavy metals such as arsenic. Linda Chuang and Nancy Forman, \textit{Mental Disorders Secondary to General Medical Conditions}, http://emedicine.medscape.com/article/294131-overview (accessed January 22, 2009).

115. A variety of infectious agents may cause dementia, including viruses (e.g., HIV), bacteria (syphilis, Lyme disease), and prions (the agents that cause Creutzfeldt-Jakob or “mad cow” disease). Osvaldo P. Almeida and Nicola T. Lautenschlager, \textit{Dementia Associated with Infectious Diseases}, 17 INTERN. PSYCHOGERIATRICS S65 (2005).

116. Causes may include traumatic injury, intracranial accumulations of spinal fluid (hydrocephalus) or blood (e.g., subdural hematoma), or benign or malignant tumors. MARC E. AGRONIN, ALZHEIMER DISEASE AND OTHER DEMENTIAS, SECOND ED. 168 (2005).

117. For example, deficiencies of thyroid hormone, \textit{id.} at 57, or B vitamins (including thiamine, niacin, and cyanocobalamin), \textit{id.} at 183-85.

118. For example, Huntington’s and Parkinson’s diseases, \textit{id.} at 4.
Under current psychiatric diagnostic criteria, a diagnosis of dementia (whatever its source) requires a significant impairment in ability to remember either new information or information previously learned, coupled with at least one of the following problems:

- Impaired language ability
- Impaired ability to carry out intentional movements
- Loss of ability to recognize or identify objects
- Disturbances in abstract thinking, planning, or organization of activities

More significant, for our purposes, are the changes in personality and emotional makeup that may accompany early dementia (i.e., dementia that has not reached a point at which it would cause impairment that is immediately obvious). A substantial fraction of demented individuals become paranoid. They believe, for example, that their belongings have been stolen because they cannot remember that they used and moved them. The paranoia may take the form of diffuse suspiciousness or specific delusions about being persecuted or mistreated. Anxiousness, abrupt changes in mood, and anger outbursts may also occur, especially when demented in-

119. Standard medical evaluation of individuals with dementia includes history taking, a physical examination, and blood and urine testing, which can be helpful in ruling out metabolic problems, infections, and organ failure as causes. Brain imaging (with a CT or MRI scan) can often detect evidence of vascular lesions, structural changes, or regional deterioration of brain tissue. Id. at 14-70.

120. The technical term is aphasia. For example, persons with dementia may have trouble recalling and using names of objects, so they use more general terms such as “it” or “thing.” Karen S. Santacruz and Daniel Swagerty, *Early Diagnosis of Dementia*, 63 AM. FAM. PHYSICIAN 703, 705 (2001). As some dementias progress, volume of speech decreases; eventually, some sufferers stop speaking. For descriptions, examples, and discussion, see Mario F. Mendez and Beth A. Zander, *Dementia Presenting with Aphasia: Clinical Characteristics*, 54 J. NEUROL. NEUROSURG. PSYCHIATRY 542, 542-45 (1991).

121. The technical term is apraxia. The impairment occurs despite the individual’s having intact motor function and sense of touch. Apraxic persons may have trouble writing or tying shoelaces. S. Della Sala et al., *Ideomotor Apraxia in Patients with Dementia of Alzheimers’ Type*, 234 J. NEUROL. 91 (1987).

122. The technical term is agnosia, and the impairment in recognition occurs despite intact visual and touch perception. As dementia progresses, its sufferers may fail to recognize even close family members. Santacruz and Swagerty, *supra* note 120, at 706-07.

123. These difficulties, termed “loss of executive functioning,” include problems with carrying out steps of a task in the proper order, making appropriate decisions, and evaluating situations. C. SETH LANDEFELD ET AL., *CURRENT GERIATRIC DIAGNOSIS & TREATMENT* 62 (2004). Examples include problems with cooking (lighting a burner without putting water in the pot) and loss of ability to balance one’s checkbook.
individuals are confronted by their limitations or a failure to cope with situations they once handled easily.

Studies of persons with Alzheimer’s dementia show that they often experience impairments in their abilities to make decisions even when their overall impairment is relatively mild. For example, persons with early Alzheimer’s may display problems understanding information and reasoning. As the dementia progresses, many persons show significant impairment of decision-making capacity even during simple tests.124

B. Schizophrenia, Paranoid Type

Schizophrenia affects approximately 1 out of 200 persons.125 The condition usually makes its appearance in the late teenage years or young adulthood, but occasionally onset occurs well after middle age. The classic, “positive” signs of schizophrenia are hallucinations, delusions, and disorganized speech or behavior.126 Over the last two decades, however, it has become increasingly clear that “negative” symptoms—diminished affect, verbal production, and initiative—and cognitive impairments that occur in schizophrenia account for much of the disability caused by the disorder.127 Antipsychotic medication, the mainstay of treatment for schizophrenia, can in most cases reduce or eliminate many positive symptoms of schizophrenia, but residual signs and negative symptoms often remain.128 Even without treatment, though, the signs and symptoms of

126. A diagnosis of schizophrenia requires that individuals experience these symptoms for at least six months, that they experience a marked deterioration in social or occupational functioning, and that other conditions—including medical conditions, intoxicants, and mood disorders—be eliminated as potential causes of the symptoms. DSM-IV-TR, supra note 35, at 312. A closely related syndrome, schizophreniform disorder, has the same signs and symptoms as schizophrenia, but its duration is under six months and it need not be accompanied by functional deterioration. Id. at 317-19.
127. See, e.g., Victoria Villalta-Gil et al., Neurocognitive Performance and Negative Symptoms: Are They Equal in Explaining Disability in Schizophrenia Outpatients? 87 SCHIZOPHRENIA RES. 246, 246 (“Negative symptoms are the major source of disability of our sample”). These features are termed “negative” symptoms because they reflect the absence of normal psychological features.
128. Julie Kreyenbuhl et al., Adding or Switching Antipsychotic Medications in Treatment-Refractory Schizophrenia, 58 PSYCHIATR. SERV. 983, 983 (2007) (noting that “[a] substantial proportion of patients with schizophrenia, estimated at
schizophrenia often fluctuate over time, as does the impairment in functioning that accompanies the illness.\textsuperscript{129}

As is the case with most mental disorders, researchers and clinicians regard the development of schizophrenia in an individual as the outcome of biological, psychological, and social forces. Five lines of evidence support a substantial contribution of biological factors to the development of schizophrenia: (1) Strong genetic evidence comes from examining co-occurrence of the condition in twins and other genetically close family members,\textsuperscript{130} and more recently, from studies identifying specific genetic variations that influence the probability of the disorder.\textsuperscript{131} (2) Evidence for an impact of congenital influences comes from observations that people born in winter or spring are more likely to develop schizophrenia,\textsuperscript{132} as are people who were exposed to certain infections while in utero.\textsuperscript{133} (3) Evidence suggests that, in persons with underlying vulnerability, marijuana use can trigger the development of schizophrenia,\textsuperscript{134} implying a biological

10\% to 30\% of outpatients, are considered resistant to standard antipsychotic treatment,” and citing studies).

129. Thomas H. Jobe & Martin Harrow, \textit{Long-Term Outcome of Patients With Schizophrenia: A Review}, 50 CAN. J. PSYCHIATRY 892, 898 (2005) (though schizophrenia patients, even if treated, “show poorer outcome than patients with other types of psychiatric disorders … a subgroup of schizophrenia patients shows intervals or periods of recovery”).


131. See, e.g., Xiao-Wei Chen et al., \textit{DTNBP1, a Schizophrenia Susceptibility Gene, Affects Kinetics of Transmitter Release}, 181 J. CELL BIOL. 791 (2008) (studies link dysbindin gene to schizophrenia, which provides a plausible mechanism by which the gene might cause illness).

132. G. Davies et al., \textit{A Systematic Review and Meta-Analysis of Northern Hemisphere Season of Birth Studies in Schizophrenia}, 29 SCHIZOPHR. BULL. 587 (2003) (excess population attributable risk for winter/spring births is 3.3\%).


134. Sven Andréasson et al., \textit{Cannabis And Schizophrenia: A Longitudinal Study of Swedish Conscripts}, 330 LANCET 1483 (1987) (relative risk for schizophrenia among high cannabis users was 6.0); Stephen M. Eggen et al., \textit{Reduced Cortical Cannabinoid 1 Receptor Messenger RNA and Protein Expression in Schizophrenia}, 65 ARCH. GEN. PSYCHIATRY 772 (2008) (link between marijuana use and schizophrenia may be due to reduced expression of the cannabinoid recep-
causal mechanism for the disorder. Also, administration of certain phar-
maceuticals to persons without the disorder can lead to development of
symptoms that mimic schizophrenia. 135 (4) Brain imaging studies have do-
cumented differences in brain configurations 136 and neural activity 137
among people diagnosed with schizophrenia. (5) Finally, overwhelming
evidence shows that medications—especially those that block activity of
the brain’s dopamine D_2 receptor 138—are effective in alleviating some
symptoms of schizophrenia, suggesting an impact on a pathological condi-
tion that is biological. 139

Although biological factors create an individual’s vulnerability to de-
veloping schizophrenia, social and individual psychological factors influ-
ence the risk of having the condition, its impact, and its clinical course.
Living in cities, poverty, and minority status are among the social factors
that increase the risk of developing schizophrenia. 140 Childhood abuse or
trauma appears to affect symptoms and the severity of schizophrenia later
in life, 141 and unsupportive, dysfunctional family relationships are a risk
factor for relapse following recovery from an episode of psychosis.\textsuperscript{142} Persons with schizophrenia exhibit psychological traits, particularly an impaired capacity to appreciate their own and other persons’ mental states, that adversely affect their social competence.\textsuperscript{143} Also, depressed mood, low self-esteem, and negative views of oneself and others correlate with having persecutory delusions that are more severe and more preoccupying,\textsuperscript{144} and specific types of symptoms in schizophrenia are comprehensible as types of cognitive biases or emotional states.\textsuperscript{145} Thus, although psychosis is biologically-based, symptoms of schizophrenia are amenable to techniques, such as cognitive-behavioral therapy, that have proven useful for persons with nonpsychotic conditions such as depression and anxiety disorders.\textsuperscript{146}

Because schizophrenia has various manifestations, Eugen Bleuler referred to “schizophrenias” when he coined the term.\textsuperscript{147} The current U.S. diagnostic system lists five subtypes of schizophrenia. Of these, the “paranoid type” is of chief interest here because it is the type most likely to produce beliefs about one’s spouse that might provide motive one to seek a divorce without causing other impairments, such as the ability to communicate coherently, that are needed to initiate a divorce action.\textsuperscript{148} Per-

\begin{itemize}
\item \textsuperscript{143} M. Brüne et al., \textit{Mental State Attribution, Neurocognitive Functioning, and Psychopathology: What Predicts Poor Social Competence in Schizophrenia Best?} 92 SCHIZOPHR. RES. 151 (2007).
\item \textsuperscript{144} B. Smith et al., \textit{Emotion and Psychosis: Links Between Depression, Self-Esteem, Negative Schematic Beliefs and Delusions and Hallucinations}, 86 SCHIZOPHR. RES. 181 (2006).
\item \textsuperscript{147} See \textit{Eugen Bleuler, Dementia Praecox; Or, The Group of Schizophrenias} (Joseph Zinkin’s translation of DEMENTIA PRAECOX ODER DIE GRUPPE DER SCHIZOFRENIEN) (1950).
\item \textsuperscript{148} The other four subtypes of schizophrenia usually are much more disabling, and the outward signs of these disorders are quickly recognized—even by nonclinicians—as indications of severe mental problems. Sufferers of “disorganized” schizophrenia have disorganized speech and behavior accompanied by inappropriate emotional responses. Persons with “catatonic” schizophrenia display motor immobility, stupor, rigid posturing, mutism, stereotyped and repetitive movements, or excessive poorly organized activity (“catatonic excitement”). Persons with “undifferentiated” schizophrenia hallucinate and have disorganized thinking; they do not usually have the types of delusions that would motivate one to
\end{itemize}
sons with paranoid schizophrenia display normal amounts of affect, and their speech, behavior, and thinking are organized and coherent.\textsuperscript{149} When ill, however, they typically have delusions that they are being persecuted and that their persecutors intend to harm them. If the illness that generates these ideas is left untreated, delusions may become more-than-ample justification for taking action to respond to threats that seem very real.

C. Delusional Disorder

In schizophrenia, delusions have “bizarre”\textsuperscript{150} content—e.g., a belief that one’s brain contains an electronic thought transmission device—that could not possibly be true. Also, persons with schizophrenia experience other symptoms (as we have just discussed) and deterioration in overall functioning. By contrast, persons with delusional disorder experience the insidious development of systematized delusions about things that could occur in real life. They often do not experience the psychosocial dysfunction that accompanies schizophrenia, and their thinking and behavior remain clear and orderly. They hallucinate little or not at all, though much of what they feel, say, and do may reflect their delusional ideas.\textsuperscript{151} Thus, a person with delusional disorder who believes he is being targeted by “Mafia hit men” may stop working, leave his house only at night, and wear disguises—that is, his decisions and behavior are logical, organized responses to a premise which, though physically possible, has no basis in reality.\textsuperscript{152}

Delusional disorder is an uncommon condition.\textsuperscript{153} It therefore has received much less study than has schizophrenia, and psychiatrists know seek a divorce, and they also lack initiative or interest in extended, determined activity. Similarly, persons with “residual” schizophrenia lack delusions that would provide “reasons” for a divorce; they also usually have impaired motivation. \textit{See DSM-IV-TR, supra} note 35, 313-17.

149. That is, the \textit{form} of their thoughts and behavior are normal. The \textit{content} of their thoughts can be quite irrational, and their actions may be motivated by delusional ideas.

150. Though “bizarreness” can be hard to evaluate, DSM-IV-TR deems delusions “bizarre if they are clearly implausible … and not derived from ordinary life experiences. DSM-IV-TR, \textit{supra} note 35, at 324.

151. The full requirements for a diagnosis of delusional disorder are (a) non-bizarre delusions that have lasted at least one month, (b) never having met diagnostic criteria for schizophrenia, (c) neither bizarre behavior nor marked impairment in functioning (apart from the direct impact of the delusion(s)), (d) absence or at-most-brief duration of mood symptoms, and (e) absence of a medical or substance-induced cause for the delusion(s). \textit{See DSM-IV-TR, supra} note 35, at 329.

152. \textit{Id.} at 324.

153. See \textsc{Benjamin J. Sadow} et al., \textsc{Kaplan} & \textsc{Sadock’s Synopsis of Psychiatry} 504 (2007) (U.S. prevalence is 0.025-0.03 percent, “much rarer than schizophrenia”).
much less about the disorder’s origins. Because individuals with neurological conditions affecting the basal ganglia and limbic system can have a clinical presentation similar to delusional disorder (that is, complex delusions but intact cognitive functioning), it is theorized that delusional disorder may itself involve disturbances in the basal ganglia and limbic system. However, a number of psychosocial factors—social isolation, sensory deprivation (deafness), socioeconomic conditions, and personality characteristics—are associated with delusional disorder and may play an as-yet-not-fully-understood role in the condition’s pathogenesis.

Delusional disorder is currently classified in several subtypes. The subtypes of greatest interest for this Article’s concerns are those accompanied by delusions that might produce a basis (in the sufferer’s mind) for seeking a divorce. Thus, the erotomaniac type, jealous type, and persecutory type are all conditions that might generate a delusional motivation for seeking divorce but a potential lack of competence to do so.

Despite its relative rarity in the general population, several factors give delusional disorder a substantial diagnostic significance in the present context. First, unlike schizophrenia, delusional disorder has a relatively late onset, meaning that individuals are more likely to develop the disorder after the ages at which most people first marry. Second, though persons with delusional disorder may seem odd or eccentric, they usually have no functional disturbance that would make their illness obvious to persons who are not mental health professionals.

154. See, e.g., A.G. Cardno & P. McGuffin, Genetics and Delusional Disorder, 24 BEHAV. SCI. LAW 257 (2006) (rarity of multiply affected families has prohibited genetic linkage studies and has limited studies of molecular genetics).

155. SADOCK ET AL., supra note 153, at 505.

156. Id.

157. This subtype is characterized by delusions that another individual, often someone of higher status, loves the person with the disorder. See DSM-IV-TR, supra note 35, at 329.

158. A person with this subtype has delusions that his sexual partner is unfaithful. Id.

159. Persons with this subtype have delusions that they are being treated maledictiously in some way. Id.

160. Other subtypes of delusional disorder are characterized by grandiose delusions (e.g., of inflated worth, power, or knowledge, or having a special relationship with a deity or famous person), somatic delusions (e.g., about having some physical defect or medical condition), and mixed delusions (that is, having delusions of more than one type, though no single theme predominates). Id.

161. The mean age of onset is 40 years, but the range stretches from late adolescence to the very elderly. SADOCK ET AL., supra note 153, at 505.

162. “The most remarkable feature of patients with delusional disorder is that the mental status examination shows them to be quite normal except for [their] delusional system.” SADOCK ET AL., supra note 153, at 506.
lusional disorder neither recognize their own problems nor see any need to get treatment, yet they may not experience impairments that would qualify them for involuntarily imposed psychiatric care. Finally, persons with delusional disorder attempt to engage clinicians in accepting their delusions, and because they are sometimes litigious, they may seek legal help from and may succeed in convincing attorneys that they have reality-based grievances against a spouse that would legitimize a divorce. Thus, given that a person seeking divorce has a psychotic motive for doing so, delusional disorder obtains a diagnostic probability far above what its comparative incidence in the general population would imply.

D. Affective Disorders

In general, “affective disorders” are mental conditions of which the salient symptom is pervasively and persistently abnormal mood. These disorders may include manic episodes (multi-day periods of elated, expansive, or irritable mood, coupled with markedly increased activity, rapid or “pressured” speech, and inflated self-esteem), depressive episodes (multi-week periods of low mood, much-diminished enjoyment of normally pleasant activities, decreased or increased sleep, low energy, altered motor activity, and feeling guilty or worthless), or episodes in which manic and depressive symptoms occur simultaneously. In the most severe cases, persons with affective disorders may also experience delusions, hallucinations, or other psychotic symptoms; when mood disorders display these features, they are termed “affective psychoses.” Sufferers of a related syndrome, schizoaffective disorder, have some episodes in which they primarily experience the symptoms of schizophrenia, and other episodes in which affective symptoms are predominant.

163. That is, they lack insight into their illness. SADOCK ET AL., supra note 153, at 508.


165. SADOCK ET AL., supra note 153, at 506.

166. JOHN Parry & Eric York Drogin, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 63 (2007) (noting that delusional disorder may be difficult to detect in part because “the state of affairs alleged by a patient or client [emphasis added] could conceivably occur in real life”).


168. Id. at 356.

169. “Since schizoaffective disorder was first introduced as a concept in 1933, there has been no clear consensus about its definition.” Thomas Munk Laursen et al., Family History of Psychiatric Illness as a Risk Factor for Schizoaffective
Affective psychoses and schizoaffective disorders have a biopsychosocial causation, that is, their onset and manifestations reflect a combination of neurological, hereditary, and environmental influences. For example, a Danish population study of 2.1 million persons showed that having a first-degree relative with bipolar disorder greatly heightened one’s risk of developing the condition, as did the death of one’s mother before age five years.\textsuperscript{170} Individuals’ statistical risk of developing depression is greatly influenced by family history\textsuperscript{171} and personality characteristics.\textsuperscript{172} Studies of familial patterns of affective and psychotic disorders suggest that schizoaffective disorder has genetic components\textsuperscript{173} and is genetically related to both schizophrenic and bipolar illnesses.\textsuperscript{174}

Mood disorders alter persons’ decision-making. Individuals with \textit{nonpsychotic} depression may have problems with concentration, processing information,\textsuperscript{175} and reasoning,\textsuperscript{176} and these problems may be accentu-
ated and exacerbated by the simultaneous presence of delusional motivations for certain actions. Persons with mania characteristically display poor judgment. The heightened energy associated with manic episode may make persons more prone to act precipitously on delusional ideas or respond rashly to grandiose ideas or perceived slights.

IV. CASE LAW ON INCOMPETENCE AND DIVORCE

A. Divorcing a Spouse Who Has Been Adjudicated Incompetent

Until the twentieth century, a person seeking to divorce a mentally ill person often could not do so. In general, more recent divorce statutes and case law have allowed competent persons to seek divorces from spouses adjudged mentally ill subject to certain conditions. As we have noted earlier, persons may divorce spouses who have “incurable insanity” or who are undergoing long-term psychiatric hospitalization may be divorced. Given current practices and available treatments, however, relatively few incompetent individuals would now be divorceable on such grounds. In some cases, trial courts have found that the mental illness of a

(2004) (“Late-life depression is characterized by slowed information processing, which affects all realms of cognition”).

176. Carl Elliott, Caring about Risks: Are Severely Depressed Patients Competent to Consent to Research? 54 ARCH. GEN. PSYCHIATRY 113 (1997) (questioning whether decisions of severely depressed persons “are authentically theirs” and whether some severely depressed persons may lack needed concern for their own welfare).

177. Paul S. Appelbaum et al., Competence of Depressed Patients for Consent to Research, 156 AM. J. PSYCHIATRY 1380, 1383 (1999) (though persons with moderate depression have good decision-making capacity, persons with severe depression, “especially those with psychotic depression, may manifest higher levels of decisional incapacity”).

178. FAMILY LAW AND PRACTICE, GROUNDS FOR DIVORCE § 4.03 (section 2). However, divorce actions “may be instituted against insane defendants for a cause of divorce committed before the period of insanity.” Iago v. Iago, 48 N.E. 30, 31 (Ill. 1897). This remained permissible in the twentieth century. Huguley v. Huguley, 51 S.E.2d 445, 448 (Ga. 1949) (husband could sue insane wife for divorce on the grounds of cruelty inflicted prior to her insanity).

179. See, e.g., Box v. Box, 45 So. 2d 157 (Ala. 1950) and Miller v. Miller, 487 S.W.2d 382 (Tex. Civ. App. 1972) (setting aside divorce decree when an incompetent defendant was not represented by a guardian ad litem or general guardian); see also Stephens v. Stephens, 45 So.2d 153 (Ala. 1950) (setting aside divorce decree where an incompetent defendant’s guardian ad litem ignored the defendant and proceedings were transacted ex parte without notice to defendant).

180. See supra, Part II.B.4.
respondent spouse existed when the couple married and have allowed annulment (though not divorce) based on the idea that a marriage is void if entered into by an incompetent. 181

B. Initiation of Divorce by Individuals Adjudicated Incompetent

In contrast to the problems posed by Mr. Doe’s divorce petition, most published decisions dealing with issues of competence and divorce concern petitioners who have already been adjudicated incompetent to manage personal affairs. In these situations, the question for the trial court becomes whether the jurisdiction permits an incompetent petitioner to maintain a divorce action through a guardian, guardian ad litem, or next friend.

The “majority rule”—that is, the rule followed in most states—is that an incompetent person may not sue for divorce through guardian or intermediary. 182 Two rationales support this position. First, a guardian’s powers are statutory creations, and absent a specific statutory provision to file for a divorce on behalf of a ward, a guardian lacks legal authority to do so. 183 Second, the right to sue for divorce is strictly personal and volitional in nature, and

must … remain personal to the spouse aggrieved by the acts and conduct of the other. Inasmuch as there are no marital offenses which in and of themselves work a dissolution of the marriage relation, or which may not be condoned, the marital relation can be dissolved only with the consent and at the instigation of the injured spouse personally, and manifestly, such consent cannot be given by one who is legally insane. 184

Two states—Alabama and Massachusetts—have for decades explicitly allowed an incompetent petitioner to maintain a divorce action through a representative. In Massachusetts, a statutory provision expressly allows a

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181. De Nardo v. De Nardo, 59 N.E.2d 241 (N.Y. 1944) (annulment acceptable instead of divorce because party was mentally ill at time of marriage); Cox v. Armstrong, 221 P.2d 371, 373 (Colo. 1950) (conservator of incompetent person may bring suit for annulment of marriage on ground of insanity, although he may not bring suit for divorce). But see Geitner v. Townsend, 312 S.E.2d 236, 238 (N.C. App. 1984) (prior adjudication of incompetency is not conclusive on the issue of later capacity to marry; therefore, marriage not necessarily subject to annulment).

182. 6 A.L.R.3d 681 §2.


184. Scott v. Scott, 45 So. 2d 878, 879 (Fla. 1950).
divorce action initiated on behalf of an incompetent person. In Alabama, statutory provisions have been interpreted broadly to allow for a divorce action to be brought on the incompetent’s behalf. More recently, a few other states have permitted guardians to initiate divorce actions on behalf of wards.

C. Specific Incompetence to Divorce

Our efforts to locate decisions providing competence criteria that might apply to plaintiffs like Mr. Doe—that is, to individuals whose wishes to divorce reflect psychotic motivations, but who are not necessarily incompetent to manage most aspects of their affairs—yielded just seven cases. We review these here.

1. Shenk v. Shenk

Mrs. Shenk sought to divorce her husband alleging gross neglect of duty and extreme cruelty. Mr. Shenk responded by asserting that his wife suffered from a mental impairment so serious that she had been awarded total permanent disability for purposes of her life insurance, and that she therefore lacked the requisite mental capacity to maintain a divorce action. The trial court refused to let Mr. Shenk put on witnesses to suggest his wife’s mental incompetence but allowed a doctor to testify that he had examined Mrs. Shenk four months following the filing of her divorce petition and found that she was competent then. The trial court,


186. Campbell v. Campbell, 242 Ala. 141, 142 (Ala. 1941) (statutes “authorize the bill to be filed by the next friend for and in the name of the non compos mentis”); accord, Hopson v. Hopson, 257 Ala. 140, 141, 57 So. 2d 505 (Ala. 1952).

187. Ruvalcaba v. Ruvalcaba, 174 Ariz. 436, 443 (Ariz. Ct. App. 1993) (spouse who has been adjudged incapacitated retains the means to dissolve his marriage, and a guardian may assert that right on behalf of the ward); Kronberg v. Kronberg, 263 N.J. Super. 632, 641 (Ch.Div. 1993) (court, exercising substituted judgment, concluded that wife “would have filed suit for divorce against her husband”); Nelson v. Nelson, 118 N.M. 17, 22 (N.M. Ct. App. 1994) (in light of statutory provisions governing both guardianships and divorces, a guardian in New Mexico has authority to file for divorce under certain circumstances). Several cases discussed in the following sections reflect similar views about guardians’ powers.

188. 135 N.E.2d 436, 437 (Ohio App. 1954).

189. Id. at 437-438.

190. Id. at 438.
noting that it was “not trying this woman’s sanity at all,” made no determination concerning Mrs. Shenk’s competence during the trial and granted the divorce. Mr. Shenk appealed, arguing that the trial court erred (1) in not determining whether his wife was competent before moving forward with the action and (2) in refusing to let him introduce evidence of his wife’s mental illness.\textsuperscript{191}

The appeals court reversed the trial court’s ruling. A previous case\textsuperscript{192} had held that in Ohio, an incompetent person could not maintain a divorce action for divorce on his own behalf or through a guardian. This meant that the Shenk trial court was obligated, under a statute in force when the case\textsuperscript{193} was heard, to determine the competence\textsuperscript{194} of a party to a divorce if competence was undetermined at the time of trial and was challenged by an opposing party.\textsuperscript{195} The appeals court noted that a divorce action “depends entirely upon the intelligent exercise of the will or volition of the plaintiff,” and the trial court needed to know whether “that will or volition is expressed by a sane and competent person.”\textsuperscript{196}

\textbf{2. In re Higgason’s Marriage}

\textit{Higgason’s Marriage}\textsuperscript{197} concerned a woman who had been placed under conservatorship and had sought to end her marriage through a guardian \textit{ad litem}, her adopted daughter. The Supreme Court of California determined that a spouse could petition for dissolution of her marriage through a guardian \textit{ad litem} “provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so.”\textsuperscript{198} The Court explained that simply having a conservator did not constitute a determination that the conservatee was in any way “insane or incompetent.” Being a conservatee required the wife to bring her divorce suit through a guardian \textit{ad litem}, but it did not preclude her from bringing the

\textsuperscript{191} \textit{Id.}.
\textsuperscript{192} Jack v. Jack, 75 N.E.2d 484 (Ohio Ct. App., Cuyahoga County 1947).
\textsuperscript{193} In the revised numbering system that took effect in October 1953, the relevant statute is \textsc{Ohio Rev. Code} § 2307.15, which reads, in its entirety, “When the insanity of a party is not manifest to the court, and the fact of insanity is disputed by a party or an attorney in the action, the court may try the question, or impanel a jury to try it.”
\textsuperscript{194} Though the statute refers to “sanity,” “competence” is a better term in the current context, because the question for the court is whether the individual has a requisite legal capacity.
\textsuperscript{195} \textit{Shenk} at 439.
\textsuperscript{196} \textit{Id.} at 439.
\textsuperscript{197} 516 P.2d 289 (Cal 1973).
\textsuperscript{198} \textit{Id.} at 294.
suit entirely. The Supreme Court noted that the trial court had found that the wife “had the ability to think,” had signed and verified the petition for the dissolution of her marriage, and had signed and verified two declarations supporting an order to show cause for injunction against her husband’s visiting her home. Moreover, the Court saw the wife’s verbal assertion of her desire to dissolve the marriage during a pre-trial deposition as evidence proving she was competent to institute the dissolution proceedings through her guardian ad litem.

3. Boyd v. Edwards

In 1968, Charles Edwards filed a divorce action against his wife, Essie. In 1970, while the divorce action was pending, Mr. Edwards had a serious motorcycle accident that resulted in hypoxic brain damage. After his release from the hospital in 1971, Mr. Edwards went to live with his sister, Ann Boyd. The divorce action was dismissed in 1972 because of Mr. Edwards’ incompetence. In 1980, Ms. Boyd, who had become her brother’s guardian in 1976, filed a new divorce action against Mrs. Edwards on behalf of Mr. Edwards. Mr. Edwards did not appear at the trial, but his sister testified about is inability to express feelings and to dress, bathe, and feed himself. Though Mrs. Edwards contended that her husband had not expressed a desire to divorce, the trial court granted the divorce because the statutory provision of living apart for at least two years had been satisfied.

Mrs. Edwards appealed, arguing, inter alia, that the court had erred by granting the divorce without having established that Mr. Edwards indeed could not testify. Ms. Boyd maintained that the trial court had no duty to ascertain the wishes of an incompetent spouse where a guardian could prove statutory requirements under Ohio’s “no fault” divorce law.

The appeals court agreed with Mrs. Edwards, finding evidence that Mr. Edwards actually could speak and express his feelings, and suggest-
ing that the separation may not have been entirely voluntarily.\textsuperscript{211} Under these circumstances, the trial court had a duty to determine whether Mr. Edwards was competent to testify, and if so, to learn his true desires regarding the divorce.\textsuperscript{212} The appeals court cited several cases in which mentally ill persons had been allowed to maintain divorce actions because they retained sufficient capacity to express clear desires for divorce, to understand proceedings, to exercise judgment, or to testify about their wishes for divorce.\textsuperscript{213}

4. In re Marriage of Kutchins

The husband in \textit{Kutchins}\textsuperscript{214} had been placed under a guardianship of his estate in early 1983; though a guardianship of his person had also been requested, the request was denied.\textsuperscript{215} Four months later, Mr. Kutchins filed an action for marital dissolution, which his wife challenged based on her husband’s earlier adjudication as disabled and his subsequent lack of capacity to bring a legal action. Mrs. Kutchins’s petition was granted and the case was dismissed.\textsuperscript{216}

Mr. Kutchins appealed the dismissal. The appeals court noted that no Illinois case had held that having \textit{only} a guardian of estate rendered a person incompetent to seek a divorce.\textsuperscript{217} However, an earlier Illinois case\textsuperscript{218} had held that what might constitute incompetence for purpose should not necessarily apply for a different legal matter; “[n]o definite rule can be laid down which will apply to all cases alike.” The standard for competence to manage one’s financial affairs and the standard of competence to file for a divorce were different.\textsuperscript{219} Concerning the latter standard, the appeals court held that

\begin{itemize}
  \item \textsuperscript{211} Id. at 1159.
  \item \textsuperscript{212} Id. at 1157-58.
  \item \textsuperscript{213} Id. at 1158-59, \textit{citing Higgason; Spooner v. Spooner, 148 Ga. 612, 97 S.E. 670 (1918) (plaintiff had sufficient capacity to maintain a divorce action); Akin v. Akin, 163 Ga. 18, 135 S.E. 402 (1926) (plaintiff, on furlough from a hospital, had sufficient capacity to sue for a divorce); Stevens v. Stevens, 266 Mich. 446, 254 N.W. 162 (1934) (substituting wife as plaintiff in divorce action originally brought by her guardian was proper because wife could understand the nature of the divorce proceedings); Turner v. Bell, 279 S.W. 2d 71 (Tenn. 1955) (plaintiff-wife previously adjudged incompetent nonetheless had requisite volition to seek divorce, testify, and maintain the action).} \textsuperscript{214} 482 N.E.2d 1005 (Ill. App. 1985).
  \item \textsuperscript{215} Id. at 1006.
  \item \textsuperscript{216} Id.
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} Snyder v. Snyder, 31 N.E. 303 (Ill. 1892).
  \item \textsuperscript{219} Id. at 1006-1007.
\end{itemize}
the test of the mental capacity required for filing a petition for
dissolution of marriage is whether the petitioner has sufficient
mental capacity to understand fully the meaning and effect of
the petition and whether the petitioner is able to determine in
his own interest that he desires a final separation. 220

Reasoning that a person who did not need a guardian of the person had the
requisite mental capacity to file a divorce suit, the appeals court reversed
and remanded the dismissal of the petition for divorce to the trial court. 221

5. Murray by Murray v. Murray 222

Fletcher and Charlie Belle Murray had been married for 18 years
when, in early January 1990, Fletcher fell ill. After a two-week hospitali-
zation, Fletcher went to the home of his son, Allan. There, Fletcher re-
ceived around-the-clock care until October 1991, when he was placed in a
nursing home. Allan had been appointed his father’s attorney-in-fact in
December 1989 and was subsequently appointed his father’s conservator
and guardian of estate in March 1990. Following Mrs. Murray’s successful
action for separate support and maintenance in February 1990, Allan
brought an action for divorce on behalf of his father in November 1991.
Mrs. Murray moved to dismiss the action on grounds that her stepson
could not bring a divorce action suit on behalf of his father, but the trial
court denied her motion and ultimately granted the divorce. 223

Mrs. Murray appealed the trial court’s denial of her motion to dis-
miss. The Supreme Court of South Carolina noted that whether a guardian
may sue for divorce had never been addressed in the state. 224 The Court
also noted that South Carolina defined an “incapacitated person” as a “per-
son who is impaired by reason of mental illness, mental deficiency, physi-
cal illness or disability, advanced age, … to the extent that he lacks
sufficient understanding or capacity to make or communicate responsibl
decisions concerning his person or property,” but questioned whether this
determination was ever made in Fletcher’s case. 225 The Court adopted the
“majority rule” that bars suits for divorce brought on behalf of a person
who is mentally incompetent to manage to his estate and person. “How-
ever,” the Court added,

we decline to impose an absolute rule denying the right to seek a
divorce if the spouse, although mentally incompetent with re-

220. Id. at 1007.
221. Id. at 1007-08.
223. Id. at 782.
224. Id. at 783.
spects to the management of his estate, is capable of exercising reasonable judgment as to his personal decisions, is able to understand the nature of the action and is able to express unequivocally a desire to dissolve the marriage.\textsuperscript{226}

Noting that the trial court had made no finding concerning Fletcher’s competence, the Supreme Court reversed and remanded the case for a determination of Fletcher’s competence and to clarify whether he indeed desired to obtain a divorce.\textsuperscript{227}

6. Syno v. Syno

Mr. Syno, who had previously been adjudged incompetent to manage his estate, filed for and obtained a divorce on his own behalf. Mrs. Syno appealed on grounds that her husband could not bring the action on his own behalf because of his status as incompetent.\textsuperscript{228}

The Superior Court of Pennsylvania noted that the Commonwealth’s case law and statutes contained no authority for distinguishing between incompetents who cannot manage their finances and those who cannot manage their personal lives. Rather, once a person has been found incompetent for either purpose, he incompetent for all purposes.\textsuperscript{229} Accordingly, the Superior Court concluded that Mr. Syno could not maintain an action for divorce in his own name, and the judgment by the lower court granting the divorce was deemed void.\textsuperscript{230} However, following \textit{Higgason}, the Superior Court held that

an incompetent spouse should be permitted to institute a divorce proceeding through a guardian or guardian \textit{ad litem}, provided the incompetent is capable of exercising reasonable judgment as to personal decisions, understand the nature of the action and is able to express unequivocally a desire to dissolve the marriage.\textsuperscript{231}

In addition, the Superior Court held that the incompetent must “be able to verify statements made in his or her complaint” and be competent to testify.\textsuperscript{232} The Superior Court remanded the case to the trial court for

\textsuperscript{226} Id. at 784.

\textsuperscript{227} Id.


\textsuperscript{229} Id.

\textsuperscript{230} Id.

\textsuperscript{231} Id. at 311, \textit{citing Higgason}, 516 P.2d at 294-295.

\textsuperscript{232} Id. Regarding the husband’s competence to testify, the Superior Court noted that “an adjudicated incompetent may be ‘competent’ to testify”; the standard for this determination would be “whether the incompetent understands his or her duty to tell the truth and whether he or she is able to perceive, remember and com-
proceedings that would determine whether Mr. Syno could satisfy these requirements, exercise reasonable judgment, and express a clear desire for a divorce.\footnote{233}

7. Northrop v. Northrop\footnote{234}

This Delaware family court case concerns an elderly man who filed for divorce in 1994. Several months later, two of the couple’s children filed a motion seeking to substitute themselves for their father based on their allegation, supported by a psychiatrist’s affidavit, that their father was incompetent due to Alzheimer’s disease. In her responses, Mrs. Northrop suggested that her husband lacked the capacity to prosecute the divorce action, though she lacked sufficient knowledge to admit or deny he had become “incompetent.”\footnote{235} To address this matter, the Delaware trial court sought additional medical evidence concerning Mr. Northrop’s competence,\footnote{236} citing, as its authority, Hoffman v. Hoffman, a 1992 Delaware Supreme Court holding that a family court has statutory authority to determine the mental competence of a spouse before entering a divorce decree.\footnote{237}

Hoffman had not established criteria for determining the competence of a litigant in a divorce proceeding, but the Northrop court noted that other jurisdictions had done so.\footnote{238} The Northrop court also noted that one might be incompetent to manage one’s estate but be capable of making reasonable choices about one’s personal life.\footnote{239} “Thus, we should not deny \textit{per se} an adjudicated ‘incompetent’ the right to proceed with a divorce action,” concluded the Northrop court. “For a litigant to be found ‘incompetent to initiate divorce proceedings,’ he must be “[in]capable of exercising reasonable judgment as to personal decisions, … not understand the nature of the divorce action, and [be] unable to express unequivocally a desire to

\textit{municate the pertinent facts.”} Id. at 313, \textit{citing} Commonwealth v. Goldblum, 447 A.2d 234 (Pa. 1982).

\footnote{233. Id. at 314.}


\footnote{235. Id. at *1.}

\footnote{236. Id. at *2-*3.}

\footnote{237. 616 A.2d 294, 298 (Del. 1992).

\footnote{238. Northrup at *3-*4, \textit{citing} Kutchins, 482 N.E.2d at 1007 (Ill. App. Ct. 1985) (test is whether petitioner can “understand fully the meaning and effect of the petition and whether” he can “determine in his own interest that he desires a final separation”).}

\footnote{239. Id. at *4, \textit{citing} Syno, 594 A.2d 307 (Pa. Super. 1991) (individual adjudicated incompetent to manage his estate may institute a divorce proceeding through a guardian or guardian \textit{ad litem}).}
dissolve the marriage.” Based both parties’ stipulation and the psychiatrist’s affidavit, the trial court found that Mr. Northrop was “incompetent to pursue his divorce action.”

D. Analysis and Comment

The cases discussed in Part IV.C. lead to certain conclusions concerning the potential legitimacy of a specific “competence to divorce” and of statutes that might recognize and implement measures for courts to respond to litigants who appear to lack this competence.

First, *Shenk* and *Northrop* find a specific state statutory basis for allowing divorce courts to address and adjudicate the competence of litigants. Though the statutes providing this authority do not apply specifically to competence to divorce, these decisions allow trial courts to make judgments about petitioners’ competence without distorting or liberally interpreting statutory language.

Second, the decisions present diverse criteria concerning competence to divorce and when competence is required. As we have just seen, the various criteria include:

- whether the divorce action reflects “the intelligent exercise of the will or volition of the plaintiff,” and whether “that will or volition is expressed by a sane and competent person”
- whether the petitioner can “exercise[e] a judgment, and express[] a wish, that the marriage be dissolved … and has done so”
- whether the petitioner can express clear desires for divorce, understand proceedings, exercise judgment, and is competent to testify as his wish for divorce
- whether the petitioner can “understand fully the meaning and effect of the petition and … [can] determine in his own interest that he desires a final separation”

240. *Id* at *5.  
241. *Id*. A subsequent decision concluded that because Mr. Northrop had the cognitive capacity to understand his actions and their consequences when he initiated discussions about divorce proceedings (though perhaps not later on when he signed the petition), he should be granted a divorce. *Northrop v. Northrop*, 1998 Del. Fam. Ct. LEXIS 88 (Del. Fam. Ct. Apr. 3, 1998).
244. *Shenk*, 135 N.E.2d at 439.  
246. *Boyd*, 446 N.E.2d at 1158-59, and *Murray*, 426 S.E.2d at 784.  
• whether the petitioner can “exercise[e] reasonable judgment as to personal decisions, understand the nature of the action, … unequivocally a desire to dissolve the marriage, … verify statements made in his or her complaint,” and testify competently.

Third, courts do not present a unitary scheme for reaching conclusions about competence to divorce. In Syno, the Superior Court insisted that the trial court make a determination of the husband’s competence from his own testimony, despite having a detailed report prepared by a doctor who had examined the husband in the case.249 By contrast, in Northrop (which cited Syno), a doctor’s report was satisfactory support for a conclusion of incompetence.250

Fourth, the cases do not provide guidance about what process is adequate for determining competence to divorce. Must the putatively incompetent petitioner testify, or has he a right not to do so? Is expert testimony required, or may lay testimony suffice? If expert testimony is necessary, has the trial court any authority to order a putatively incompetent petitioner to undergo examination? Finally, what level of proof is required to bar a petitioner from proceeding?

Finally, none of the cases provides a detailed rationale either for concluding that petitioners must be competent, or for deciding what particular capacities constitute competence for divorce. Implicitly, some cases protect autonomy of petitioners by holding that their competence for divorce may be retained despite having a mental illness or a previous adjudication concerning competence to manage one’s person or estate. However, the cases do not tell us why any minimum level of mental capacity should be necessary for pursuing a divorce. Moreover, nothing in these decisions would require other jurisdictions to see matters the same way, nor would these decisions inform courts about why certain cognitive functions should or should not count in determining competence to divorce.

The next two Parts describe ways to plug these gaps in case law. We begin with the rationale for recognizing and requiring specific competence to divorce.

V. COMPETENCE FOR DIVORCE: A LEGAL RATIONALE

The merits of keeping individuals from making major, life-changing decisions on the basis of their delusional beliefs seems obvious, and this may be why some courts have imposed competence requirements on divorce petitioners. But this begs the question of why it might be desirable

249. Syno, 594 A.2d at 312.
250. Northrop at *5.
for courts to require some form or level of competence before permitting an individual to proceed with a divorce, especially when the very notion of competence for divorce has drawn so little attention. We suggest that two other areas of law where legal requirements for competence are well established—competence to stand trial (CST) and competence to consent to medical treatment—suggest rationales for requiring individuals to satisfy some competence requirement if they wish to divorce.

A. Competence to Stand Trial

1. Historical Background

Within Anglo-American legal tradition, the expectation that a criminal defendant be competent to stand trial dates back to at least mid-17th century England, an era and setting in which even persons who faced the severest penalties defended themselves without legal counsel. The competence requirement may have originated in response to defendants who stood “mute” rather than enter a plea regarding guilt. By the time Blackstone wrote his Commentaries, though, a defendant’s competence was deemed essential to the fairness of a criminal trial. In Frith’s case (1790), for example, after a jury found that a mentally ill prisoner charged with treason was “quite insane,” the prisoner was remanded and his trial was postponed (perhaps indefinitely) until the prisoner might re-


252. In such cases, juries decided whether the defendant was “obstinately mute, or whether he be dumb ex visitatione Dei,” 4 BLACKSTONE, COMMENTARIES 477 (9th ed. 1783). A defendant found “obstinately mute” was subjected to peine forte et dure, a procedure (that continued into the eighteenth century) in which the defendant had increasingly heavy weights placed on his chest until he answered or died. Id. at 335, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 887 (1974) (citing 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND (1968)). Those defendants who were mute “by visitation of G-d” were spared this ordeal. Though this category originally included just persons who could not speak or hear, it ultimately came to include persons with mental illness. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (ED 3) 126 (2007).

253. At common law, a “mad” defendant was “not to be arraigned ... because he is not able to plead to [the charge] with that advice and caution that he ought,” nor was he to be tried, “for how can he make his defense?” 4 BLACKSTONE, COMMENTARIES 24. See also HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34 (1847).

254. 22 HOW. STATE TRIALS 307 (1790).
cover sufficiently to defend himself. ²⁵⁵ In charging the _Frith_ jury, Lord Kenyon invoked, as justification for requiring trial competence,

> the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing… ²⁵⁶

### 2. Standards

Though requiring defendants to be competent is a well established feature of Anglo-American jurisprudence, courts and legislatures have historically provided varying definitions of CST. The judge in _Frith’s case_ instructed the jury to decide whether the prisoner was “of sound mind and understanding or not”; ²⁵⁷ if not, his trial would be delayed until “that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law.” ²⁵⁸ _King v. Pritchard_ ²⁵⁹ articulates an early and still frequently cited English formulation for judging CST, directing a jury to consider, first, whether a defendant is “mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial.” ²⁶⁰

Looking at _Pritchard_ and current tests for adjudicative fitness in Canada ²⁶¹ and Australia, ²⁶² one discerns a focus on cognitive, factual under-

²⁵⁵. _Id._ at 318. John Frith had attorneys, _id._ at 309, who asked for the postponement of the trial over their client’s objection. Frith had already been locked up for three months and wished to proceed with his trial. His charge of treason had arisen from his throwing a stone at the carriage of King George III, after which authorities had immediately arrested him. _Id._ at 307-08.

²⁵⁶. _Id._ at 318. There is no evidence that Frith ever was brought to trial. Richard Moran, _The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield_ (1800), 19 L. & Soc’y REV. 487, 510 n.21 (1985).

²⁵⁷. _Frith’s case_, 22 HOW. STATE TRIALS at 311.

²⁵⁸. _Id._ at 318.

²⁵⁹. 7 CAR. & P. 303, 173 ENG. REP. 135 (1836).

²⁶⁰. _Id._ at 304.

²⁶¹. Canadian courts followed _Pritchard_ until 1992, when the Canadian criminal code formally defined “unfitness” to stand trial as being unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel.
standing. By contrast, American jurisdictions have additionally looked at the defendant’s rationality. For example, a New York State case from the mid-nineteenth century held that a defendant was “sane” or competent for purposes of a criminal trial if he …

… is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner…

In an early twentieth century opinion, a U.S. federal appeals court provided this test for CST:

Does the mental impairment of the prisoner’s mind, if such there be, whatever it is, disable him … from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition ... ?

Another test asked trial courts whether the defendant was “capable of properly appreciating his peril and of rationally assisting in his own defense.”

Since the 1960s, all U.S. jurisdictions have come to utilize CST standards that are consistent with Dusky v. United States, in which the U.S. Supreme Court declared that a criminal defendant may stand trial only if “he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “has a rational as well as


262. Though Australia continues to use the fitness criteria of Pritchard, its law now further specifies that criminal defendants must have

the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge. Kesavarajah v. R, 181 C.L.R. 230, 243, 123 A.L.R. 463 (1994).

263. Freeman v. People, 4 Denio 9, 24-25 (Sup. Ct., N.Y. Co. 1847).


266. Bennett G: A Guided Tour Through Selected ABA Standards Relating To Incompetence To Stand Trial: Incompetence To Stand Trial. 53 GEO. WASH. L. REV. 375, 376 (1985) (“In considering the criteria for determining competence to stand trial, one must begin—and indeed, end—with the criteria set forth in Dusky v. United States”).
factual understanding of the proceedings against him.”267 Although many state statutes contain definitions of competence or incompetence to stand trial that do not mention rationality,268 statutes or case law in at least eight states do.269

3. Rationale

As the above discussion illustrates, the requirement that defendants be competent to stand trial evolved in times and contexts in which defendants were precluded from retaining counsel in felony and treason cases.270 Having defendants be competent was a means of protecting accused individuals from unopposed action (i.e., prosecution) by the state. Since Gideon v. Wainwright’s assurance of legal counsel even for indigent criminal defendants,271 being able to mount a defense on one’s own no longer provides a justification for requiring defendants to be competent. Yet in the United States, where availability of counsel is constitutionally assured,272 the CST requirement has been seen as vital to the criminal law. Among the justifications:

- The CST requirement is a mechanism for preventing an innocent but mentally impaired defendant from being wrongly convicted when he

\[\text{267.} \text{Dusky v. United States, 362 U.S. 402 (1960). In 1996, the Supreme Court indicated that Dusky is a universal standard in the U.S., when it described Dusky as providing the “well settled” standard for CST. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996). The Supreme Court views Dusky as specifying a minimum CST standard: “States are free to adopt competency standards that are more elaborate than the Dusky formulation, [though] the Due Process Clause does not impose these additional requirements” Godinez v. Moran, 509 U.S. 389, 402 (1993).} \]

\[\text{268.} \text{OHIO REV. CODE § 2945.37(G) (defendant is incompetent if “incapable of understanding the nature and objective of the proceedings against [him] or of assisting in [his] defense”).} \]

\[\text{269.} \text{See, for example, CAL. PENAL CODE § 1367 (West 2000), Withers v. People, 177 N.E.2d 203 (Ill. 1961), People v. Foley, 192 N.E.2d 850, 851 (Ill. 1963) (test of CST is whether a defendant “can, in cooperation with his counsel, conduct his defense in a rational and reasonable manner”), MICH. COMP. LAWS ANN. § 330.2020 (West 1999), N.C. GEN. STAT. § 15A-1001(a) (2003).} \]

\[\text{270.} \text{Powell v. Alabama, 287 U.S. 45, 60 (1932).} \]

\[\text{271.} \text{Gideon v. Wainwright, 372 U.S. 335 (1963).} \]

\[\text{272.} \text{U.S. CONSTITUTION AM. VI.} \]
knew of exculpatory facts but could not appreciate their significance and the need to share them with counsel.

- Having defendants be competent is a safeguard against cruel treatment.
- “It is not ‘due process of law’ to subject an insane person to trial upon an indictment involving liberty or life” and would thus violate the U.S. Constitution.

A trial against an obviously psychotic or otherwise mentally helpless defendant might appear unfair and might undermine society’s need to view its criminal justice system as reliable. Such considerations underlie the Supreme Court’s more recent view that the CST requirement “is fundamental to an adversary system of justice” and promotes fairness, accuracy, and dignity.

Professor Richard Bonnie has emphasized that CST also has a dimension that “derives from legal rules that establish that the defendant must make or have the prerogative to make certain decisions regarding the defense or disposition of the case.” This “decisional competence” stems from a “norm of client autonomy” or an implicit “principle of self-determination” that places the responsibilities for whether to plead guilty, whether to request a jury trial, and whether to testify squarely with the defendant. Further, when a defendant waives constitutional rights, the trial court must make sure that the defendant has done so know-

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274. “It would be inhumane, and to a certain extent a denial of a trial on the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or to be tried for his life or liberty.” Jordan v. State, 135 S.W. 327, 328 (Tenn. 1911).


279. Id.

280. Id. at 554.


ingly, intelligently, and voluntarily\(^{284}\)—a further requirement that the defendant possess some minimum level of rational cognitive capacity.

Professor Bonnie adds that, particularly now that criminal defendants have guaranteed access to counsel, the CST requirement reflects societal interests that are independent of the implications for specific defendants. Bonnie summarizes these interests as society’s appropriate concern for the dignity of criminal prosecutions. For example, the right to a public trial, but the lack of a corresponding right to a private trial,\(^{285}\) derives from society’s “independent interest in the pedagogical features of criminal trials, especially jury trials … [P]ublic access to and participation in criminal proceedings helps to assure accountability of the judiciary and to effectuate democratic ideals of self-governance.”\(^{286}\) Requiring a defendant’s competence at the time of trial or conviction insures that punishment is imposed only on persons who have “a meaningful moral understanding of wrongdoing.”\(^{287}\) Also independent of the defendant’s interests is society’s interest in accuracy and in avoiding erroneous convictions, which explains why a defendant does not have an unqualified right to plead guilty.\(^{288}\) Finally, to prosecute some who “lacks a rudimentary understanding of the nature and purpose of the proceedings … offends the moral dignity of the process because it treats the defendant not as an accountable person, but as an object of the state’s effort to carry out its promises.”\(^{289}\)

B. Competence to Consent to (or Refuse) Medical Treatment

1. Historical Background

The requirement that physicians obtain consent from patients before treating them has an ancient heritage in tort law,\(^{290}\) where an intentional touching in the absence of consent has long constituted a form of bat-
Modern U.S. law has greatly expanded physicians’ obligations through the doctrine of “informed consent.” Traditionally, a physician could avoid a successful action for battery if he had told his patient what the proposed treatment was and had obtained the patient’s permission. But under current informed consent requirements, physicians are expected to provide much more information about a proposed treatment, including a description of the treatment’s risks, benefits, and the available alternatives (including no treatment).

292. The phrase “informed consent” is widely believed to have first appeared in Salgo v. Leland Stanford, Jr., University Board of Trustees, 317 P.2d 170, 181 (Cal. Ct. App. 1957), where it occurs in the context of explaining the physician’s duties:

A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient’s consent. At the same time, the physician must … recognize that … each patient presents a separate problem, … and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.

Salgo at 181. Professor Katz suggests that this doctrine appears to come “out of nowhere,” but was in truth lifted from an amicus brief filed by the American College of Physicians and Surgeons. Jay Katz, Reflections on Informed Consent: 40 Years After Its Birth, 186 J. AMER. COLLEGE OF SURGEONS 466, 468 (1998) (citing American College of Surgeons, Brief as Amicus Curiae in Support of Defendant and Appellant Frank Gerbode (1956)).

Concerning the distinction between legal requirements for informed consent and the related philosophical doctrine that has developed, see Armand Arabian, Informed Consent: From the Ambivalence of Arato to the Thunder of Thor, 10 ISSUES L. & MED. 261, n. 1(1994).


294. Salgo appears to be one of the first, if not the first, case to establish failure to obtain consent as a matter of negligence. See Cobbs v. Grant, 8 Cal. 3d 229, 239-40, 104 Cal. Rptr. 505, 511-12, 502 P.2d 1, 7-8 (1972) (noting that courts were still “divided” and citing cases).

The key cases concerning the nature of disclosure are Natanson v. Kline, 187 Kan. 186, 350 P.2d 1093 (Kan. 1960) and Canterbury v. Spence, 464 F.2d 772, (D.C. Cir. 1972), cert. denied, 409 U.S. 1064 (1972). Natanson established a medical custom standard, holding that the required disclosures by the physician must accord “with those which a reasonable medical practitioner would make under the
Of course, a physician’s comprehensive and conscientious disclosure of information is useless unless the patient can understand, think about, and apply what the physician is explaining. Thus, the validity of informed consent is closely tied to a patient’s competence to make medical decisions.

2. Legal Standards

Concerning the legal standards for competence to make medical decisions (CMD), two initial observations are appropriate. First, although the requirement of competence should be “neutral” as to whether a patient is agreeing with or refusing recommended treatment, a patient’s CMD is more likely to be questioned (and evaluated) when the patient is declining treatment that the physician recommends and believes is necessary to prevent death or serious deterioration. Thus, whatever contours the law has

same or similar circumstances.” Natanson, at 190. In Canterbury, however, the court held that

the duty to disclose … arises from phenomena apart from medical custom and practice, [and must not be] dictated by the medical profession … The scope of the physician’s communications to the patient, then, must be measured by the patient’s need, and … the test for determining whether a particular peril must be divulged is its materiality to the patient’s decision: all risks potentially affecting the decision must be unmasked.

Canterbury, 464 F.2d at 786.

California quickly adopted Canterbury’s “materiality” standard through Cobbs, 8 Cal. 3d at 245. Subsequent California law has elaborated what “material” means: the necessary information includes “reasonable disclosure of the available choices with respect to proposed therapy including nontreatment and of the dangers inherently and potentially involved in each.” Thor v. Superior Court, 855 P.2d 375, 383 (Cal. 1993). At present, the physician disclosure standard is favored over the materiality standard by a slight majority of U.S. jurisdictions. BARRY R. FURROW ET AL., HEALTH LAW (ed 4) 355 (2003).


296. That the consent be given voluntarily is important as well, that is, without coercion, unfair persuasion, or inducement. Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.C. 1974). Lacking voluntariness, a patient’s agreement to treatment is at best acquiescence rather than true consent. For an older but still useful formulation of the interrelationship between competence, voluntariness, and informed consent, see Alan Meisel et al., Toward a Model of the Legal Doctrine of Informed Consent, 134 AM. J. PSYCHIATRY 285, 286-87 (1977).

297. Loren H. Roth et al., Tests of Competency to Consent to Treatment, 134 AM. J. PSYCHIATRY 279, 281 (1977) (“if patients do not decide the ‘wrong’ way, the issue of competency will probably not arise”); THOMAS GRISSO, EVALUATING
provided concerning CMD often speak to contexts in which a patient is refusing rather than receiving treatment—the opposite of situations that led to case law establishing information requirements for consent.298

A second observation follows from the first: the requirement that patients be CMD often has the effect of preventing individuals from harming themselves by rejecting needed care because of their irrationality. Thus, in contrast to the law’s CST requirement (which in former times protected mentally compromised individuals from being prosecuted when they could not mount a defense), CMD often protects an individual from himself. The CMD requirement assures that only those persons who meet a certain standard can reject medical treatment that their physicians believe they need. Also, it assures that the decisions that determine treatment are the patient’s own, and not merely those of the doctor. Through the CMD requirement, the patient is a self-governing collaborator in care rather than a mere passive object of care.

Legal standards concerning CMD are often left ill-defined in case law, but Berg and colleagues299 argue that to the extent standards have been articulated, they follow a four-part scheme promulgated by psychiatrist Paul Appelbaum and psychologist Thomas Grisso.300 Appelbaum and Grisso construe CMD as having four component abilities: (1) communicating a choice, (2) understanding relevant information, (3) appreciating one’s situation and the relevant likely consequences, and (4) rational manipulation of information.301

COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 395 (2nd ed., 2003) (“a patient whose decision creates a higher level of risk regarding the patient’s health is likely to receive greater scrutiny”).

298. For example, the plaintiffs in Natanson and Canterbury had both accepted and undergone care that had suboptimal outcomes. Natanson, 350 P.2d at 1095; Canterbury, 464 F.2d at 776.


300. Paul S. Appelbaum & Thomas Grisso, Assessing Patients’ Capacities to Consent to Treatment, 319 NEW ENG. J. MED. 1635 (1988). For a recent iteration of these ideas from this now-classic article, accompanied by a practical example, see Paul S. Appelbaum, Assessment of Patients’ Competence to Consent to Treatment, 357 NEW ENG. J. MED. 1834 (2007).

301. Appelbaum & Grisso, supra note 300, at 1635-36. This four-part scheme has served as a key clinical heuristic where other types of competence are concerned. See, for example, NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 59-61 (2002) (application of the four-part scheme in CST context).

Missing from this four-part scheme is a feature suggested by Roth and colleagues: whether the patient’s decisionmaking reaches a “reasonable” outcome. Roth et al., supra note 297, at 280-281. The problem with this criterion relates to
Courts have often treated the ability to communicate a choice as a necessary and perhaps self-evident feature of CMD. Were this the only criterion for CMD, however, verbal patients could make self-damaging choices even if they lacked any ability to assimilate or rationally utilize information provided by care-givers. Thus, when ability to express a choice appears in case law, it usually does so accompanied by other elements of CMD.

An ability to understand information is the feature of CMD most commonly identified by courts and legislatures. Berg and colleagues suggest that when used in this context, understanding should be regarded narrowly—simply as a capacity to assimilate or comprehend facts and statements about proposed care that are communicated by care-givers.

Distinct from the capacity to understand information is the ability to appreciate what that information means in one’s own situation. Appreciation involves recognition by a patient that information supplied by care-

302. See, e.g., In re Estate of Loungeway, 549 N.E.2d 292, 299 (I11. 1989) (“Obviously, a patient who is irreversibly comatose … will be incompetent, unable to communicate his intent”); Morgan v. Olds, 417 N.W.2d 232, 235 (Iowa Ct. App. 1987) (patient incompetent “as the result of being comatose” and unable to make a decision).

303. See, e.g., Estate of C.W., 640 A.2d 427, 431 (Pa. Super. Ct. 1994); Miller v. Rhode Island Hosp., 625 A.2d 778, 786 (R.I. 1993); Virgil D. v. Rock County, 524 N.W.2d 894, 898 (Wis. 1994); Rasmussen v. Fleming, 741 P.2d 674, 683 (Ariz. 1987) (“the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis”).

304. See, e.g., IDAHO STATUTE 39-4503, which declares that “[a]ny person of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any [proposed care] is competent to consent thereto.” See also Wisconsin Stat. § 51.61(1)(g)4, which provides that “an individual is not competent to refuse medication or treatment if, [following an explanation of proposed treatment and alternatives] … [t]he individual is incapable of expressing an understanding of the advantages and disadvantage of accepting medication or treatment and the alternatives.” Implicit in this provision is that the individual’s grasp of information can be evaluated only through some outward display of understanding.

305. Berg et al., supra note 299, at 353-54.
givers applies to him. Therefore, a psychotic individual who understands and can repeat what his physician has told him about antipsychotic medication, but who refuses the drugs because he flatly denies that he is mentally ill, is incapable of appreciating—or properly evaluating—the information he has received and its relevance to his situation. On the other hand, a psychotic individual may hold several delusional beliefs yet be recognized as competent to refuse medical care if the delusions do not prevent him from grasping the significance of the information he has received and its implications for his condition.

**Rational manipulation** of information is the fourth feature of CMD under Appelbaum and Grisso’s formulation. This criterion looks to whether a patient can engage (and demonstrate) logical thought processes when comparing risks and benefits of treatment options. Berg and colleagues note that of the four CME-related capacities, rational manipulation “is the least often included in legal competence standards,” in part it

306. Saks and Jeste suggest a slightly different articulation of this distinction: “understanding refers to comprehension of the meaning of the information given one about the treatment . . . . whereas appreciation refers to the beliefs one has formed about that information.” Elyn R. Saks & Dilip V. Jeste, *Capacity to Consent to or Refuse Treatment and/or Research: Theoretical Considerations*, 24 BEHAV. SCI. LAW 411, 414 (2006).

307. Here, we recognize that doctors can make mistakes and allow that reasonable disagreements can form the basis of a valid treatment refusal. Thus, a patient who says, “My doctor is sure that I need antidepressants, but I think I can manage my problems without them” has recognized (and appreciated) the applicability of the doctor’s judgments. By contrast, a patient who says, “The doctor says I am mentally ill and need medication, but that’s baloney; my problem is that I have an electronic monitoring device in my brain” cannot apply the doctor’s assessment because of adherence to a delusional belief.

308. See, e.g., In re Roe, 583 N.E.2d 1282, 1286 (Mass. 1992) (man with schizophrenia was incompetent because he denied that he was mentally ill and thus could neither “appreciate the need to control his illness with antipsychotic medication” nor “the risks associated with refusing it.”)

309. See, e.g., In re Milton, 505 N.E.2d 255, 258 (Ohio 1987) (delusional psychiatric patient refused to consent to radiation therapy for uterine cancer because such treatment would conflict with her belief in faith healing; despite her delusion that she was married to a faith healer, her right to refuse was upheld because her “belief in spiritual healing stands on its own, without regard to her delusion”).

310. Berg et al., *supra* note 299, at 357. For example, Illinois’s health care surrogate law requires “decisional capacity,” defined as “the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision.” ILCS ch. 755, ¶ 40/10. Interestingly, though its mental health treatment preference statute requires rationality: there, someone lacks decisional capacity if, “in the opinion of 2 physicians or the court, a person’s ability to
“the hardest to operationalize,”311 and in part because courts may be reluctant to make judgments about what is and is not rational.312 Nonetheless, rational manipulation or use of rational thought processes is a feature of many statutory definitions of CMD. In Alaska, for example, rational manipulation appears in the state’s mental health statute, under which a “competent” psychiatric patient:

(A) has the capacity to assimilate relevant facts and to appreciate and understand [his] situation with regard to those facts …
(B) appreciates that [he] has a mental disorder or impairment, if the evidence so indicates; …
(C) has the capacity to participate in treatment decisions by means of a rational thought process; and
(D) is able to articulate reasonable objections to using the offered medication[].313

3. Rationale

These four criteria do not look directly at the outcome of a decision. Rather, communication, understanding, appreciation, and rational manipulation of information focus on a patient’s thinking and decisionmaking processes, and his articulation thereof. A patient who can understand and appreciate information, think logically about his situation, and communicate and evaluate information effectively or communicate decisions.” ILCS ch. 755, ¶ 43/5(5).

311. Id. Berg and colleagues apparently use “operationalize” as the term is used in the social sciences, where to “operationalize” a concept, one must define it so as to make it measurable through observations of specific, objective variables.

312. The facts in Milton provide an example: In holding that Ms. Milton’s belief in faith healing, even if unwise or foolish, could be overridden only if the belief threatened paramount interests, Milton at 258, the Ohio Supreme Court failed to recognize or examine ways that her delusion of being married to a faith healer might be affecting her decision to refuse radiation therapy. See also In re Yetter, 62 Pa. D. & C.2d 619 (1973) (delusional 60-year-old woman found competent to decline mastectomy to treat breast cancer, though her refusal was based on concern about how the surgery would affect her non-existent Hollywood career).

Courts do not always respected patients’ viewpoints, however. See, e.g., In re Harvey U., 501 N.Y.S.2d 920, 922 (N.Y. App. Div. 1986) (“irrational trust” in the natural healing of a patient’s illness and the belief that hospitalization were for experimental purposes supported finding that he was not competent).

313. ALASKA STAT. § 47.30.837(d)(1). The statute also notes, in connection with the ability to appreciate one’s illness, that “denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions.” Id.
cate his decision is competent and should have his decision respected even if the decision seems wrong to nearly everyone. Thus, the four criteria give life to Justice Brandeis’s oft-quoted sentiment:

> The makers of our Constitution … sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.\(^{314}\)

The legal and ethical doctrine of informed consent in medical decision-making reflects a paramount respect for self-determination, the individual’s right to define personal goals and make decisions to achieve goals.\(^{315}\) Case law and statutes concerning informed consent encourage physicians (and other care-givers) to make disclosures to patients and to refrain from providing care until patients give consent. Rulings and statutes also have an “educative role”: they reinforce respect for self-determination\(^{316}\) in a context where ever-increasing knowledge and expertise of care-givers might encourage a “doctor knows best” approach to healthcare decisions.\(^{317}\)

At the same time, the exceptions to informed consent—including the exception for individuals who lack CMD—implicitly acknowledge that other ends, including the promotion of well-being and protection of life, exert a countervailing influence within doctor-patient relationships.\(^{318}\) The idea that patients are better off when they participate in making choices about their medical care is based partly in moral principle—respect for autonomy—and partly in empirical reality. Some patients clearly cannot benefit morally or practically from self-determination. To allow persons suffering from debilitating mental illnesses to refuse needed medical treatment could harm or kill them and might thereby frustrate their own long-term values and objectives. By making competence a requirement for medical decision-making, society (through the law) enhances everyone’s

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314. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This notion has frequently arisen in connection with refusal of treatment on religious grounds. See, e.g., In re Estate of Brooks, 205 N.E.2d 435 (Ill. 1965) (Jehovah’s Witness had a First Amendment right to refuse blood transfusions); In re Brown, 689 N.E.2d 397 (Ill. App. 1997) (state may not override pregnant mother’s religion-based refusal of transfusion).

315. **President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions** 17 (1982).

316. **Id.** at 30.


318. **President’s Commission, supra** note 315, at 17.
well-being. The competence requirement protects all of us from harms we might suffer were we to become disabled by defects in our decision-making capacities. In a sense, then, requiring CMD is a general advance directive, executed not by individuals but by civil society on behalf of all its members. Requiring CMD ultimately serves as an autonomy- and freedom-enhancing feature of the law and is justifiable on Rawlsian grounds: it is appropriate to ignore or override the medical choices of incompetent persons because all rational people, knowing in advance that they could suffer a loss of their decision-making capacity, would desire a mechanism for such protection.

D. Implications: Rationales for Competence to Divorce

The legal standards, traditional bases, and rationales for requiring competence of criminal defendants and individuals who decline health-restoring or live-saving treatment provide clear hints about the rationales that would support a legal requirement of competence for divorcing individuals and legal criteria that would give effect to that requirement. In the next part, we propose a legal standard for competence to divorce along with inquiries that might help courts (aided by input from mental health professionals) adjudicate the matter. We conclude this Part with a set of rationales that support legal provisions that would bar from participating in divorce proceedings individuals whose judgment is severely impaired by active symptoms of mental illness.

1. Protection of the Mentally Ill Litigant

As we have seen, one of early justifications of requiring competence for criminal defendants was their potential need to defend themselves without the assistance of counsel. Though attorneys are now made available to criminal defendants who cannot afford counsel, the U.S. Supreme Court has recently affirmed the legal system’s ongoing concern for and obligation to protect defendants who might wish to proceed pro se. In divorce proceedings, litigants have no constitutional guarantee of counsel.

319. Id. at 56-57.

320. JOHN RAWLS, A THEORY OF JUSTICE 249 (1971) (belief in liberty consistent with paternalistic protections for the “mentally disturbed”).

321. Indiana v. Edwards, 128 S.Ct. at 2386-87 (discussing impact of severe psychopathology, and concluding that allowing pro se defense by someone cannot “carry out the basic tasks needed to present his own defense without the help of counsel ... is at least as likely to prove humiliating as ennobling” and would preclude a fair trial).

322. The Internet has scores or perhaps hundreds of websites aimed at helping individuals initiate divorce actions on their own and inexpensively. See, e.g.,
This leaves open the possibility that a vulnerable mentally ill individual seeking divorce for delusional reasons might not only initiate a potentially harmful divorce action but might make additional self-harming judgments in the course of litigation.

Even if the mentally impaired litigant has retained counsel, divorce proceedings may still require the separating parties to make complex decisions (e.g., when substantial assets are involved) or decisions with major consequences for a litigant’s own future situation or the situation of loved ones. Depending on the content and force of their delusions, individuals with psychotic disorders may find themselves motivated by irrational (but nonetheless intense) fears or desires. Yet they may not heed the advice of counsel because their illness impairs their ability to recognize that their fears are false or to appreciate that their decisions are foolish.

2. Deleterious Consequences of Divorce

Even when the parties do not suffer from capacity-compromising psychiatric illnesses, divorce litigants are statistically likely to suffer adverse consequences. Women and their children are likely to be financially worse off after a divorce, and although the results are more mixed for men, many of them wind up as financial “losers,” too. Divorced women experience

http://www.3stepdivorce.com/index.html (last accessed August 27, 2008),
http://www.completecase.com/index.html (last accessed August 27, 2008), and

Many jurisdictions provided government-sanctioned help with initiating divorce. For example, New York State maintains a website that “offers free instruction booklets and forms for people starting a divorce.”

323. Recall that such considerations underlie the “majority rule,” discussed supra, Part IV.B., that a guardian may not bring a suit for divorce on behalf of an incompetent individual.

324. “[S]ome individuals with mental illness have anosognosia, a biologically based inability to recognize that one has a mental illness.” H. Richard Lamb & Linda E. Weinberger, Mental Health Courts as a Way to Provide Treatment to Violent Persons With Severe Mental Illness, 300 JAMA 722 (2008). See also Lorenzo Pia & Marco Tamietto, Unawareness in Schizophrenia: Neuropsychological and Neuroanatomical Findings, 60 PSYCHIATRY CLIN. NEUROSCI. 531 (2006) (describing defects in frontal lobe functioning and other possible neuroanatomical bases for lack of insight into mental illness).

an increased risk for cardiovascular disease that persists well into middle age.\textsuperscript{326} Marriage is unambiguously beneficial to men’s health: never-married men have mortality rates 250 percent higher than married men.\textsuperscript{327} Studies across various cultures and times have shown that married persons live longer than persons who are divorced, widowed, or single.\textsuperscript{328} Finally, married individuals experience less depression and anxiety, and lower rates of other psychiatric disorders than do persons who are single, widowed, or divorced. The health benefits of being married have received confirmation through cross-sectional and longitudinal studies.\textsuperscript{329}

Though these findings may in part reflect better emotional and physical health of persons who get and stay married, a variety of factors suggest that divorce may cause health problems. Divorce is a highly stressful event, and it often is accompanied or followed by other stressors: lowered living standards, residence changes, disrupted social networks and social support, and single parenting. A variety of studies suggest that declines in health may result from stress-related changes in the release of pituitary hormones, adrenal hormones, and proinflammatory cytokines, which are associated with cardiovascular disease. Stress can also increase the likelihood of to unhealthy behavior patterns (e.g., smoking and overeating).\textsuperscript{330}

Given what we know about the adverse mental and physical impact of divorce, it makes sense for society to bar this option when individuals are acting for reasons that are clearly symptoms of a severe mental illness.

and divorce are heterogeneous, with a majority of losers but a sizable core of winners”). This is an international phenomenon. See, e.g., Caroline Dewilde & Wilfried Uunk, \textit{Remarriage as a Way to Overcome the Financial Consequences of Divorce—A Test of the Economic Need Hypothesis for European Women}, \textit{24 Europ. Sociol. Rev.} 393 (2008) (noting that divorce “results in a substantial decline of household income” for women “and an increased likelihood of falling into poverty,” and citing studies).

\textsuperscript{326} Zhenmei Zhang & Mark D. Hayward, \textit{Gender, the Marital Life Course, and Cardiovascular Disease in Late Midlife}, \textit{68 J. Marriage Family} 639 (2006) (following divorce, women have a higher risk of cardiovascular disease in late midlife compared to continuously married women; increased risk explained by higher emotional distress and fall in socioeconomic status).

\textsuperscript{327} C. E. Ross et al., \textit{The Impact of the Family on Health: The Decade in Review}, \textit{52 J. Marriage & Family} 1059 (1990).


\textsuperscript{330} Zhang & Hayward, \textit{supra} note 326, at 641 (citing studies).
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3. Dignity and Integrity of Legal Processes

We have previously seen that courts cite society’s interest in the dignity of criminal proceedings as a justification for requiring defendants to be competent to stand trial. Divorce hearings and trials usually do not receive much publicity, and (unlike criminal proceedings\(^{331}\)) they do not function as public expressions of society’s attitudes or moral response to certain types of behavior.\(^{332}\) Yet society has a far-from-trivial interest in protecting the dignity and seriousness of all legal processes, including those processes that lead to termination of marriages.\(^{333}\)

Dignity of legal processes was one of the rationales behind the development of no-fault divorce laws. Previously, lawyers often advised clients who wished to divorce about how to create evidence that courts would accept.\(^{334}\) In many states, the most popular allegation for divorce was “cruelty.” Wives would regularly testify that their husbands treated them miserably. As a California Supreme Court judge characterized the situation:

Every day, in every superior court in the state, the same melancholy charade was played: the “innocent” spouse, generally the wife, would take the stand and, to the accompanying cacophony

\(^{331}\) “Determining the truth about guilt and innocence, however, is not the sole purpose of a trial. The trial is also a public performance, an opportunity for the community to witness and absorb a morality tale about crime and punishment and thereby to learn the values of the society.” Sherry F. Colb, What Is a Trial?: President Bush Asks Congress to Authorize Military Commissions, viewable at http://writ.news.findlaw.com/colb/20060920.html (last accessed August 26, 2008). For a discussion of Kantian morality as the only sensible basis for prosecuting war crimes, see Aaron Fichtelberg, Crimes Beyond Justice?: Retributivism and War Crimes, 24 CRIMINAL JUSTICE ETHICS 31 (2005).

\(^{332}\) The classic articulation of this notion is Joel Feinberg, The Expressive Function of Punishment, in DOING AND DESERVING 95-118 (1970).

\(^{333}\) In acknowledgment of the seriousness of divorce, South Carolina requires its courts of domestic relations to “make an earnest effort to bring about a reconciliation,” and no divorce may be granted by a judge unless he states “in the [divorce] decree that he has attempted to reconcile the parties to such action and that such efforts were unavailing.” S.C. CODE § 20-3-90 (2007).

\(^{334}\) Our personal favorite, termed “collusive adultery,” required both sides to agree that the wife would “surprise” her husband at home and discover him committing adultery with a “mistress” hired for this purpose. The wife and would swear falsely to the “facts” and the husband would admit them, which was tantamount to both sides committing perjury. The husband’s “conviction” on adultery provided the judge with grounds for divorce. See Lawrence M. Friedman, American Law in the Twentieth Century 436 (2002).
of sobbing and nose-blowing, testify under the deft guidance of an attorney to the spousal conduct that she deemed “cruel.”

No-fault divorce was seen as a solution to a situation in which widely acknowledged lying and collusion threatened the dignity and integrity of legal proceedings. Although it is not perjury when a litigant files documents or testifies about matters that he sincerely but delusionally believes are true, the dignity and honesty of legal proceeding is implicated when the court knows that the initiating party to divorce is acting for completely false reasons. Moreover, the dignity of legal proceedings is potentially abused by mentally ill persons who use legal mechanisms to pursue delusional ideas.

4. Therapeutic Jurisprudence

In recent years, “therapeutic jurisprudence” has recognized that the law is a social force that shapes behavior through imposing consequences, and can potentially serve as a therapeutic or anti-therapeutic agent. While proponents of therapeutic jurisprudence insist that their scholarly approach is not an effort to subvert other important legal values, they urge that therapeutic impact be one factor that courts, attorneys, and other legal actors consider as they create and carry out legal policy. Clearly, absent some overriding reason to the contrary, the law should not implicitly sanction, foster, or promote a mentally ill person’s acting on his delusions when such action has potentially serious consequences for him or affected others.

5. Self-Determination

Self-determination (or vindication of autonomy) has, as we have seen, served as a justification for no-fault divorce and as the basis for allowing individuals to refuse recommended medical treatment. In the latter case, requiring competence is a complement to self-determination: it functions as an implicit, general advance directive that expresses one’s freedom, and

335. In re Marriage of McKim, 6 Cal. 3d 673 (1972) (Mosk, J., dissenting).


337. See the chief text on this subject, DAVID B. WEXLER & BRUCE J. WINICK, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996)

338. They note, for example, that therapeutic considerations do not, by themselves, justify coercion, id.
it serves as a mechanism for preserving one’s safety (and opportunity for future self-expression) when mental disability might otherwise leave one imperiled. If the availability of no-fault divorce can be seen as an advance in self-determination, requiring competence of divorcing parties has a similar role in complementing autonomy. In requiring competence at the time of divorce, the law would provide a safeguard that rational individuals would desire as a means of protecting themselves and their loved ones from being harmed by choices impaired by and arising from their mental illnesses.

6. Lack of Countervailing Value

Finally, we recognize that persons might raise objections or counterarguments to several of the preceding rationales for requiring competence of divorcing parties. As a final point, then, we note that there is little countervailing value to allowing someone to divorce when his reason is one he would not hold were he not suffering from a serious mental illness.

VI. A Model Statute

Because the aim of divorce proceedings is to produce an agreement dissolving the marriage, one might regard those competence standards pertaining to formation and enforcement of contracts as the best source for guidance concerning competence to maintain a divorce action. Traditionally, the law has recognized immaturity, mental disorders (including substance-related conditions), and mental retardation as bases for invalidation. Whether this and similar developments in family law represent an “advance” in the melioristic sense has been the subject of scholarly (as well as public) debate. See, e.g., Carl E. Schneider, Moral Discourse and the Transformation of Family Law, 83 Mich. L. Rev. 1803, 1809-16 (1985) (legal changes, including no-fault divorce, reflect diminished moral discourse); Mary Ann Glendon, Abortion and Divorce 105-08 (1989) (emphasis on individuality ignores the reality of interdependence, especially dependence of children on caretakers).

340. In a similar vein, Saks and Jeste state:

An incompetently made choice is, in an important sense, not an autonomous choice. The choice may well not reflect the chooser’s goals or values. If those goals or values represent the core of the person, then a choice that fails to serve them is, in a sense, not the chooser’s choice, and is therefore not reflective of the core of the person. It is not his or her choice.

Saks & Jeste, supra, note 306, at 412.

341. Formerly defined as age less than 21 years; now, age below 18 years. E. Allen Farnsworth, Farnsworth on Contracts 443-44 (3d ed. 2004).
dating contracts. The test for competence has referred to the person’s “ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract.”342 Incompetence to contract occurs if “the powers of a person’s mind have been so affected as to destroy the ability to understand the nature of the act in which he is engaged, its scope and effect or its nature and consequences.”343

These tests focus primarily on the individual’s cognitive grasp of the transaction.344 While there may be valid policy reasons for constructing the laws of contract along these lines,345 the strictly cognitive emphasis would fail to recognize and avert the devastating impairments discussed in Part III, which induce delusional motivations in individuals while preserving their capacity to act on those delusions. Also, contract law requires certain efficiencies that are unnecessary and even unwise in divorce cases. Contracts between individuals usually are created without the supervision or approval of an independent legal authority, and the demands of commercial transactions require clear-cut rules that can be implemented reliably, quickly, and automatically. In divorce cases, a court must approve the final settlement, and the existence of special courts of domestic relations attests to the law’s recognition of how divorce may affect family ties that society wishes to foster. The duration of and individual judicial attention offered during many divorce proceedings provide opportunities and a framework for requiring competence to pursue a divorce and for undertaking assessments when competence is questioned.346

A. Text of a Model Statute

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343. Davis v. Marshall (Ohio App. 1994) (also stating that incompetence to contract occurs when “the powers of a person’s mind have been so affected as to destroy the ability to understand the nature of the act in which he is engaged, its scope and effect or its nature and consequences.”)
344. But see the Restatement (Second) of Contracts § 15(l)(b) (2004) (proposing that a contract is invalid “if by reason of mental illness or defect [the individual] is unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of his condition”).
345. Farnsworth suggests that a “case-by-case analysis of incompetency may be too costly and too productive of uncertainty,” and that “[a]rbitrary rules” to society’s needs for reliable business transactions. FARNSWORTH, supra note 341, at 443.
346. See Beck & Frost, supra note 6, at 25 (offering a similar argument concerning competence to mediate a divorce settlement).
Accordingly, we propose the following Model Statute on competence to maintain a divorce action, which utilizes elements of existing statutes concerning competence to stand trial and to make treatment decisions.\footnote{347}{We have modeled our proposal on existing laws in Ohio and Alaska: Ohio’s statutory provisions concerning competence to stand trial, \textit{OHIO REV. CODE} §§ 2945.37–.38; and Alaska’s statutes concerning informed consent for and capacity to make treatment decisions concerning psychotropic medications, \textit{Alaska Stat.} §§ 47.30.836–.837. This adaptation of adopting laws that have proven workable for courts should provide some assurance of our proposal’s appropriateness and practicability in the contexts we address in this Article.}

1. Presumption and Definitions

1.1 For purposes of this section, “competent” means “competent to initiate, maintain, and participate in divorce proceedings,” and “competence” refers to being competent to initiate, maintain, and participate in divorce proceedings.

1.2 Parties to a divorce action are presumed to be competent.\footnote{348}{This presumption is consistent with other areas of law governing competence. See, e.g., \textit{OHIO REV. CODE} § 2945.37(G) (presumption of competence to stand trial); Fed. Evid. Rule 601 (“Every person is competent to be a witness”); \textit{GEORGIA CODE} § 53-4-10(a) (“Every individual 14 years of age or older may make a will, unless laboring under some legal disability”).}

1.3\footnote{349}{This subsection parallels the Alaska statute’s implementation of the four-part Appelbaum-Grisso standard discussed \textit{supra}, notes 300-312 and accompanying text.} A party is competent if that party:

\begin{itemize}
  \item[1.3.1] can express a clear, consistent preference as to whether to divorce;
  \item[1.3.2] can assimilate and understand relevant facts concerning the divorce proceedings and the consequences of the proceedings;
  \item[1.3.3] can appreciate the party’s situation with regard to those facts;
  \item[1.3.4] can participate in the divorce proceedings using rational thought processes;
  \item[1.3.5] can provide and does articulate reality-based reasons for seeking or pursuing a divorce and for wishing to participate in divorce proceedings.
\end{itemize}

1.4\footnote{350}{We discuss the rationale for this section \textit{infra}, notes 357-363} Attitudes, Beliefs, and Competence

1.4.1 The following are not, by themselves, evidence of lacking competence:

\begin{itemize}
  \item[1.4.1.1] plausible but inaccurate perceptions of the spouse;
\end{itemize}
1.4.1.2 callousness or bitterness toward the spouse;
1.4.1.3 seeking a divorce for seemingly petty, trivial, or ill-considered reasons;
1.4.1.4 seeking a divorce despite the party’s best interests or the interests of loved ones;
1.4.1.5 having a mental disorder or mental illness.

1.4.2 Any party’s holding of patently false beliefs directly related to seeking or as reasons for seeking a divorce constitutes rebuttable evidence that the party is not competent.

1.5 "Evaluee" means a party that the court has ordered to undergo an examination concerning competence, as described in Section 3, below.

1.6 In enacting this Section, the legislature specifically recognizes that individuals seek to divorce for reasons that are callous, mean-spirited, ill-considered, stupid, self-centered, trivial, or contrary to their own best interests and/or the interests of their loved ones. The legislature does not intend to bar an individual from obtaining a divorce simply because it was initiated under such circumstances.

2. Hearings

2.1 In a divorce action in the court of domestic relations, the court or either party may raise the issue of a party’s competence. If the court finds probable cause to believe that a party is not competent, the court shall hold a hearing on the issue as provided in this section.

2.2 Either party may submit evidence relevant to the party’s questioned competence. A written report of a medical or psychological evaluation...

351. Sections 2 and 3 create mechanisms for a court of domestic relations to inquire into a party’s competence to divorce; the sections also give the court authority and powers to require (or compel) a possibly incompetent party to undergo evaluation to aid the court in determining whether the party is competent. This authority parallels the authority available to criminal courts when the question of trial competence arises. This latter authority arises both from statutes (see, e.g., OHIO REV. CODE § 2945.38; 18 U.S.C.A. § 4241) and from case law (including Dusky, Jackson, and Cooper) that has established competence at the time of trial as a Constitutional protection.

The existence of cases cited in Part IV.B. suggests that domestic relations courts have assumed they may have similar powers; at the very least, domestic relations courts have established powers to bar divorce for some individuals, perhaps on the same grounds that has allowed these courts to bar divorces of individuals previously adjudicated incompetent. To our knowledge, however, neither statute nor case law has clearly established any authority to request mental examinations of parties suspected of incompetence to divorce, to incentivize (through legal compulsion or staying proceedings) parties to submit to examinations, or to act upon the results of such examinations by dismissing or staying proceedings.
tion of the party may be admitted into evidence at the hearing by stipulation, but if either party objects to its admission, the report may be admitted under sections [applicable statute or rule on expert evidence].

2.3 The court shall not find a party incompetent solely because the party has a mental disorder or mental illness. The court shall not find a party incompetent solely because the party is receiving or has received psychotropic medication or other forms of psychiatric or psychological treatment, even if the party might become incompetent without such treatment.

2.4 If, after a hearing, the court finds by a preponderance of the evidence that, because of the party’s present mental condition, the party is not competent as defined in Section 1.3, the court shall do one of the following:

2.4.1 dismiss the divorce petition;

2.4.2 issue an order staying any divorce proceedings for up to one year pending the outcome of a course of treatment aimed at restoring the party’s competence.

2.5 If the court has ordered treatment as provided in Section 2.4.2, the court shall hold hearings at intervals not to exceed six months, and in all cases at the end of one year following issuance of the treatment order. At these hearings, the court shall receive evidence relevant to whether the party has regained competence. At the conclusion of such a hearing:

2.5.1 if the court finds that the party has regained competence, the court shall issue an order lifting the stay;

2.5.2 if the court finds that the party has not regained competence, but one year has not elapsed since the order issued pursuant to Section 2.4.2, the court shall continue the hearing;

2.5.3 if the court finds that the party has not regained competence, and one year has elapsed since the order pursuant to Section 2.4.2, the court shall dismiss the divorce petition.

2.6 No person whose divorce petition has been dismissed pursuant to Sections 2.4.1 or 2.5.3 may submit a new divorce petition unless one year has elapsed since the dismissal.

3. Examination by Court Order

3.1 If the issue of a party’s competence is raised, the court may order one or more evaluations of the party’s present mental condition. An examiner shall conduct the evaluation. “Examiner” means either of the following:
3.1.1 a psychiatrist who is licensed to practice medicine in this state and who is eligible to take the American Board’s certification examination in psychiatry; or

3.1.2 a clinical psychologist licensed to practice in this state under [applicable section].

3.2 If the court orders an evaluation under division 3.1 of this section, the examinee shall be available at reasonable times and places established by the examiner who will conduct the evaluation. If an examinee refuses to submit to a complete evaluation, the court shall do one of the following:

3.2.1 stay divorce proceedings until the examinee undergoes evaluation; or

3.2.2 dismiss the divorce petition; or

3.2.3 order the sheriff to take the examinee into custody and deliver the examinee to a suitable location for evaluation; or

3.2.4 hold the examinee in contempt of court and order the examinee detained for evaluation in a jail, psychiatric facility, or other suitable facility for a period not to exceed ten days. In such case, the examiner will evaluate the examinee at the place of detention.

3.3 The examiner shall file a written report with the court within thirty days after completion of the evaluation, and the court shall provide copies of the report to both parties. The report shall include:

3.3.1 the examiner’s findings;

3.3.2 the facts in reasonable detail that provide the basis for the examiner’s findings;

3.3.3 the examiner’s opinion about whether the examinee:

3.3.3.1 can express a clear preference as to whether the examinee desires to divorce;

3.3.3.2 assimilate and understand relevant facts concerning the proceedings and their consequences;

3.3.3.3 can appreciate the examinee’s situation with regard to those facts;

3.3.3.4 can participate in the proceedings using rational thought processes;

3.3.3.5 can provide and does articulate reality-based objections to remaining married as the examinee’s reasons for seeking or pursuing a divorce and for participating in divorce proceedings;
3.3.6 holds any patently false beliefs directly related to the
evaluee’s seeking a divorce or as reasons for seeking a
divorce; and
3.3.7 has a mental disorder or impairment and the nature of
that disorder or impairment, if the evidence so indi-
cates.
3.3.4 the examiner’s opinion concerning whether the evaluee is
competent.
3.4 If the examiner’s conclusion is that the evaluee is not competent, the
examiner’s opinion as to:
3.4.1 the cause of or reason for the incompetence;
3.4.2 the relationship between the incompetence and any mental
disorder or impairment that the examiner has diagnosed;
3.4.3 the likelihood of the evaluee’s becoming competent within one
year if the evaluee receives appropriate treatment;
3.4.4 what treatment is appropriate, both for the evaluee’s mental
condition and for restoring competence, if restoration appears
possible;
3.4.4 the least restrictive alternative setting for such treatment.
3.5 Neither the appointment of an examiner under this section nor the
testimony of an examiner precludes either party from calling other
witnesses or presenting other evidence relevant to competence.
3.6 No statement that an evaluee makes in an examination or hearing
concerning competence shall be used against the evaluee during any
proceeding or concerning any issue not related to the evaluee’s com-
petence. The examiner may not be called as a witness during any
proceeding unrelated to competence unless both parties agree. 

As was noted earlier, the Model Statute is based on Alaska and Ohio
statutes concerning CMD and CST, and uses the four-part formulation of
competence promulgated by Appelbaum and Grisso. Though the Model
Statute’s description of competence to divorce goes beyond the holdings

352. This section provides protections analogous to those found in many
state statutes that forbid using information disclosed in an evaluation of compe-
tence to stand trial to prove guilt. See, e.g., TEXAS CODE CRIM. PROC. ART.
46.023(g). Inclusion of such statements vindicates a criminal defendant’s constitu-
(1981). Here, the protection is included so that evaluees would not be dissuad-
would be used to make
later judgments during any subsequent disposition of their divorce petition.
reviewed earlier, it is in accord with several elements of those decisions. Those decisions refer to the ability to express wishes that one’s marriage be dissolved, understand proceedings, and make reasonable judgments about personal matters. The notion that the petitioner should be competent to testify, though present in some rulings, is not included in the Model Statute because it is not universally required in all cases and because other means (e.g., services of an attorney or a guardian ad litem) might fulfill or satisfactorily effectuate a petitioner’s needs. The Model Statute does provide that a petitioner must be able to “reasonably participate” in proceedings, however, which we believe incorporates testifying relevantly, if a particular case will require testimony.

The Model Statute’s § 1.4.2 and § 3.3.3.6 provide that a “patently false belief” (PFB) is evidence of incompetence to initiate or participate in divorce proceedings, while § 1.4.1 and § 2.3 state that simply having a mental disorder or simply having bad reasons for desiring a divorce should not be barriers to proceeding. These provisions have aims that parallel the desiderata for assessments of competence to consent to research endorsed by Saks. We explain these values shortly, but we first explain Saks’s notion of a PFB.

Saks suggests that respect for autonomy requires that a standard for evaluating persons’ beliefs about proposed treatment or research should not require those persons to simply “believe what most people would believe… [W]e should try … to characterize the standard in a way that does not refer essentially to majorities.” However, basing decisions on “beliefs that obviously distort reality[, or] are based on little evidence[, or] are indisputably false[, or] are patently delusional” is a clear indication of incompetence in decision-making. Saks defines PFBs as “grossly improbable” beliefs, and notes that these come in three varieties. (1) A belief may be bizarre, that is, physically impossible or requiring a violation of “the laws of nature as we know them,” such a man’s insisting he can fly

358. *Id*.
360. *Id*. 
by flapping his arms. (2) A belief may, without violating the laws of nature, declare a fact that is physically impossible or “so improbable that the reasons for the person’s holding the belief are irrelevant,” such as a man untrained in medicine who insists he is the world’s greatest diagnostician. (3) A belief may represent a “gross distortion of obvious facts,” that is, it is a false belief about physical events concerning which almost all people would agree (e.g., as to whether a spacecraft has landed on the White House lawn). This category includes beliefs which, though not obviously impossible or bizarre, are just obviously false.

In the Model Statute, the PFB criterion and the instruction not to deem someone incompetent simply because of mental illness serve to protect three interests held by individuals who might seek a divorce. (1) The PFB criterion protects individuals who would, because of mental illness, be vulnerable to errors and the consequences of decisions adverse to their real interests. (2) The PFB and mental illness criteria allow individuals with unconventional or ill-considered beliefs that are not obviously erroneous to act according to how they perceive the world—that is, these criteria protect these individuals’ autonomy. (3) The mental illness criterion provides a protection against discrimination simply because of a diagnosis; a person with a severe mental disorder is deemed incompetent only because his illness produces a major distortion in beliefs. Beliefs that represent the sorts of distortion to which many of us are vulnerable, and that lead many of us to bad decisions, are not a basis for finding a party incompetent.

Finally, § 2.4 of the Model Statute provides two courses for trial courts where the petitioner is incompetent to divorce: staying or dismissing the proceedings. The option of appointing a guardian ad litem is not included to conform to the notion, underlying the “majority rule,” that initiation of divorce proceedings must involve the personal judgment of a petitioner that a marriage should end.

B. Sample Questions for Courts

Model Statute § 3.3.4 calls for examiner’s express opinion about an evaluee’s competence to divorce. Respected commentators hold that mental health experts should not express opinions on ultimate issues and

361. Id.
362. Id. Saks elaborates on PFBs and their role in competence to refuse treatment in ELYN R. SAKS, REFUSING CARE 180-196 (2002).
363. This discussion follows Saks et al., supra note 359, at 168.
364. Discussed supra, Part IV.B.
365. See, e.g., Stephen Morse, Reforming Expert Testimony: A Response from the Tower (and the Trenches), 6 LAW & HUM. BEHAV. 45 (1982); Grant H. Morris et al., Assessing Competency Competently: Toward a Rational Standard for
evidence rules or cases occasionally enforce such a restriction.\textsuperscript{366} We believe, however, that having mental health professionals offer views on the ultimate issue—if such opinions are coupled with the professionals’ rationale—can be helpful to courts. Knowing the examining expert’s view on the ultimate issue may help the court\textsuperscript{367} see how the expert synthesizes a large body of clinical data, and this provides the court with a context for understanding those data and their relevance. Examining professionals cannot possibly report all the data they sense; their reports to court always represent a subset of data that the examiner selectively reports because of apparent relevance. Provided that courts feel free to disagree with the expert’s conclusion, an ultimate opinion helps the court grasp the significance (from the expert’s viewpoint) of reported data. This puts the court in the best position to interpret those data in a context and to recognize potential deficiencies in the data or the expert’s reasoning.

Courts are the ultimate arbiters of competence, however, and should reach independent conclusions about a litigant’s fitness to proceed with a divorce. We think courts can best do this by eliciting their own information from participants. Despite their knowledge and legal skills, judges sometimes may feel uncomfortable or unprepared to interview litigants who may suffer from severe mental disorders. We also note that judges often ask litigants questions answerable as “yes” or “no.”\textsuperscript{368} Though this interview strategy may satisfy legal requirements, it usually will not get at the kinds of data about comprehension, reasoning, and appreciation that are crucial to evaluating soundness of judgment.


366. Concerning interpretations of Evid R. 704(b), see United States v. Hillsberg, 812 F.2d 328, 331 (7th Cir. 1987) (expert may not testify about whether defendant had the capacity to conform his conduct to the law); United States v. Buchbinder, 796 F.2d 910, 917 (7th Cir. 1986) (expert should not testify as to whether defendant had the requisite mental state to defraud, though testimony about extent of defendant’s depression was allowed).

367. This paragraph discusses benefits to courts, but attorneys for the litigants may also benefit from the examiner’s views on the ultimate issue in ways we describe here.

368. Godinez v. Moran, 509 U.S. 389, 411 (1993) (Blackmun, dissenting) (trial judge failed to ascertain full extent of defendant’s mental impairment and accepted his “guilty pleas after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers”); FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 4-5 (1996, with March 2000 revisions) (recommending judge’s questions when defendant wishes to proceed \textit{pro se}, all answerable with “yes” or “no”).
We therefore offer a series of questions that courts may use to gather data relevant to reaching conclusions about competence to divorce. In footnotes, we note how responses to these questions may help courts address criteria for competence under the Model Statute.

1. Can you tell me what your goal is in coming to our court?
2. Would you summarize for me how you concluded you should come to our court on this matter?
3. How did you decide whether to follow your lawyer’s recommendation concerning your case?
4. Is anything making it hard for you to follow your lawyer’s advice?
5. Please tell me in your own words what you understand about:
   • what getting a divorce means
   • possible benefits and risks for you of getting a divorce
   • alternatives you have (or “other courses of actions you could take,” or “other things you could do”), besides getting divorced
   • the risks and benefits of choosing those alternatives
6. What do you believe is wrong with your marriage now?
7. How did you decide that you needed a divorce?
8. What leads you to believe that getting divorced is better than remaining married?
9. How do you think a divorce would affect you?

369. We have adapted these questions from Appelbaum, supra note 300, at 1836 (Table 1).
370. These questions (with appropriate changes in wording) should also prove helpful to examining experts conducting evaluations of competence to divorce.
371. We intend these as examples only. They should not be deemed requirements, and judges should feel free to modify and expand upon them to fit circumstances of a specific case.
372. See supra, Model Statute § 1.3.
373. Questions 1-4 are most relevant to § 1.3.1. That the word “divorce” does not appear in the questions is intentional; by omitting such “hints,” the court also can ascertain whether the litigant grasps what he is doing. Questions 3 and 4 are appropriate only for litigants who have (or at some point have had) attorney representation.
374. Question 5 is most relevant to the “understanding” and “consequences” portions of § 1.3.2.
375. Questions 6-8 address §§ 1.3.4-1.3.5, that is, the party’s reasoning and whether the basis for seeking to divorce is realistic (as opposed to delusional). In asking these questions, one tries to ascertain how well the party can compare getting divorced to remaining married. In looking at the party’s reasons for seeking a divorce, the focus of inquiry is the process the party uses to reach the decision, not whether getting divorced is a “good” idea. As § 1.4 entails, a party may make an ill-advised or unreasonable choice to seek divorce so long as the motivation is not a patently false belief.
10. What else might happen?
11. What makes you believe a divorce will have those results?
12. What do you think will happen to you if you do not get divorced?
13. Why do you think your spouse has opposed a divorce? 

VII. CONCLUSIONS

This Article suggests that legal recognition of a specific form of incompetence—incompetence to initiate or maintain a divorce action—would remedy an important gap in domestic relations law as it exists in most jurisdictions. Recognition of a specific incompetence to maintain a divorce action would provide trial courts with powers to address possibly “crazy” petitioners like Mr. Doe with the respect and concern they deserve. Barring individuals who lack insight into their mental illnesses and who wish to pursue divorces for delusional, patently false reasons is consistent with several principles that courts affirm in other legal arenas where it is common to deal with psychiatrically impaired individuals. Requiring competence to divorce:

- Protects a vulnerable mentally ill individual from maintaining a legal action in the course of which that individual might make other self-harming judgments.
- Protects a mentally ill person from suffering financial insecurity, poorer mental health, and poorer physical health that are known risks of getting divorced.
- Preserves the dignity and integrity of legal processes, which was an important rationale for the alterations in divorce law that took place in the 1960s and 1970s.
- Provides a means for courts to avoid implicitly sanctioning, fostering, or promoting a mentally ill person’s acting on his delusions when such action has potentially serious consequences for him and others.
- Respects and enhances the freedom of a delusional petitioner by preserving his safety and opportunity for future self-expression when mental disability might cause him to act improvidently.

In the absence of countervailing reasons, giving trial courts the legal authority to dismiss or stay delusionally motivated, potentially harmful divorce actions is a just and compassionate response to the needs of loved ones of litigants who have serious mental illnesses and—especially and most importantly—to the needs of those litigants themselves.

376. Questions 9-13 address §§ 1.3.3 and 1.3.5, that is, whether the party’s appreciation is flawed by delusions or pathological distortions of reality.