The Stolen Birthright--An Examination of the Psychology of Testation and an Analysis of the Law of Testamentary Capacity--A Modest Proposal

Thomas J Reed
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I. INTRODUCTION

When Esau sold his birthright to Jacob for a hot lunch, he
probably had no notion of Jacob’s designs on his inheritance.¹ The
hidden agenda behind Jacob’s enticement of his older and slower-
witted brother became excruciatingly clear to Esau when he ar-
rived at his father’s deathbed shortly after Jacob. There Esau dis-
covered that his father Isaac had been deceived into willing all of
the family flock and the rights under the Covenant between Ab-
raham and Yaveh exclusively to his brother Jacob.²

At the time of this incident, Isaac was blind and probably
senile. Jacob utilized a combination of palpable fraud and excessive
favoritism to receive the bounty of his father. Once the deception
had been played out, the winner and the victim entered a twenty
year power struggle.³ The hatred, treachery, and malice shown in

¹. And Esau said to Jacob, Feed me, I pray thee, with that same red pot-
tage, for I am faint: therefore was his name called Edom.
And Jacob said, Sell me this day thy birthright.
And Esau said, Behold, I am at the point to die: and what profit shall this
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And Jacob said, Sware to me this day; and he sware unto him: and he sold
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Genesis 25:30-34 (King James).

². Genesis 27:6-38 (King James). Understandably, Esau vowed to murder his
brother and recover his place as head of the extended family group. Jacob promptly
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³. Genesis 27:41-45 (King James). The first recorded will contest was settled
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33:1-20. Esau, of course, came out with an armed band to attack Jacob’s retinue. Jacob
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alysis of the concrete problems associated with testamentary capacity;

(4) an empirical survey of appellate will contest decisions to determine what types of disposition patterns and what types of testators are most often involved in will contests, and the probable results of such contests at the appellate level; and

(5) a modest proposal for placing a direct limitation on testamentary freedom and deriving an alternative test for testamentary capacity.

II. HISTORICAL ANALYSIS OF THE LAW OF TESTAMENTARY CAPACITY

Prior to the Reformation, the making and enforcement of wills was a task consigned by the English legal system to the clergy. Land could not be devised. Wills related only to the testator's movable property, and were written and enforced by the clergy through the ecclesiastical legal system. The legal principles governing the making of wills were derived from the Roman law. In England, canon law recognized five classes of persons who were considered unable to make a will: (1) those lacking the power to make wills, such as a son, a slave, or a monk; (2) those who were mentally defective, such as the mentally retarded, madmen, or prodigals; (3) those whose senses were defective, the blind, deaf, or dumb; (4) those who were criminals; and (5) those whose legal status was doubtful.

Willmaking was associated with administration of the final sacraments. The priest who administered the last rites to the testator, generally the only literate person available, took down the last wishes of the dying man with respect to the distribution of his livestock and other movable goods. Since the testator usually could not sign his name, he made his mark on the testament, with the priest as official witness. The local priest offered the will to the diocesan courts as evidence of the dying man's last wishes. The willmaking, at that time a matter between the dying penitent and

4. For a good summary of this system, see III W. Holdsworth, A HISTORY OF ENGLISH LAW (5th ed. 1942).
5. Id. at 541 ("propter defectum suae potestatis").
6. Id. ("propter defectum mentis").
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9. Id. ("ratione dubietatis").
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I. INTRODUCTION

When Esau sold his birthright to Jacob for a hot lunch, he probably had no notion of Jacob's designs on his inheritance.\(^1\) The hidden agenda behind Jacob's enticement of his older and slower-witted brother became excruciatingly clear to Esau when he arrived at his father's deathbed shortly after Jacob. There Esau discovered that his father Isaac had been deceived into willing all of the family flock and the rights under the Covenant between Abraham and Yawe exclusively to his brother Jacob.\(^2\)

At the time of this incident, Isaac was blind and probably senile. Jacob utilized a combination of palpable fraud and excessive favoritism to receive the bounty of his father. Once the deception had been played out, the winner and the victim entered a twenty year power struggle.\(^3\) The hatred, treachery, and malice shown in

1. And Esau said to Jacob, Feed me, I pray thee, with that same red pottage, for I am faint: therefore was his name called Edom.
   And Jacob said, Sell me this day thy birthright.
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3. *Genesis 27:41-45 (King James).* The first recorded will contest was settled by a compromise. Jacob was permitted to retain the sacred covenant and Esau was assuaged by a gift of livestock and free passage to the land of Edom. *Id.* at 32:2-13, 33:1-20. Esau, of course, came out with an armed band to attack Jacob's retinue. Jacob sent an advance to Esau, promising him 200 she-goats, 20 he-goats, and assorted
this biblical will contest illustrates the trauma which occurs in any family involved in a will contest.

Modern will contests are no different in kind than that between Esau and Jacob. The damaging effect such crises have upon the people involved, as well as upon the assets of the decedent’s estate, cannot be fully understood by empirical analysis. What empirical analysis can show, of course, is the way in which the Anglo-American legal system has attempted to deal with the Esau-Jacob problem via its legal rules concerning the making and enforcement of wills, and its rules for the disallowance of certain kinds of wills.

The primary American notion which governs the jurisprudence of willmaking is the notion of “testamentary freedom.” This notion, which will be analyzed in the course of this article, allows a person to make or to refrain from making a post-death transfer of his property to anyone he pleases, with the exception of a surviving spouse who has a crude form of forced interest in the assets of the testator under the laws of all fifty states.

This freedom to transfer assets at death is limited by the countervailing notions of testamentary capacity and undue influence. The principle of testamentary capacity holds that a person is considered legally competent to make a will if that person knows the nature and extent of his property, the natural objects of his bounty, and is able to put the two notions together to form a rational plan for disposition of his property. The principle of undue influence holds that one who acquires property in a post-death transfer by exercising undue influence over the testator will not be permitted to enjoy the fruits of his deception. This article will examine the notions of testamentary freedom and testamentary capacity. The objects of this article include:

(1) An historical survey of the development of the legal principles underlying the test for testamentary capacity;

(2) a comparison between these historically derived principles and current psychological and psychiatric understanding of human behavior relating to property values;

(3) a review of the mechanics of attacking testamentary capacity to illustrate how historically derived principles of burden of proof, presumption, and evidentiary law have been substituted for an-

sheep, cattle, and horseflesh as a pledge of his brotherly love. Esau accepted the gift and called off the war.
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Willmaking was associated with administration of the final sacraments. The priest who administered the last rites to the testator, generally the only literate person available, took down the last wishes of the dying man with respect to the distribution of his livestock and other movable goods. Since the testator usually could not sign his name, he made his mark on the testament, with the priest as official witness. The local priest offered the will to the diocesan courts as evidence of the dying man's last wishes. The willmaking, at that time a matter between the dying penitent and

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his priest, was not witnessed by anyone other than the scrivener. The testament of the dying freeman was enforceable in ecclesiastical courts, at least in some instances, by excommunication from the church. Pre-reformation commentators such as Lyndwood recognized and applied the five classes of disabilities to English testaments of personal property.

The Reformation meant the abolition of the ecclesiastical courts as a separate court that could appeal to a law higher than the monarchy. In one of the many trade-offs used by Henry VIII to consolidate his position as absolute monarch, he accepted the principle of willing land as well as personal property. This was incorporated into the original Statute of Wills of 1534. The statute prescribed:

That all and singular person and persons having a sole estate or interest in fee simple . . . shall have full and free liberty, power and authority to give, dispose, will or devise to any person or persons, . . . by his last will and testament in writing . . .

* * *

[W]ills or testaments made of any man or . . . by any idiot, or by any person of non-sane memory shall not be taken to be good or effectual in law.

The Statute of Wills raised the question whether the ecclesiastical law relating to defects or incapacity to make a will had been changed. If not, it was an Anglicized version of the Latin "defectum mentis" which excluded impubus, madmen, and prodigals from the ecclesiastical privilege of making a will.

A. Definition of Testamentary Capacity at Common Law

The early English cases defining who was "an idiot" or "a person of non-sane memory" were the dialectical prelude to modern legal rationalizations for testamentary capacity. In the first leading

11. Id. at 73-87.
12. Id. at 543.
13. 34 & 35 Hen. 7, c. 5 (1534).
14. Id. (emphasis added).
15. Substantially the same notion was transmitted by the Wills Act of 1837. See 1 T. JARMAN, A TREATISE ON WILLS 66 (5th American ed. 1881). The original disabilities stated in Ecclesiastical commentary were not repealed by the Wills Act. See III W. HOLDSWORTH, supra note 4, at 541.
case following the Statute of Wills, *Pawlet Marquess of Winchester’s Case*, the testator died leaving a will which gave most of his property to his bastards. The legitimate son of the Marquess sued out a prerogative writ of prohibition to restrain the Ecclesiastical Court from probating the Marquess’ will on the ground that the testator was not of sane and disposing memory when he made his will. Attorney General Coke pled that the common law courts ought to decide whether the testator was of sane and disposing memory at the time the will was made. The Court of King’s Bench naturally agreed with this contention. As an aside, Coke suggested a test for determining when a willmaker was of “sane and disposing memory”:

> [F]or by law it is not sufficient that the testator be of memory when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls sane and perfect memory.17

This formulation, considering the status of scientific understanding of human thought in 1601, stressed the willmaker’s ability to formulate a rational project, that is, a series of coordinated deductive and inductive propositions about the giving of his property to those persons whom he wanted to include in his post-death plan. The formulation, however, really adds very little to the ecclesiastical notion that madmen and idiots could not make wills.18

At this time, English wealth was principally held by the landed aristocracy. Land was considered to be family property rather than individual property. Five hundred years of official discouragement of alienation of family lands was still firmly embedded in legal minds, although a comprehensive system of land reform instituted by Henry VIII had changed the basis of wealth distribution and ownership to favor free alienation of realty.

The development of the test for testamentary capacity is closely tied to the evolution of English political theory. At the time of the *Marquess of Winchester’s Case* at the end of the reign of

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17. Id. at 287-88 (emphasis added).
18. See, e.g., III W. HOLDSWORTH, supra note 4, at 542-43. Holdsworth claims that the Roman canonical law of incapacity was supplanted by common law notions formed around ecclesiastical law. I W. HOLDSWORTH, supra note 4, at 626-29.
Elizabeth I, England's jurisprudence was emerging from its medieval period. According to medieval thought, the lawmaking power of the crown and the legislature was limited by a series of universal decisionmaking principles of right and wrong, innately known, called the natural law. These immediate, non-rational principles of decisionmaking were implemented by positive law, which consisted of two branches; the law of nations or *ius gentium*, and the law promulgated by the political states.

The medieval view of political society was organic; the notion of the state was a later addition to political thought. Political societies arose because it was in the nature of things that men must

19. The medieval notion of "natural law" differs from modern post-Enlightenment use of the term such that in this context, it needs some explanation. The medieval notion of natural law was rooted in an Aristotelian conception of the activity of the human intelligence. First, according to Aristotle, knowledge of the objects of possible action preceded choice. Accordingly, in order to make a choice between a course of action which benefited the actor and a course of action which did not, the human intellect, acting in its practical or judgment-making activity, had to make a judgment with respect to the course of action. If the practical intellect judged that the proposed course of action was "good," then the actor's will moved the actor to do the act. If the intellect said its judgment was that the action was "bad," the will did not move the actor to act. That is what the medieval thinker understood by the notion of the natural law. See J. Maritain, *Man and the State* 84-107 (1951).

20. *Ius gentium* comes closer to the natural law of Grotius and the contractarians of the 17th and 18th centuries. Literally translated as the "law of nations," the body of law called *ius gentium* consisted of principles of action which were commonly held to be derived from the natural law by deduction, and thus irrefutable. All political societies were, in theory, bound by *ius gentium* insofar as each person in that society was bound to these fundamental derivative principles of action. See 2 *Bracton on the Laws and Customs of England* 27 (G. Woodbine ed., S. Thorne trans. 1968).

The structure of *ius gentium*, according to the medieval commentators, included much of what is usually referred to as the "law merchant." It related to the buying and selling of commodities, among other human activities, according to St. Thomas Aquinas, who derived most of his theories about law from St. Isidore of Seville. ST. THOMAS AQUINAS, *Summa Theologica* Pt. 1-11, Q. 95, Art. 4 (Fathers of the English Dominican Province trans. 1947). Medieval legal theory recognized as a general principle that all human law was derived from the natural law, either by deduction, such as the principles behind the decalogue, or by inductive application of general deductions. Id. at Pt. 1-11, Q. 95, Art. 2. Human law, in any case, binds everyone and is ordained for the common good, according to Aquinas. Id. at Pt. 1-11, Q. 96, Arts. 1, 6. Finally, Aquinas acknowledged the rational basis for decisional law. In Pt. 1-11, Q. 97, Art. 3, he states that custom can become or have the force of law. These notions, which were abandoned after DesCartes and were not interpolated into the later notions of the natural law and the role of human positive law, recognized an organic, evolutionary law in process which was neither static nor wholly a matter of existential commitment to process, but rather was a historical, developing normative pattern for society.

live and work together. The principal function of lawmaking was to provide concrete interpretations of the basic principles of right and wrong, guided, of course, by the church. This left virtually no room for the development of private dynastic wealth.

In the 190 odd years between the Marquess of Winchester’s Case and the next landmark case on testamentary capacity, Greenwood v. Greenwood, English thinkers developed a rationalization for the modern capitalist state, derived in part from French 16th century thought. These principles were quite different from the medieval thought of Thomas Moore and other English Renaissance thinkers of the 16th century. For example, Hobbes, Locke, and Berkely concurred in a radically different perception of the formation of political society. First, it was not natural and inevitable that all men live together in society. Each of the English thinkers of the 17th and 18th century set up a hypothetical state of nature in which all men were posited as monads pursuing their own survival interests. The war of all against all, according to Hobbes, the

22. *Id.* at 2-4. This notion, of course, reached Europe through the Arabian commentators on Aristotle, notably the commentary of Averroes on Aristotle’s *Politics*.


25. Thomas Hobbes, the most profound member of the contractarian movement, described the state of nature construct about as well as any of the later and more moderate contractarians:

> Hereby it is manifest that, during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man. For WAR consists not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known; and therefore the notion of time is to be considered in the nature of war as it is in the nature of weather.

> * * *

> To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor the mind. . . . They are qualities that relate to man in society, not in solitude. It is consequent also to the same condition that there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man’s that he can get, and for so long as he can keep it. And thus much for the ill condition which man by mere nature is actually placed in . . . .

intellectual godfather of this school, was a self-destructive struggle for power. As a result of the debilitating effects of the struggle for power, each monad impliedly agreed with each and every other monad to resign his total control over his own life and destiny to the representative of all in return for protection from the rapacity of others. The representative, Leviathan, Hobbes' Mortal God, was the king.

In the late 17th century, Locke expanded the Mortal God concept to include Parliament in order to justify the Glorious Revolution of 1688. According to Hobbes and Locke, Leviathan manufactured law, within the limits of the contract, to protect the property rights of the citizen. The English philosophers of the 17th and 18th century taught that once the state was formed there was no natural law, and that all law came from the state. Property, furthermore, was the principal reason for the state. Under the contract theory of state formation, property was the only object of state control. The only remedy an individual had against state regulation of his property, according to contractarian theory, was to start a revolution. Consequently, the contractarian theory of political science served to promote revolution as well as a defense of the status quo.


27. Id. at 142-43.

28. This explanation has been offered by several modern scholars as a plausible way to understand Locke's use of the state of nature.

29. Hobbes was particularly clear on this point. See T. HOBBES, supra note 24, pt. II, ch. 18, at 143-47. Locke, on the other hand, dissembled on this issue. J. LOCKE, supra note 25, at 45-56, 73-76.


31. This criticism was offered by Dr. R.F. Sasseen during his political theory courses in the early and mid-1960's. It seems to be a fair assessment of the impact of the English contractarians. It certainly is a fair restatement of the ambiguities of J.J. ROUSSEAU, DU CONTRAT SOCIAL (1767), which Jacques Maritain developed in MAN AND THE STATE. See J. MARITAIN, supra note 19, at 36-40.
Contractarian psychology was a product of the political theory relating to the formation of the state.\textsuperscript{32} It was based upon constructs which have not been confirmed by empirical investigation.\textsuperscript{33} Nonetheless, contractarian psychology had become embedded in Anglo-American law during the latter part of the 18th century. Contractarian psychology still provides the basis for the present legal rules relating to the law of testamentary capacity. So far, these psychological constructs and their legal progeny have still not been proved by legal scholars. At the time of its formation, contractarian psychology was radical. It was used to support social and political change. Contractarian political and psychological thinking provided an adequate rationalization for the partnership of Parliament with the English mercantile and industrial capitalists of the era. In short, these notions made the Industrial Revolution happen. The implications for English property law were equally as revolutionary.

If, as the contractarians thought, an individual has priority over his society and his family, then he should be accorded absolute freedom of choice in the distribution of his property at death. Since property is prior to the state, the state may regulate the acquisition of and exploitation of one's property only within the limit of the social contract.\textsuperscript{34} Regulation within the parameters of

\textsuperscript{32} Each of the major contractarians wrote a study of "human understanding" in addition to the political theories included in their major writings. Part I of \textit{Leviathan} represents Hobbes' understanding of human behavior. T. Hobbes, \textit{supra} note 24, pt. I (Of Man) (particularly ch. 6 ("Of the Interior Beginnings of Voluntary Motions Commonly Called the Passions, and the Speeches by Which they are Expressed"). Locke also wrote \textit{An Essay Concerning Human Understanding} to expound his concept of human psychology. J. Locke, \textit{An Essay Concerning Human Understanding} (1956). Bishop Berkeley did the same. G. Berkeley, \textit{A Treatise Concerning the Principles of Human Knowledge} (1957).

\textsuperscript{33} The principles of contractarian psychology may be summarized briefly as follows: (1) The individual is analytically and historically prior to the formation of political society; (2) the principal object of human activity is to acquire property; (3) all intellectual activity is conscious activity; (4) the intellectual faculty of choice is analytically and historically prior to the intellectual faculty of knowing; and (5) the intellectual faculty of choice moves toward what it projects as useful for the individual, against a superimposed image derived from the faculty of knowing, thus making good-bad decisions basically anti-intellectual. \textit{See generally} J. Bentham, \textit{An Introduction to the Principles of Morals and Legislation} 85-89 (1789); T. Hobbes, \textit{supra} note 24, pt. 1, ch. 2, at 29-32; D. Hume, \textit{A Treatise of Human Nature} being an attempt to introduce the experimental method of reasoning into moral subjects (1961); J. Locke, \textit{supra} note 25; J. Locke, \textit{supra} note 32.

\textsuperscript{34} J. Locke, \textit{supra} note 25, at 50.

Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of na-
the contract is limited to prohibiting evils in order to promote the
health, safety, morals, and welfare of other property owners.\textsuperscript{35}
Thus, the jurisprudential concept of individualistic total ownership
of productive property owes its existence to the 18th century con­
tractarian movement. The doctrine of testamentary freedom is a
corollary of this ownership theory, and its source is the same: the
priority of the individual and his property to social control.

1. Greenwood v. Greenwood

The revolution in property law jurisprudence is reflected in
Lord Kenyon's famous charge to the jury in Greenwood v. Green­
uiood.\textsuperscript{36} Greenwood was an ejectment suit. John Greenwood had
contracted "consumption" in 1786. His closest relative was his
brother William. As John's condition deteriorated, it affected his
mind. He accused people of poisoning him. His physician, Dr.
Reynolds, urged him to "take a cure" by going to Lisbon in the fall
of 1787. Dr. Reynolds suggested that John take his brother with
him to manage his affairs. Following this suggestion, John Green­
wood exhibited marked hostility toward his brother William. John
took up with his cousin Abram, whom he showered with attention
and gifts.\textsuperscript{37} He selected Abram to accompany him to Lisbon. On
the night of December 6, 1787, John Greenwood, a former law
clerk under articles, decided to make his own will.\textsuperscript{38} About eleven
p.m. Greenwood told his good friend Pope that he would make a
will. The following day Greenwood produced a piece of paper be-

\textsuperscript{35} The formulation of the "police power" doctrine must be rooted in some
conception of the formation of society which places the individual prior in analysis to
\textit{any} social limitations. The contractarians never articulated a legal standard for defin­
ing the limits of the social contract. This task fell to Jeremy Bentham and John Stuart
Mill.


\textsuperscript{37} \textit{Id.} at 933.

\textsuperscript{38} \textit{Id.} After being sent down at Cambridge, John Greenwood was appren­
ticed under articles to a solicitor named Dampier in the vicinity of his home.
fore Pope and another man named Owen and said: "Well, Pope, I sat down and made my will after you were with me, and now I will execute it." The sheets were already signed, and the witnesses then signed the attestation clause.

Several witnesses at trial testified that John Greenwood managed his property, spoke civilly to others, and did not appear insane. The most damning evidence put in by his brother William, the contestent, was the testimony of Price, John Greenwood's male nurse, and Reverend Thomas Jones. Price was a former attendant at a mental institution hired to look after John in 1786. He stated that John Greenwood had to be confined in a straightjacket to prevent him from attacking Price with a knife, and later, in a similar episode, from attacking other parties with a candlestick. Reverend Jones was John's tutor at Trinity College in Cambridge. Reverend Jones related a morbid discussion he had had with John Greenwood following his father's death in May 1786, which indicated that John suspected that his brother plotted to do away with his father. Both witnesses, however, had nothing to say about John's conduct at the time he made his will in December 1787.

Lord Kenyon's charge to the jury in this case was:

[T]he inquiry and the single inquiry in the cause is, whether he was of sound and disposing mind and memory at the time when he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will. . . . If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will.

Lord Kenyon's test for testamentary capacity is loosely based on Locke's Essay Concerning Human Understanding and the writ-

39. Id.
40. Id. at 938.
41. Id. at 939.
42. Id. at 943 (emphasis added).
43. J. Locke, supra note 32, bk. II, at 63-69, bk. IV, at 225-32. This rather complicated epistemological approach to the concrete act of making a will seems to relate to Locke's general theory about the function of choice and recall. In Book IV of An Essay Concerning Human Understanding, supra note 32, Locke states that knowledge is generally the perception of the agreement or disagreement between two ideas, analytically occurring on four planes at the same time. The judgment of congruence is made with respect to identity or diversity, relation, coexistence, and
ings of David Hume, a major figure in the contractarian movement. It assumes that the only significant factor in limiting testamentary giving is the strength of the testator's conscious recall and his conscious intellectual ability to carry out his prior unfettered voluntariness through manipulation of his property. No account need be taken of the social value of the testator's disposition since, by definition, that is not a factor in the legal equation. The jury returned a verdict for the plaintiff.

Greenwood v. Greenwood established the two primary components of the modern law of testamentary capacity: A testator must know who the natural objects of his bounty might be, and the nature and extent of his property. Greenwood left open the psychological problem of integrating these two conscious acts of recall into a dispository scheme by the testator.

2. Harwood v. Baker

The third component of the test for testamentary capacity was added by Harwood v. Baker. The testator in that case, Thomas Edward Baker, died March 27, 1833. About seven p.m. on that day, Baker executed his will by mark, when he was feeble, insensible, and dying. Baker had become ill on March 21st and developed brain fever. The inflammation of the brain became progressively worse, according to several witnesses at the trial. Prior to his last illness, Baker had made a will distributing most of his assets to the children of his first marriage. The new will left nearly

necessary connection with and real existence in the "out there" beyond intellectual activity. Locke further divides knowledge into actual and habitual. Habitual knowledge relates specifically to recall. It is, for Locke, the same as memory, which Locke analyzes in Book II of An Essay Concerning Human Understanding, supra note 32.

But our ideas being nothing but actual perceptions in the mind, which cease to be anything when there is no perception of them, this laying up of our ideas in the repository of our memory signifies no more but this—that the mind has a power, in many cases, to revive perceptions which it has once had, with this additional perception annexed to them, that it has had them before. And in this sense it is that our ideas are said to be in our memories, when indeed they are actually nowhere, but only there is an ability in the mind when it will to revive them again, and, as it were, paint them anew on itself, though some with more, some with less, difficulty . . . .

J. Locke, supra note 32, at 64 (emphasis added).

44. D. Hume, supra note 33, at 8-10.
46. Id. at 118.
47. Id. at 119-20.
48. Id. at 126.
all his estate to his wife, who was much younger than he. The disaffected children of the first marriage filed caveats to the probate of the will, and the whole affair ended up in Privy Council before Lord Justice Erskine. On review of the ecclesiastical court's decision to probate the will, Lord Erskine gave the following rationale of English law on testamentary capacity:

But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property . . . and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.49

This added a third element to the test for a willmaker's capacity to make a will enunciated in Greenwood v. Greenwood; the ability of the testator to form a rational plan for disposing his property. As a result, Baker's children broke their father's will.50

3. Dufaur v. Croft

The same year as Harwood v. Baker, the Privy Council decided another important will contest case, Dufaur v. Croft.51 The testator in that case, Charles Day, made a codicil to his will on September 22, 1836, when he was totally blind, paralyzed from the waist down, and incapable of conversing rationally for more than a

49. Id. at 120 (emphasis added). This holding was foreshadowed some 47 years earlier by dicta in the case of Cartwright v. Cartwright, 161 Eng. Rep. 923 (P.C. 1793). There, Sir William Wynne stated that the will of the testator, Mrs. Armyne Cartwright, ought to have been admitted to probate because she wrote it in her own hand. This, Sir William thought, showed that Mrs. Cartwright had a plan for disposition of her wealth which she carried into execution. Id. at 933.

50. Incidentally, this is one of the most common fact patterns in American will contests reported in the West National Reporter System. It suggests that one way to ensure a will contest is to prefer a subsequent spouse to children of a previous marriage.

quarter of an hour.\textsuperscript{52} His condition was the result of epileptic sei-

zures in August and September of 1836, which reduced his physi-

cal and mental capacity to that of a child.\textsuperscript{53} Dufaur, the beneficiary

of the codicil, was nominated co-executor and given a £500 leg-

acy.\textsuperscript{54} Dufaur visited with Day on September 21, and took down a

pencil draft of the codicil. He showed the draft to Mr. Hewson,

the surgeon attending Day that evening, and on the next morning

showed it to Day’s family. Hewson redrafted the codicil and read it

to Day about nine or ten a.m. Day said he wished to sign it. Mrs.

Day brought him his writing desk and put it on his lap. Day re-

fused to sign by mark, insisting that he would sign the codicil with

his signature. The execution of the codicil was witnessed by Hew-

son, a man named Clagget, and a maid named Frances Barton.\textsuperscript{55}

Hewson and Barton did not consider Day sane when he signed the

codicil.\textsuperscript{56} The ecclesiastical court refused to probate the codicil.

The Privy Council, on appeal, affirmed the ecclesiastical court.\textsuperscript{57}

The important passage in this case is Justice Bosanquet’s view of

the burden of proof on the party propounding a will for probate:

If this were the case of a testator possessed of undoubted

and unimpaired capacity, the reading of the instrument in the

presence of his family, pursuant to his desire, expressed by ges-

ture, his approval of it by an affirmative expression, and the sig-

nature of his name, might be sufficient to show that the act was

his own, though the instrument had been prepared by the per-

son to be benefitted by it. But in a case circumstanced like this,

where the capacity is fluctuating and the intervals of reason very

short, it is incumbent upon the party propounding the instru-

ment to show, by more than ordinary proof, that at the precise

time when the act was done the Testator was in the possession

and exercise of his mental faculties.\textsuperscript{58}

The decisional law of England, prior to 1850, had developed

the following rationalization for establishing testamentary capacity.

(a) Initially, the proponent of a will must show by some proba-
tive evidence that the testator was in possession of his mental

\begin{itemize}
\item \textsuperscript{52} Id. at 60.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id. at 59.
\item \textsuperscript{55} Id. at 61.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id. at 63.
\item \textsuperscript{58} Id. (emphasis added).
\end{itemize}
faculties when he executed his will.\(^\text{59}\)

(b) In order to overcome the impact of the propounder's prima facie showing of due execution and thus competency, the caveator had to show one of the following bases to set aside the will:

(i) The testator did not know the persons who were his kindred, or natural objects of bounty,\(^\text{60}\)

(ii) the testator did not know the nature or extent of his property,\(^\text{61}\) or

(iii) the testator could not form a rational plan for disposing of his property.\(^\text{62}\)

The relevant time for ascertaining capacity was the precise moment when the testator executed his will.\(^\text{63}\) Clearly, this rationalization referred to conscious mental activity, the integration of rather complex data into patterns of logic, and a concluding physical act, actual signing of the testamentary instrument. It was in line with the rational, voluntaristic theories of human behavior current at the time. Naturally enough, this set of rules was adopted by the American states shortly after their independence from England.

B. Early American Testamentary Capacity Cases

It will best serve our purposes to develop early American capacity law by examining New York decisions. New York had the earliest and most accurate reporting system. The best early American statement of the rules for determining testamentary capacity may be found in Clark v. Fisher\(^\text{64}\) and Van Alst v. Hunter.\(^\text{65}\)

New York adopted the Greenwood v. Greenwood rationale in 1821 in Van Alst v. Hunter. The testator in that case, Jacob Bennet, was between ninety and one hundred years old when he made his will. He left the bulk of his estate to one daughter, ignoring the children of his deceased children. Apparently the only evidence tending to show that Bennet lacked capacity was his inability to recall the names of old friends. The court concluded that this evidence would not be enough to set aside Bennet's will. As he allowed Bennet's will to be probated, Chancellor Kent said,

\(^{59}\) Id. at 62.
\(^{60}\) 163 Eng. Rep. at 943.
\(^{61}\) Id.
\(^{63}\) See text accompanying notes 51-58 supra.
\(^{64}\) 1 Paige Ch. 171 (N.Y. 1828).
\(^{65}\) 5 Johns. Ch. 148 (N.Y. 1821).
It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. . . . The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts . . . the whole case resolves itself into one simple question of fact, whether the testator by reason of age had or had not lost his sound, disposing mind and memory.66

Seven years later, Chancellor Walworth decided Clark v. Fisher, an extremely thoughtful opinion on a hard case. The testator, John Fisher, made his will at age eighty-seven, shortly before his death. Fisher left all his real and personal estate to his second wife, Diana Rapelje, excluding his blood relatives, who were nieces and nephews. Fisher had an apoplectic seizure three or four years before his death, and was bedridden and paralyzed from that time until death. Fisher’s physician and his nurse were called by the caveators.67 The medical experts concluded that Fisher’s mind was generally deranged.68 The will itself had been drawn by a scrivener at Diana’s suggestion because she stated she could communicate with and understand Fisher, although no one else could.69 The surrogate had admitted Fisher’s will to probate. Chancellor Walworth overruled the surrogate.70 In so doing he adopted the English rules for determining testamentary capacity:

The general principles of law in relation to the capacity of a person to make a will, are well understood. He must be of sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property and to the relative claims of the different persons who are or might be the objects of his bounty.71

Walworth’s opinion is practically identical to Lord Kenyon’s charge in Greenwood v. Greenwood.72 It shows that roughly thirty-five years after English judges had adopted the rational, voluntarist

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66. Id. at 160.
67. 1 Paige Ch. at 174.
68. Id.
69. Id. at 175-76.
70. Id. at 177-78.
71. Id. at 173 (emphasis added).
72. See text accompanying note 42 supra.
standards for determining capacity, New York had adopted the same standards.

In 1862, New York’s Court of Appeals decided the celebrated leading American case of *Delafield v. Parish.* Henry Parish, the testator, made a will in 1842. In 1849 he suffered what was described as an “attack of paralysis described by the physician as hemiplegia.” His 1842 will gave most of his estate to his wife. In August 1849, Parish added a codicil to his 1842 will which was re-executed in December 1849. This codicil gave $200,000 worth of realty to his wife. In 1853, Mrs. Parish instructed Daniel Lord, the lawyer who drew the first codicil, to make another giving her about $500,000 in personal property. On June 20, 1854, Mrs. Parish had a third codicil prepared which revoked all devises to Parish’s blood relations, vesting the whole of his estate in her. During the span of those five years, Parish could not talk. His gestures and signs were interpreted by his wife. After Parish’s death, the surrogate refused to probate the 1853 and 1854 codicils and Mrs. Parish appealed.

At that time, the provisions of the New York Wills Act had not been changed since 1780. These statutes were essentially identical to the English Statute of Wills of 1534. Thus, Judge Davies rightly applied the English testamentary capacity cases, beginning with the *Marquess of Winchester’s Case.* The judge also cited a brace of American cases from other jurisdictions including *Harrison v. Rowan,* *Den v. Johnson,* and the earlier New York case of

73. 25 N.Y. 9 (1862).
74. Id. at 17.
75. Id. at 17-18.
76. Id. at 20.
77. Id.
78. Id. at 21.
79. Id. at 22.
80. It is provided by the statute law of this State, that “all persons, except *idiots, persons of unsound mind,* married women and infants, may devise their real estate, by a last will and testament,” duly executed, in accordance with the formalities prescribed by law (2 R.S. 57, § 1); and that “every male person of the age of eighteen years or upward, every female not being a married woman, of the age of sixteen years and upward, *of sound mind and memory, and no other,* may give and bequeath his or her personal estate by will, in writing” (2 R.S. 60, § 21).
81. Id. at 23-26.
82. 11 F. Cas. 658 (C.C. Wash. 1820) (No. 6,141).
83. 5 N.J.L. 454 (1819).
Stewart's Executor v. Lispenard. After this review, Judge Davies set out the standard of testamentary capacity which has since prevailed in practically all United States jurisdictions:

We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the case, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental powers to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.

Judge Davies then explored the issue of the burden of proving a will to be the testator's valid disposition. He cited in support of his conclusion Baker v. Batt, Harwood v. Baker, and the Massachusetts leading decision, Crowninshield v. Crowninshield. He summed up his conclusion on burden of proof in two propositions which disposed of the case:

1. That in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory.
2. That this burden is not shifted during the progress of the trial, and is not removed by proof of the factum of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

The court affirmed the denial of probate of the two codicils procured by Mrs. Parish.

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84. 26 Wend. 255 (N.Y. 1841).
85. 25 N.Y. at 29 (emphasis added).
87. 68 Mass. (2 Gray) 524, 526 (1854).
88. 25 N.Y. at 34.
89. Id. at 65.
The first part of this case's holding, the test for testamentary capacity, is the predominant United States formulation of the legal rationalization for establishing capacity. The second part, which lays the burden of proof of testamentary capacity on the proponent, has since been given several different twists by other American jurisdictions. The usual United States rule places the burden of disproving the testator's capacity on the party contesting the will for lack of capacity, once the proponent proves the will was duly executed according to the statutory formalities. In order to show that the testator lacked capacity, the contestant must set up one or more missing elements in the Greenwood-Baker three-fold rule and establish the negative by at least a preponderance of the evidence.

The Greenwood-Baker test of capacity has thus become the principal legal standard for measuring testamentary capacity. Ex-
v. McGill, 402 Ill. 46, 59, 83 N.E.2d 313, 320 (1949); Challiner v. Smith, 396 Ill. 107, 124, 71 N.E.2d 324, 333 (1947); Quathamer v. Schoon, 370 Ill. 606, 608, 19 N.E.2d 750, 751 (1939); Miles v. Long, 342 Ill. 589, 596, 174 N.E. 835, 839 (1931); McLean v. Barnes, 285 Ill. 203, 209, 120 N.E. 628, 630 (1918); Owen v. Crumbaugh, 228 Ill. 380, 399, 81 N.E. 1044, 1050 (1907);

 Indiana: Swygart v. Willard, 166 Ind. 25, 35, 76 N.E. 755, 759 (1906); Zawacki v. Drake, 149 Ind. App. 270, 272, 271 N.E.2d 511, 512 (1971);

 Iowa: In re Adams' Estate, 234 N.W.2d 125, 127 (Iowa 1975); Perkins v. Perkins, 116 Iowa 253, 259, 90 N.W. 55, 57 (1902);

 Kansas: In re Walter's Estate, 167 Kan. 627, 634, 208 P.2d 261, 267 (1949); In re Casida's Estate, 156 Kan. 73, 76, 131 P.2d 644, 646-47 (1942);

 Kentucky: Sutton v. Combs, 419 S.W.2d 775, 776 (Ky. 1967); Teegarden v. Webster, 304 Ky. 18, 20-21, 199 S.W.2d 728, 729 (1947); Frazie's Ex'r v. Frazie, 186 Ky. 613, 621, 217 S.W. 668, 672 (1919); Newcomb v. Newcomb, 96 Ky. 120, 125, 27 S.W. 997, 998-99 (1894);

 Louisiana: Succession of Moody, 227 La. 609, 614, 80 So. 2d 93, 95 (1955); McCarthy v. Trichel, 217 La. 444, 455, 46 So. 2d 621, 624 (1950);

 Maine: In re Leonard, 321 A.2d 486, 488 (Me. 1974);


 Minnesota: In re Jenks' Estate, 291 Minn. 138, 141-42, 189 N.W.2d 695, 697 (1971); In re Holmstrom's Estate, 208 Minn. 19, 22, 292 N.W. 622, 624 (1940);

 Mississippi: Lee v. Lee, 337 So. 2d 713, 715 (Miss. 1976); Cowart v. Cowart, 211 Miss. 459, 462, 51 So. 2d 775, 776 (1951);

 Missouri: Lewis v. McCullough, 413 S.W.2d 489, 505-06 (Mo. 1967); Ahman v. Elmore, 211 S.W.2d 480, 488 (Mo. 1948); Lee v. Ullery, 346 Mo. 236, 245, 140 S.W.2d 5, 10 (1940); Fullbright v. Perry Co., 145 Mo. 432, 442, 46 S.W. 955, 958 (1898);

 Montana: Blackmer v. Blackmer, 165 Mont. 69, 76, 562 P.2d 559, 563 (1974);

 Nebraska: In re Urbanowski's Estate, 191 Neb. 308, 311-12, 215 N.W.2d 74, 76 (1974); In re Coon's Estate, 158 Neb. 620, 626, 64 N.W.2d 301, 304 (1954); In re Witte's Estate, 145 Neb. 295, 296, 203, 16 N.W.2d 203, 206 (1944);

 New Jersey: In re Lucas' Will, 124 N.J. Eq. 347, 348, 1 A.2d 929, 929-30 (1938); Wallhauser v. Rummell, 25 N.J. Super. 358, 370, 96 A.2d 289, 295 (1953); In re Filo's Will, 9 N.J. Super. 146, 149, 75 A.2d 517, 519 (1950);

 New Mexico: Callaway v. Miller, 58 N.M. 124, 129, 266 P.2d 365, 368 (1954);


 North Carolina: In re Double's Will, 272 N.C. 706, 709, 158 S.E.2d 796, 798-99 (1968); In re Kemp's Will, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951);
except for Connecticut and Delaware, every American jurisdiction

North Dakota: Stormon v. Weiss, 65 N.W.2d 475, 504 (N.D. 1954);
Ohio: Niemes v. Niemes, 97 Ohio St. 145, 155, 119 N.E. 503, 506 (1917);
Oklahoma: In re Samochee's Estate, 542 P.2d 498, 501 (Okla. 1975); In re Free's Estate, 181 Okla. 564, 565, 75 P.2d 476, 478 (1938); In re Sixkiller's Estate, 168 Okla. 302, 305, 32 P.2d 936, 938-39 (1934);
Oregon: In re Fredrick's Estate, 204 Or. 378, 388, 282 P.2d 352, 356 (1955); In re Johnson's Estate, 162 Or. 97, 130, 91 P.2d 330, 342-43 (1939); In re Crum's Estate, 27 Or. App. 231, 235-36, 555 P.2d 785, 787 (1976); In re Johnson's Estate, 24 Or. App. 897, 904-05, 547 P.2d 658, 663 (1976);
Pennsylvania: In re Ziel's Estate, 467 Pa. 531, 537, 359 A.2d 728, 731 (1975); In re Proyniak's Estate, 427 Pa. 524, 529, 235 A.2d 372, 375-76 (1967); In re Skrtic's Estate, 379 Pa. 95, 100, 108 A.2d 750, 752 (1954); In re Sturgeon's Estate, 357 Pa. 75, 81, 53 A.2d 139, 142 (1947);
Rhode Island: Travenier v. McBurney, 112 R.I. 159, 162, 308 A.2d 518, 520 (1975);
South Carolina: Hellmas v. Ross, 233 S.E.2d 98, 100 (S.C. 1977); Sumpter Trust Co. v. Holman, 134 S.C. 412, 422, 132 S.E. 811, 814 (1926);
South Dakota: In re Fleegle's Estate, 230 N.W.2d 230, 233 (S.D. 1975);
Utah: In re Hanson's Estate, 87 Utah 580, 604, 52 P.2d 1103, 1114 (1935);
Vermont: In re Burt's Estate, 122 Vt. 260, 263, 169 A.2d 32, 34 (1961);
Virginia: Tate v. Chumbley, 190 Va. 480, 495, 57 S.E.2d 151, 158 (1950);
West Virginia: Prichard v. Prichard, 135 W. Va. 767, 771-72, 65 S.E.2d 65, 68 (1951);
Wisconsin: In re Becker's Estate, 76 Wis. 2d 336, 344, 251 N.W.2d 431, 434 (1977); In re Velk's Estate, 53 Wis. 2d 500, 505-06, 192 N.W.2d 844, 848 (1972); In re Washburn's Will, 248 Wis. 467, 474, 22 N.W.2d 512, 515 (1946);

Note: No cases giving the elements of testamentary capacity have been located for Hawaii, Nevada, or New Hampshire.

92. The Connecticut formulation states that capacity to make a will is the same as the capacity to contract—whether the individual's mind and memory was sound enough to enable him to know and understand the business in which he was engaged. See, e.g., Falk v. Schuster, 171 Conn. 5, 9, 368 A.2d 40, 42 (1976); Sturdevant's Appeal, 71 Conn. 392, 397, 42 A. 70, 72 (1899); Kimberly's Appeal, 68 Conn. 428, 435, 36 A. 847, 849 (1896); Comstock v. Hadlyme Ecclesiastical Soc'y, 8 Conn.
has adopted this formula as its paradigm for finding testamentary capacity when capacity has been attacked in a will contest. The standard United States formulation of the Greenwood-Baker rule states that a testator has testamentary capacity if he: (1) knows the natural objects of his bounty, (2) knows the nature and extent of his property, and (3) has a rational plan for disposition of his property, taking into account its nature and extent and the natural objects of his bounty. Until the 1960's, no writer had attempted to comprehensively investigate or seriously criticize this formula. It has been immune from re-evaluation for its adequacy despite the revolution in psychology which began with Sigmund Freud's *Interpretation of Dreams*. No legal writer had attempted to formulate an adequate psychological explanation of why people make wills, and why the law supports or disallows the willmaking. In the 1960's, a few writers began to take some strides in this direction. One of the aims of this article is to pursue the critical commentary which began fifteen years ago in order to fashion a tentative explanation of the psychology of testation, and of property.

C. The Re-evaluation of Testamentary Capacity

Although the findings of analytical and empirical psychology have been used by legal scholars for several decades in explaining deviant behavior, these findings were not applied to other aspects of the law until the last fifteen years or so. The following is a survey of the recent literature on the psychology of testation. The re-evaluation of testamentary capacity and undue influence is so new that a survey of recent periodical and literary work in the field is unfortunately quite short.

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254, 263-64 (1830). Connecticut courts demand much more from a testator than the majority of American jurisdictions. Connecticut also places the burden of proof on the proponent, who must establish all elements of capacity by a preponderance of the evidence. Boschen v. Second Nat'l Bank of New Haven, 130 Conn. 501, 504, 35 A.2d 849, 851 (1944); Comstock v. Hadlyme Ecclesiastical Soc'y, 8 Conn. 254, 261 (1830). The Delaware test states that the testator must "be capable of exercising thought, reflection and judgment; he must know what he is doing and how he is disposing of his property; he must have sufficient memory and understanding to comprehend the nature and character of his act." *In re* Estate of Bandursky, 281 A.2d 621, 623 (Del. Ch. 1971). *See* Rodney v. Burton, 27 Del. (4 Boyce) 171, 177, 86 A. 826, 828 (1912); Pritchard v. Henderson, 19 Del. (3 Penne.) 128, 144, 50 A. 217, 222-23 (1901); Ball v. Kane, 17 Del. (1 Penne.) 90, 106, 39 A. 778, 783 (1897); Lodge v. Lodge's Will, 2 Del. (2 Houst.) 418, 422 (1886); *In re* Estate of Bandursky, 281 A.2d 621, 623 (Del. Ch. 1971). In Delaware, the contestant has to disprove capacity by a preponderance once the proponent shows that the testator's will has been duly executed. *In re* Reed's Estate, 300 A.2d 1, 2 (Del. 1972); Pritchard v. Henderson, 19 Del. (3 Penne.) 128, 150, 50 A. 217, 223 (1901).
1. Periodical Literature

In the past fifteen years two major articles have appeared in law journals relating to the mental and physical groundnorms for making a will. Smith and Hager's *The Senile Testator*, written in 1964, was principally directed at exploring the medical lexicon of senile disorders. The authors attempted to distinguish between the process of aging, or senescence, and its change of quality from the aging process to mental deterioration commonly called “senility.” They then tried to untangle the medical terminology which described “senile psychosis” and “cerebral arteriosclerotic psychosis” as either separate or distinct disorders. They follow this with an extended discussion of the so-called “lucid moment” theory, which, in legal jargon, is the theory that a person who is senile may have a moment of perfect sanity, and thus be hypothetically able to function normally, if only for a short time. They also describe some of the medical characteristics of the “insane delusion,” that legalistic phrase used to describe a congeries of delusions in testators which are supposed to vitiate their wills.

Shaffer's *Undue Influence, Confidential Relationship, and the Psychology of Transference*, published in 1970, did offer a tentative construct relating to the psychology behind the legalistic canons called “undue influence.” Shaffer described will contests by analyzing the relationship between the testator and the beneficiary in terms of transference. Transference refers to the projection of inappropriate feelings on to another individual. Shaffer created a “taxonomy” of will contest cases structured upon the type of transference phenomenon detectable in analyzing reported appellate decisions. These include: (1) The case of conscious manipulation, exemplified by *In re Kauffman’s Will*, in which the beneficiary consciously used the psychology of transference to induce the testator to make a will favoring the beneficiary; (2) the case of unconscious opportunities, illustrated by *In re Pitt’s*
Estate, in which the beneficiary is unaware that unconscious motivation, acting through transference, causes the testator to favor him; (3) the “let it happen” case in which the manipulating party was aware of transference, was aware that he would be benefitted by the testator’s transference, and did nothing to impede the windfall, as illustrated by In re Faulk’s Will; and (4) the “no manipulation” case in which a person gets a benefit from a testator without using the transference relationship, which, because of the status of the beneficiary and his relationship to the testator, must be avoided, as shown by such cases as In re Powers’ Will.

Shaffer presents a discursive discussion of “transference” in psychoanalysis in which the patient projects on the analyst qualities attributable to some person in the patient’s past. These qualities may be good or bad. Shaffer’s thesis is that testators often transfer inappropriate feelings to the potential beneficiaries of the testator’s will. Shaffer considers this to be what the courts mean by the presumption of undue influence arising when a party having a confidential relationship with the testator receives the benefit of the testator’s will. Unfortunately, the law deals with this phenomenon by attempting to reverse the transference relationship after death by setting aside the testator’s will as the product of undue influence. Shaffer offers a convincing schema for evaluating undue influence cases, and for a change in judicial attitude about undue influence.

2. Books

Shaffer has also written two books relating to the psychology of testation and of property, Death, Property and Lawyers, and The Planning and Drafting of Wills and Trusts. In these two books, Shaffer sets out the foundation for a psychology of property. He relies on an analysis of property from a phenomenological

100. 88 Ariz. 312, 356 P.2d 408 (1960).
101. 246 Wis. 319, 17 N.W.2d 423 (1945).
103. Id. at 226, 229-30, 234-35.
104. Id. at 226, 229-30, 234-35.
106. T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS (1972). Much of the meat of DEATH, PROPERTY AND LAWYERS was re-issued in this slim, red book designed for second-year law students.
viewpoint.\textsuperscript{107} Shaffer's phenomenology of property views property as a form of existential leap into the void of life after death, as an instrument of the owner's ego state which extends its existence in time and space.\textsuperscript{108} According to Shaffer, property can be used to change the behavior of other persons by lifetime giving or withholding, or to extend the testator's life, that is, to achieve immortality through post-death transactions. Shaffer does not explore the historical development of Anglo-American legal propositions, nor specifically apply his theorems to a large range of practical examples, although his work certainly indicates that such analysis could and should be done by lawyers and legal scholars.

In 1968, Dr. Andrew S. Watson published \textit{Psychiatry for Lawyers.}\textsuperscript{109} This small book condensed much analytical theory and Dr. Watson's twenty-five years of practice and teaching experience into a readable format. Watson includes a brief description of a possible psychology of aging based upon E.H. Erikson's work.\textsuperscript{110} Watson contrasts the ego states of integrity and despair, since he considers this the primary struggle in which the senescent ego engages.\textsuperscript{111} He briefly discusses organic degeneration, but keeps his focus on functional disorders since the main purpose of his book is to explain to lawyers and other laypersons the constructs of psychiatric medicine.\textsuperscript{112} Watson does mention regression or reversion to childish behavior patterns as a potential and inappropriate resolution of the crisis between despair and integration.\textsuperscript{113} Since Watson's main purpose does not include an exhaustive analysis of the mental process of aging, or a consideration of the role of property as the extension of the human ego, his book leaves to later writers a great treasure trove of potential activity. In the following section, some of the implications of Shaffer's and Watson's thinking will be applied to the act of making a will.

\begin{itemize}
\item \textsuperscript{107} T. SHAFFER, \textit{supra} note 106, at 21-23.
\item \textsuperscript{108} See \textit{T. SHAFFER, supra} note 105, at 31-40; \textit{T. SHAFFER, supra} note 106, at 22-26.
\item \textsuperscript{109} A. WATSON, \textit{PSYCHIATRY FOR LAWYERS} (1968).
\item \textsuperscript{110} Id. at 280-83.
\item \textsuperscript{111} Id. at 281.
\item \textsuperscript{112} Functional mental illness is mental disturbance which cannot be traced to any known organic cause. Mental illness is generally divided according to severity into nervous and psychosis. Psychosis is the more severe illness. Psychosis is further divided into organic (caused by some known physical condition, hereditary or traumatic) and functional.
\item \textsuperscript{113} A. WATSON, \textit{supra} note 109, at 127-28.
\end{itemize}
D. Application of Contemporary Psychological Thought to the Greenwood-Baker Rule

Since the scope of this article is confined to analyzing post-death distribution, it is appropriate to take the tentative thinking already developed by Shaffer and Watson and apply it, together with the insights of other psychologists and lawyers, to the current legal rationalizations relating to willmaking. The working hypothesis assumes that the traditional legal rationalizations contained in the Greenwood-Baker rule are appropriate summaries of known empirical data on the psychological aspects of willmaking and of property. In this sense, “appropriate” means normal to the proper functioning of the testator’s personality at the time of willmaking, conceived as a process commencing with planning one’s “estate” with professional assistance, and terminating with the execution of necessary legal documents. In this context, “inappropriate” refers to activity which would be either psychotic or neurotic activity under the same circumstances.

1. Knowledge of Natural Objects of Bounty

In considering the Greenwood-Baker rule, the legal issue becomes which of the three poles of testamentary capacity is primary. Unfortunately, very few courts have bothered to shed light on this issue by defining the way they perceive these three principles. Insofar as knowing the natural objects of one’s bounty is concerned, the few courts which have commented on this principle generally say that the testator knows the natural objects of his bounty when he knows what “duties” he has toward them as members of his family.114 This notion is difficult to understand. First, acknowledging a duty toward one’s bounty has very little to do with memory, or recall in the primary sense of the term. Second, the concept of “duty” may either mean a legally enforceable lifetime support obligation, or some moralistic hidden agenda in which a moral duty exists commanding willmakers to make provisions for their immediate family or blood relatives before making provisions to benefit any other person. This hidden agenda may be critical to understanding the first element of the Greenwood-Baker test.

It is clear that “knowing the natural objects of one’s bounty”

114. See, e.g., Brown v. Emerson, 205 Ark. 735, 737, 170 S.W.2d 1019, 1021 (1943); Emerich v. Arendt, 179 Ark. 186, 188, 14 S.W.2d 547, 548 (1929); Challiner v. Smith, 396 Ill. 107, 124, 71 N.E.2d 324, 333 (1947).
does not mean honoring a legal support obligation.\textsuperscript{115} The courts are dealing here with a moral or psychological compulsion to leave one's property at death to one's blood relatives. This notion appears to be a medieval hangover. Medieval moral theologians concluded that one owes a duty to love one's parents, children, and members of the household before outsiders.\textsuperscript{116} Leaving one's property to one's family, in the extended sense of next-of-kin, met that duty to love one's own kin first. In the thirteenth century, wills were a matter between the dying penitent and his confessor. The execution of a will took on the character of a sacral act.\textsuperscript{117} Historically, then, the compulsion to transfer one's property to one's family had religious, moral, and cultural roots in the Christian ethical understanding of family obligations. In the primary sense, "knowing the natural objects of one's bounty" did not mean the ability to recall them by name and degree of kinship. It required the dying property owner to recall his own love for his family. This, then, appears to be the root of the first element of the Greenwood-Baker test of testamentary capacity.

Although modern psychology has not extensively explored people's feelings about dying and the distribution of property at death, some fragments of thought indicate that the subject may still be invested with a magical or sacral character in the individual or collective unconscious. Shaffer has already projected the basis for a psychology of dying and of testation.\textsuperscript{118} He sees property as an extension of human personality in two planes: the first plane is lateral, across the structure of human life as lived; the second plane is skewed or tilted across the boundary between life and death.\textsuperscript{119} Shaffer sees property as "something I use," "something I do," and "something I am."\textsuperscript{120} He feels that property is instrumentally manipulated by an individual as an extension of the individual's personality. It is also invested \textit{with} that personality because it is an extension thereof. Thus, the act of making a will magically extends

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\textsuperscript{116} See II St. Thomas Aquinas, \textit{supra} note 20, at Pt. II-II, Q. 26, Art. 9, which relies on citations from Origen, \textit{Hom. ii}, in \textit{Cant.} (a. 300 A.D.) and Aristotle, \textit{Ethics} (200 B.C.).
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\textsuperscript{117} See text accompanying note 10 \textit{supra}.
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\textsuperscript{118} See T. Shaffer, \textit{supra} note 106, at 19-27.
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\textsuperscript{119} \textit{Id.} at 21-23.
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\textsuperscript{120} This clearly indicates that property plays a significant role in ego state transactions. \textit{Id.} at 22-26.
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a person's manipulation of others through his property after his death, and sacraly extends his life to confer a legitimate "immortality" on the willmaker.121 According to analytical psychology, then, the identity of the ego is extended in time and space through the use of property.122 Post-death giving involves a complex set of subconscious and conscious acts towards the possible objects of this extension of the personality after death. Should the testator "hurt" a member of his family who has "hurt" him? Should the willmaker consciously or unconsciously use a "carrot and stick" approach to his family in order to extract "love" from them through the medium of making one or more wills? Should the testator project his bad feelings about himself, or about some person in his life on a member of his family? These issues really reach the level of sacred, magical, and shamanist behavior. Recalling the natural objects of one's bounty, then, encompasses the complex set of possible conscious and unconscious acts relating to the willmaker's immediate circle of family, friends, or associates. The courts, in reviewing such a criterion, seem to have no coherent view of what they are about.

2. Knowledge of Nature and Extent of Property

Upon a superficial examination, this portion of the capacity test appears to be rather straightforward. To have testamentary capacity, a willmaker must be able to recall what he owns. The usual restatement of this element of the Greenwood-Baker test is that the testator need only have the capacity to recall, rather than actually remember, the nature and extent of his property.123 Some courts say that the size of the decedent's estate is immaterial to this element.124 However, other jurisdictions have attempted to match up the required degree of recall of one's property to the size of the decedent's estate by a formula which says that "the amount of knowledge" of one's estate decreases in proportion to the decrease in size of the estate.125

121. Id. at 16. Shaffer quotes Shniedman's definition of the post-self, which he applies to people seeking to make a will.

122. This seems to be a by-product of identity, which, according to orthodox psychiatry, is achieved at the post-adolescent level by reconciling love, sex, orgasm, extragenital sensory needs, procreation, and work. A. WATSON, supra note 109, at 257.

123. See, e.g., Brown v. Mitchell, 75 Tex. 9, 16, 12 S.W. 606, 608 (1889).


125. See, e.g., Campbell v. Campbell, 130 Ill. 466, 480, 22 N.E. 620, 623-24
A brief digression into the psychology of memory will be helpful for further analysis. Memory, according to recent psychological studies, appears to function on several planes. Classically, "memory" is the label applied to the intellectual functions of recognition and recall. In addition to this function, there also appears to be "structural recall." This phenomenon can be illustrated by the simple example of learning to swim. Once a person masters the elements of body functioning and coordination required for swimming, he no longer has to consciously recall when and where he learned it, nor generate a sensate image of "swimming" before he jumps into the pool. His total range of swimming behavior patterns, or "schema" of swimming, comes back without conscious recall. According to what is known of brain functioning, brain chemistry is altered in the first place by a "patterning" stimulus which works directly on the nerve cells in the nervous system and brain. This patterning creates "reverberating circuits," or alterations in the electro-chemical structure of the brain corresponding to the stimuli. This original "circuit" reacts when the same neural pathway is stimulated again by interior or exterior stimuli, producing the phenomenon called "recall." This leads to the hypothesis that, ordinarily, recall functions as a two-stage system. There appears to be a first-stage recall system which fades shortly after original stimulus, which in turn produces a long-term pattern by way of consolidation. This two-stage system leads to recall of sensate images, and to recall of schema.

(1889); In re Holmstrom's Estate, 208 Minn. 19, 22, 292 N.W. 622, 624 (1940); Clifton v. Clifton, 47 N.J. Eq. 227, 242, 21 A. 333, 339 (1890). For an interesting analysis of this concept, see Drum v. Capps, 240 Ill. 524, 88 N.E. 1020 (1909).

127. Id. at 5-6. Recall experimentation has been performed with respect to random unassociated letter sequences, line patterns, and the like by researchers other than Piaget and Imhelder. See, e.g., W. KOHLER, GESTALT PSYCHOLOGY 167-74 (1947). This type of research, by design, excluded the discovery of schema empirically.

129. Id.
130. Id. at 472-73. This procedure seems to be confirmed experimentally by Jarvik and Essman. They ran tests in which rats were allowed to step down from one platform to another a few inches below. The researchers electrified the lower platform, causing the rats to be shocked when they stepped down on it. After being shocked once, the rats remembered for about 24 hours not to step down on the electrified platform, so long as nothing interfered with their short-term memory. If the researchers shocked the rats enough to cause convulsions, their short-term memory was disrupted. The rats then had no recall of the previous event, and the next day would unknowingly step down on the electrified platform again. Id.
If these findings about recall apply to the "ability to know the nature and extent of one's property," then what is the testator supposed to do when he "knows" his property? Is a willmaker supposed to be able to have a sensate image of every item of his property in his head when he goes through the will making process, or is he to have a non-sensate schema which is the outline of his property? Returning to Shaffer's hypothesis that property is a vertical and horizontal extension of the ego or personality, must a testator be able to extend his ego functioning through his property in order to be legally capable of making a will?

It is possible that the judiciary anticipated some of the findings of empirical analysis intuitively and do not require the testator to hold a sensate image of every item of his property. The same sort of analysis can be applied to "recalling one's natural objects of bounty" as well. It is fairly clear that in order to make a will, a willmaker must be able to hold a schema of his property and his next of kin. A number of cases have expressed this concept by stating that a testator need not recall his property in detail, nor actually recall it, rather he need only have the ability to recall his property.

3. Ability to Form a Rational Plan for Disposition of Property

The third element of testamentary capacity is logically distinct from the other two. The first two elements consist of a mixture of judicial speculation about the way persons recall sensate images or schema, and the way in which persons view their relationship to others through their property, seen as an extension of ego functioning. The third element, the "ability to form a rational plan for disposition," deals directly with impaired ego functioning. If the testator is something less than a functionally well-adjusted adult, he may not be able to make a will because he lacks the ability to make rational plans about using his property after death. If so, then this element is critical to determining when someone has the capacity.

131. Inferentially, this same pattern recall applies to knowledge of the natural objects of one's bounty. This result is apparent in a case such as McGreal v. Culhane, 172 Or. 337, 141 P.2d 828 (1943). There the testator, who suffered from a variety of physical and psychic problems associated with advancing age, left his estate to the children of his late uncle Daniel although he was unable to recall any of them by name. The court held that the testator had sufficient capacity to make a will.

132. Id. at 339, 141 P.2d at 829-30.

to make a will, as some courts have indeed held.\textsuperscript{134} It also explains why judges and commentators have been so concerned over the issue of whether capacity to make a will is identical to capacity to make a contract. The usual judicial statement says that any person who has the capacity to transact business and to make contracts surely has capacity to make a will.\textsuperscript{135} In fact, the vast majority of courts passing on this aspect of the "rational plan" doctrine have determined that it takes less "mental capacity" to make a will than to engage in business, or to make a simple contract, or even to execute a deed.\textsuperscript{136} Only Colorado, Connecticut, Maryland, and Montana, among the American jurisdictions, hold that capacity to make a will and to make a contract are identical legal principles.\textsuperscript{137}

\textsuperscript{134} See, e.g., Epsy v. Preston, 199 Ga. 608, 609, 34 S.E.2d 705, 715 (1945); Manley v. Combs, 197 Ga. 768, 779, 30 S.E.2d 485, 492 (1944); Hill v. Deal, 185 Ga. 42, 46, 193 S.E. 858, 861 (1937); Slaughter v. Heath, 127 Ga. 747, 750-51, 57 S.E. 69, 71 (1907); Williams v. Ragland, 307 Ill. 386, 396-97, 138 N.E. 599, 603 (1922); Redman v. Ruff, 196 Ky. 471, 476, 244 S.W. 910, 912 (1922); Newcomb v. Newcomb, 96 Ky. 120, 125, 27 S.W. 997, 998-99 (1894); In re Washburn's Will, 248 Wis. 467, 471, 22 N.W.2d 512, 515 (1946).

\textsuperscript{135} In re Arnold's Estate, 16 Cal. 2d 573, 586, 107 P.2d 25, 32 (1940); In re Sexton's Estate, 199 Cal. 759, 768-69, 251 P. 778, 782 (1926); In re Agnew's Estate, 65 Cal. App. 2d 553, 560, 151 P.2d 126, 130 (1944); DeMarco v. McGill, 402 Ill. 46, 58-59, 83 N.E.2d 313, 320 (1949); In re Hayer's Estate, 230 Iowa 880, 884, 299 N.W. 431, 434 (1941); Bishop v. Shear, 214 Iowa 644, 653, 241 N.W. 3, 7 (1932).


\textsuperscript{137} Hanks v. McNeil Coal Corp., 114 Colo. 578, 585-86, 168 P.2d 256, 260 (1946); Falk v. Schuster, 171 Conn. 5, 9, 368 A.2d 40, 42 (1976); Sturdevant's Appeal, 71 Conn. 392, 397, 42 A. 70, 72 (1899); Kimberly's Appeal, 68 Conn. 428, 435, 36 A. 847, 849 (1896); Comstock v. Hadlyme Ecclesiastical Soc'y, 8 Conn. 254, 263-64 (1830); Doyle v. Rody, 180 Md. 471, 477-80, 25 A.2d 457, 459-60 (1942), overruling Scheller
If the "ability to transact business" and the "ability to make a rational plan for disposition" are essentially statements of the same rule, it is hard to see why most American jurisdictions demand that a testator be able to make a disposition plan, yet do not equate that planning ability, the ability to integrate functionally, with that of making a contract. Essentially, both acts call for about the same response from the testator's ego structure. Each requires selectivity or choice among ends. This, then, leads to the question of motivation, or the impetus for action by the testator. In classical psychology, motivation was considered purely as a conscious, rational selection of ends seen as pleasurable or of avoiding ends seen as painful. To a certain extent, modern theory accepts this principle and refines it into motivation factors. One set of human motives runs to insuring survival and security. Another runs to satisfaction and stimulation of desires. The first set are labeled "deficiency motives," the second set, "abundance motives."\footnote{D. KRECH, R. CRUTCHFIELD, & N. LIVSON, supra note 128, at 492-98.}

Deficiency motives seek to avoid anxiety or to remove deficiencies in the environment. Abundance motives, on the other hand, are directed toward self-realization. "Abundance motives" are those motives pertaining to one's self and to one's relationship with others and go toward or tend toward self-actualization.\footnote{Id. at 498.}

This, too, seems to follow from Shaffer's notion of property as an extension of the personality. In Freudian terms, property allows an ego to project undesirable or forbidden feelings upon an inanimate object, rather than upon another person.\footnote{See A. WATSON, supra note 109, at 121-22, for an explanation of the defense mechanism of projection. Watson, in describing the anal period of development, hints at the "projection" of feelings about the child's body onto fecal matter. The projection may survive into later development phases in which property becomes a form of "fecal matter" to be manipulated by the ego.}

Such an activity is a highly sophisticated form of animism. The ego is also permitted to deal with the resolution of a particular conflict, in most cases of aging and exile from active social participation, with the ego's need to control its situation. This makes the motivational analysis of willmaking extremely complex. This complexity explains in part, as intimated by In re Powers' Estate,\footnote{See text accompanying notes 345-53 infra.} why lawyers and judges cannot understand psychiatric explanations of the factors involved in willmaking.


\footnotesize{138. D. KRECH, R. CRUTCHFIELD, & N. LIVSON, supra note 128, at 492-98.}

\footnotesize{139. Id. at 498.}

\footnotesize{140. See A. WATSON, supra note 109, at 121-22, for an explanation of the defense mechanism of projection. Watson, in describing the anal period of development, hints at the "projection" of feelings about the child's body onto fecal matter. The projection may survive into later development phases in which property becomes a form of "fecal matter" to be manipulated by the ego.}

\footnotesize{141. See text accompanying notes 345-53 infra.}
This article cannot present a definitive, research-based conclusion on the motivational pattern behind willmaking and how the "rational plan" criterion expresses any limitation on socially acceptable motivation. It should be sufficient to note at this preliminary stage that "the ability to make a rational plan" does not encompass the spectrum of permissible and impermissible motives for making a will or for selecting one beneficiary over another. The judicial attempts to deal with motivation generally are confined to conscious motivation, as in the case of the "insane delusion" or "will procured by undue influence." It suffices, however, to note that "the ability to form a rational plan" really means the ability to choose socially acceptable motivation to achieve self-actualization through willmaking.

In summary, the third element of the capacity test is a question of determining motivation for making a will. If a testator is unable to relate to reality in a significantly effective manner, then his reality principle, his ego, is impaired. His motivation for acting then reverts to an unacceptable primitive level, and the "rational plan" for willmaking is no longer present.

E. A Tentative Psychology of Property

Although this article cannot propose a final solution to the issues raised by the traditional law of testamentary capacity, it can probe these legal formulae, discover their psychological bases, and suggest a more comprehensive psychology of property. Willmaking appears to be one of the central, existential acts of any person with respect to his or her property. For this reason, some working theories relating to the role of property and a pathology of property manipulation should clarify the lag between the initial formulation of the legal rules about making wills and what has since been discovered about human behavioral phenomena.

1. The Psychological Role of Property

The principal role of property is to extend human personality142 laterally and vertically in space and time. This extension is

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142. Personality in this sense transcends the behaviorists' definition of "the integration of all an individuals characteristics into a unique organization that determines, and is modified by, his attempts at adaptation to his continually changing environment." D. KRECH, R. CRUTCHFIELD, & N. LIVSON, supra note 128, at 696. The wider meaning of the term, as used by Gabriel Marcel, Nicholas Berdayaeve, and Carl Rogers, summarizes the application of this notion of personality to psychology and to psychotherapy in general. In this wider sense, property functions as the ex-
accomplished by using property instrumentally to achieve the dynamic ends of human personality. There appear to be four ways in which human personality makes use of property in both lateral and vertical extension of its "boundaries."

The first way in which property is used is to establish territoriality, or living space. Every human personality seems motivated to acquire living space in the sense of a field of operation for itself among other personalities, together with a necessary life support system, the means with which to ensure psychological and physical survival. Without living space of this type, it is difficult to see how any human personality can establish its identity as a specific actor. The second function seems to be the appropriation of property beyond simple living space, what Freudian psychology has termed the "hoarding" level of development. Appropriation of property beyond what is required for living space is apparently one way of dealing with reality as support for further expressions of personality. It is the foundation for the projective activities of sharing and creating. Insofar as it represents a basis for these activities, hoarding is necessary to one's personality. The next use of property is sharing. Sharing seems to be as necessary to one's personality as is acquiring living space or hoarding. Sharing is also an activity of the human personality relating to how the personality works with property. By allowing other persons to participate in one's living

terior principle of integration with reality other than spiritual. See N. BERDAYAEVE, SLAVERY AND FREEDOM 20-59 (1944); G. MARCEL, THE MYSTERY OF BEING 182-209 (1960); C. ROGERS, CLIENT-CENTERED THERAPY 491-533 (1965).

143. Living space, in this sense, means something much more profound than the half-baked theories of Dr. Goebbels and Adolph Hitler. In this sense, every organism requires a life-support system which includes an operating territory and a biological basis for continued existence. In the case of humans, who are conscious of their own existence and who operate in a nonphysical manner at times, this concept includes a nonmaterial zone of privacy functioning like territoriality in addition to the necessity for physical space to live and a life-support system by which to live. For additional material, see BEHAVIOR AND ENVIRONMENT, THE USE OF SPACE BY ANIMALS AND MEN (A. Esser ed. 1971).

144. S. FREUD, INFANTILE SEXUALITY, in THE BASIC WRITINGS OF SIGMUND FREUD 389 (1938). This is, of course, based on Freud's theory of three levels of sexual development—oral, anal, and genital—around which he initially structured his theory of human behavior and typed functional behavior disorders. The "hoarding" state in Freud's theory corresponded to the anal level of development, to which Freud related later "fixations" to the tension between the child who does not wish to accept toilet training and the parent forcing early toilet habits on the child. These similes have limited value to our discussion of testamentary capacity; it suffices to say that humans to some extent hoard, and hoarding appears to be behavior subject to some modification under exterior environmental influence.
space and one's acquisitions beyond living space, one does in fact extend control over those who share, whether that control be generated and sustained by defensive mechanisms or by relationships with others which are non-defensive in character. Finally, property acquired beyond living space may be employed in creative or artistic activities. This involves the remolding or transformation of property into forms which express one's personality.

In dynamic situations, these four property functions will overlap, and will be presented in rather complex empirical fields. For example, a man who is married desires to build a house. The house clearly relates to his living space, his life support system. It also requires some degree of hoarding activity as a preparation for the creative act of building the house. He has to come up with the downpayment and a mortgage to finance the house. All this requires accumulation of "excess" property or a surplus in the economic sense, which translates into hoarding. Finally, the house will be shared with his wife and children who will co-participate socially in his hoarding and artistic work.

The relatively simple description of house building includes a number of complex dynamic situations. It illustrates a typical lateral extension of one's personality through the four functional uses of property. Vertical extension, by contrast, pushes the activities of a human personality beyond the time frame of its concrete existence. It projects the personality's existence beyond the present into the future. In this sense, property functions as a form of "immortality." \[^{145}\] Take the example of the man who has built a house for his wife and children. If that man provides that at his death his widow will have the house, he controls the activity of his wife after his death by using the family home, a "sharing place," as her "living space." Consequently, he has expanded his personality beyond the limits of his lifespan to affect others after he is dead.

An artist achieves similar results by his creativity. For example, a painter transforms canvas, oils, and pigment into a painting, which in theory will be treasured by persons after his death. He projects into his creative act a great deal of who and what he is,

\[^{145}\] See T. Shaffer, supra note 106. One of Shaffer's recurrent themes is the relationship between planning post-death transfers and the human search for life beyond death. This theme seems to be confirmed by other phenomena associated with property disposition, such as the artist's approach to his canvas and the writer's approach to his novel, both of which indicate an attempt to prolong one's lifetime through a creative act resulting in a work of art. Graffiti, incidentally, may serve the same unconscious necessity as sculpture or prose.
and that projection into property form confers a degree of "immortality" on him. He also engages in post-death "sharing" with others the beauty of what he has made. If the painter makes a will which leaves his art to a museum, he protects his creative act by post-death projection of his personality as a new hoarding activity. In place of his hoarding his created work, the museum will hoard it for him after death.

2. Normal and Pathological Projections of Personality Through Property

It seems fair to say that one should regard the use of property in extension of human personality as normal, unless it is flawed by a pathological use of property. To compress a great deal of matter into a few lines, if a personality uses property so as to destroy itself, that use is pathological. The destruction of personality structure in this sense corresponds to neurotic and psychotic behavior.

Since these tentative notions have not been confirmed by anything stronger than a lawyer's clinical impression, it would probably be inappropriate to draw a laundry list describing the pathological uses of property by human personality. In Freudian terminology, the human ego employs a number of defense mechanisms against threatening exterior forces. These defense

146. Pathology in this sense means disintegrative behavior which, rather than integrating the functional or behavioral aspect of personality, tends to disrupt and impair the functioning of this level of personality. More deeply, this notion comes about as close to the ordinary Christian notion of sin as behavioral science allows itself to do. The "personalist" sees the phenomenon of human personality wounded, or held captive by inappropriate behavior toward the world, and liberated only by correct appreciation of the personality's situation in the world. N. Berdayaev, supra note 142, at 29.

147. A. Watson, supra note 109, at 112-32.

The most important notion for lawyers to retain is that defense mechanisms are characteristically unconscious reactions to an anxiety-producing situation. What defense mechanisms do is attach anxiety feelings to other "things" in order to deal with the state. The usual classification of defense mechanisms includes: (a) sublimation, or the redirection of an instinctive drive in conformity with some supposedly higher motivation directed in terms of a right/wrong dichotomy; (b) repression, which is an unconscious, purposeful forgetting of internal or external phenomena which are painful; (c) projection, in which painful or objectionable feelings or ideas are perceived as originating from other persons or things, and not belonging to one's self; (d) denial, in which obvious reality factors are subconsciously treated as non-existent; (e) introjection, where the ego incorporates human behavior patterns or actions from others and attaches it to itself; (f) reaction formation, which is the establishing of a rigid attitude or character trait as a means of preventing an undesirable or painful attitude or trait of the opposite kind from operating; (g) undoing, which is an operation by which the ego does one thing for the purpose of undoing or neutraliz-
mechanisms are inappropriate in the sense that if an ego employs such mechanisms, it is likely to lose touch with reality.\textsuperscript{148} Property clearly can be part of ego defense mechanisms in this sense. An example will make this more clear.

A man desires to control and dominate his daughter’s life. This need to dominate his daughter is probably based upon fundamental flaws in the man’s ego structure; his feelings of inadequacy about his relationship with his wife, unconscious feelings of hostility toward other men who may make sexual overtures to his daughter, and the like. In order to keep his daughter for himself, he turns her into a piece of property. This transvaluation of a human person into property is fundamentally destructive. He then plots to keep his daughter always under his control by showering her with goods, paying for her education, and so on, so that she will always “owe” him everything, and thus still be possessed by him.

The defense mechanisms employed by the father to avoid dealing with his own feelings of inadequacy and sexual insufficiency include projection, a special form of which is called transference and countertransference.\textsuperscript{149} First, the father converted his daughter, another human personality like himself, into a “thing” and tried to “possess” it, showing that he really regarded other persons as things to be hoarded. Second, he tried to extend his living space over his child to avoid facing his unconscious feelings about his wife, and probably about his own daughter. If the father cannot have forbidden relations with his daughter, he can still “have” her by using property to control her future activities. Meanwhile, he makes little progress at dealing with his hostilities and his feelings of inadequacy. Instead he hides his feelings from himself by this game-like strategy.

These examples could be multiplied and the range of Freudian ego defense mechanisms can be matched to manipulation of others

\textsuperscript{148} Id. at 112-13.

\textsuperscript{149} Id. at 4-9. Freudian analysis places transference and countertransference at the foundation of all therapeutic (counseling) relationships. It holds that the relationship, once established between therapist and client, must be shifted to another autonomous basis before therapy is successful.
by the use of property in a pathological manner. The father in the preceding example, in all likelihood, will consciously experience his attempt to "own" his daughter as an example of his conspicuous generosity toward his offspring. It should be sufficient to say that the use of property is a vital factor in the total strategy that human personalities often use to avoid facing their unconscious and conscious feelings of hatred, fear, inadequacy, and frustration.

Consequently, a fully developed psychology of property should take into account the various modes by which people utilize property to manipulate reality, and describe both the pathology of property distribution and the integrative or authentic aspects of property distribution. To fully explore individual personality expansion by means of property, a social psychology of property describing the social influence on property distribution should be developed. This, in the last analysis, is an elaboration on the sociology of wealth and of class. The remainder of the article is an appraisal of the Greenwood-Baker formulations about testamentary capacity based upon the psychology of property and wealth transfer.

III. Testing the Greenwood-Baker Rule: Organically Impaired Testators

The Greenwood-Baker rule was designed to be applied to the case of the senile willmaker. It was designed to determine whether advancing deterioration of the testator's recall and motivation had reached a point where his testamentary freedom should be cut off. It has since been applied by the courts to situations in which it originally had no application. It has been used to gauge the legality of the wills of retarded testators, and to measure the acceptability of the wills of alcoholics and drug addicts. It has also been misapplied to the case of the senile testator for which it was originally designed. This section will review the history of the Greenwood-Baker rule as applied to retarded, handicapped, senile, and alcoholic testators.

A. The Retarded Testator

The English Statute of Wills provided a simple formula for retarded testators: an idiot cannot make a will. The prevailing 19th century classification for the mentally retarded divided them into three groups: idiots, morons, and imbeciles. An idiot was supposed
to possess the mental acuity of a two to seven year old. 150 A moron had the mental ability of a child between seven and twelve. 151 Imbeciles had the mental capacity of someone between twelve and whatever level was assigned as mental maturity. Modern medical terminology classifies mental retardation as slight, moderate, or severe. Mental retardation is normally the product of brain damage. 152 Brain damage can occur pre-natally, as a result of an illness to one's mother such as measles, or post-natally from illness or trauma. Brain damage takes many forms, and the resulting impairment to mental functioning varies widely.

Very few American appellate decisions have seriously discussed the willmaking ability of retarded persons. The few that have done so include the ancient case of Townsend v. Bogart, 153 In re Delaveaga's Estate, 154 and In re Glesenkamp's Estate. 155 The following two cases show how courts deal with mentally retarded testators.

In In re Teel's Estate, 156 Marvin Teel, the testator, was a moderately retarded adult. According to testimony given in the will contest, he functioned at a competence level of ten to twelve years. 157 In 1945, Teel went to an attorney and had a will drawn which disinherited his brother, Frank, in favor of Marvin Teel's friend, Ruth Roberson, 158 who functioned as a mother-substitute for Teel after his own mother's death. 159 Within ten months after he made his will, Marvin Teel was placed under guardianship. He remained under guardianship until his death. 160 Teel died in 1967 at the age of seventy-seven, leaving his 1945 will. Frank Teel filed objections to probate of the 1945 will. The trial court admitted

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151. Id.
152. The medical definition does not appear to have penetrated legal thinking at this time. See generally 3B L. Gordy & R. Gray, Attorneys' Textbook of Medicine (1978).
153. 5 Redf. 93 (N.Y. 1891).
154. 165 Cal. 607, 133 P. 307 (1913).
157. Id. at 372, 483 P.2d at 604.
158. Id.
159. Id. The testimony in the case showed that at one time Marvin Teel had operated a dairy farm, had been an active gardner, and had been a regular churchgoer. He was literate and able to transact business, insofar as he made purchases at the grocery store, maintained and repaired his automobile, and managed his farm.
160. Id. at 373, 483 P.2d at 605.
Teel's will to probate, and Frank Teel appealed the decision. The Arizona Appellate Court sustained the trial court's judgment. It relied on the traditional Greenwood-Baker rule, finding that Teel had fulfilled, by a preponderance of the evidence, the requisite three conditions of testamentary capacity.161

In re Glesenkamp's Estate shows how another jurisdiction has dealt with the mentally retarded testator. Joseph A. Glesenkamp died at age fifty-nine, unmarried, survived by twenty-two first cousins as his next of kin. Glesenkamp made his will in October 1951, a few months prior to his death from liver cancer.162 At that time, Glesenkamp was under guardianship as a "weak-minded person."163 Apparently the attorney who made the will for Glesenkamp had some misgivings because he brought in a psychiatrist to examine Glesenkamp. The physician related the results of his examination at trial:

Anxious to determine, if I could, to what extent he was aware of his worldly goods, we went into that to some extent. He had no definite knowledge of his wealth at all. He knew that he had a guardian and that money came from the bank to him; and that he owned the house he lived in, and that he had enough he didn't have to work. I wouldn't feel that beyond that he had much knowledge of his means at all.164

The physician concluded that Glesenkamp could have capacity to make a will if all he was required to know was a general knowledge of his property.165 Glesenkamp had made his housekeeper, Mrs. Carson, the principal beneficiary of his will. She had been hired by his guardian to look after him.166 His cousins objected to the probate of the will. The trial court set the will aside.167 The Pennsylvania Supreme Court affirmed, without extensive legal analysis, applying the Greenwood-Baker test.168 It concluded that a finding of capacity would have been contrary to the overwhelming weight of the evidence.169

161. Id.
162. 378 Pa. at 638, 107 A.2d at 733.
163. Id.
164. Id. at 639, 107 A.2d at 733.
165. Id. According to the contestant's witnesses, however, Glesenkamp's functional ability was that of a five-year-old boy.
166. Id.
167. Id. at 640, 107 A.2d at 734.
168. Id. at 640, 107 A.2d at 733-34.
169. Id.
In both cases, the reviewing court tried to apply the Greenwood-Baker rule to the recall and motivation of a retarded testator. The evidence relating to the ordinary elements of capacity contained the usual mish-mash of lay opinions, medical reports, and hypothetical expertise. Joseph Glesenkamp appeared to have a pretty good grasp of what he owned and how he could use it. Marvin Teel had engaged in business with some outside help. Both had detractors who thought them "feeble minded" or "unable to care for themselves." Teel made his will before undergoing formal guardianship; Glesenkamp made his after being placed under guardianship. Each will disinherited blood relations in favor of a friend. The court's strict application of the Greenwood-Baker rule caused them to miss some of the real issues involved. Neither case reviewed the physiology of brain damage, nor the psychology of brain damaged persons. Neither case inquired into recall impairment or motivational deficiencies relating to property. In each case, the object of the will would ordinarily by socially acceptable: benefiting a close friend. It is difficult to see the basis for the differing results.

B. The Handicapped Testator

The situation of the handicapped testator really has nothing to do with the Greenwood-Baker rule. However, some lawyers have accepted cases contesting wills made by handicapped people. "Handicapped" in this instance means physical disorders which impair motor-sensory skills without significant change in psychological behavior. The will contest waged against the handicapped testator may unconsciously arise from the dread of most people for certain types of illness. In this classification, one finds the case of the blind testator, the deaf testator, and the testator who has Parkinson's disease, epilepsy, locomotor ataxia, or tuberculosis.

170. See, e.g., Coleman v. Walls, 241 Ark. 842, 410 S.W.2d 749 (1967) (will of 100-year-old blind testator, attacked for want of capacity, sustained); Frazie's Ex'r v. Frazie, 186 Ky. 613, 217 S.W. 668 (1919); Kingman v. Damon, 290 Mass. 472, 195 N.E. 740 (1935) (testator memorized parent's will, then reproduced it verbatim).

171. See, e.g., Potts v. House, 6 Ga. 324 (1849); Tidholm v. Tidholm, 391 Ill. 19, 62 N.E.2d 473 (1945); In re Eklund's Estate, 186 Minn. 129, 242 N.W. 467 (1932).


Even the will of a diabetic has been assailed.\textsuperscript{176}

\textit{Lynn v. Ada Lodge 146}\textsuperscript{177} is a representative case from this class. David Ray McNeil, the testator, was an epileptic.\textsuperscript{178} He was employed as a night watchman. His physician described him as rational and of sufficient mental capacity to know the nature and extent of his property and his family members, and to make a rational plan to deal with his property at death.\textsuperscript{179} In 1947, his mother filed an insanity proceeding against him and had him committed after an episode in which David McNeil tore up the McNeil home.\textsuperscript{180} Mrs. McNeil had a change of heart and obtained her son’s discharge. However, her son attributed his discharge to the efforts of the local International Order of Odd Fellows Lodge.\textsuperscript{181} McNeil believed until his death that his mother and sister wanted to put him away. There was apparently some basis for his belief.\textsuperscript{182} The trial court probated his will which left all of his property to the Odd Fellows Lodge.\textsuperscript{183} The contestants argued that McNeil had an insane delusion which led him to make this disposition. The Supreme Court of Oklahoma sustained the trial court, finding that McNeil’s blind hatred of his mother and sister were related to his physical condition.\textsuperscript{184} One would wish that the Oklahoma Supreme Court had restated the evidence relating to McNeil’s ailment in clearer terms.\textsuperscript{185} If McNeil’s condition led to moments of total mental dysfunction without apparent physical symptoms, the so-called “psycho-motor” seizure, then his will may have been vitiated by his organic condition.

\begin{itemize}
  \item \textsuperscript{176} In re Jacobsen’s Will, 223 Wis. 508, 270 N.W. 923 (1937).
  \item \textsuperscript{177} 398 P.2d 491 (Okla. 1965).
  \item \textsuperscript{178} Id. at 493.
  \item \textsuperscript{179} Id.
  \item \textsuperscript{180} Id. at 494.
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Id. at 495.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id. at 497.
  \item \textsuperscript{185} The description without diagnosis appears to parallel psychomotor epilepsy. Epilepsy is generally classified as idiopathic or acquired. Acquired epilepsy includes all those cases in which a seizure is produced by a structural lesion or condition of the brain, which causes an alteration in its electrical activity. When no pathology is detected, the condition is described as idiopathic, since no cause has been isolated. \textit{3B L. Gordy & R. Gray, supra} note 152, § 92.05. Psychomotor epileptic seizures are a type of acquired epilepsy produced by a brain lesion. These seizures manifest automatism characteristic of this form of seizure and some neuropsychiatric behavior disorders. \textit{Id.} § 92.40. According to Penfield, a person suffering from a psychomotor attack may walk and engage in activity, but will be unable to make judgments or decisions, will not be open to reason, and will be resistive of any attempt to control his behavior. \textit{Id.} § 92.41.
\end{itemize}
In Nowlin v. Spakes the testator had Parkinson's disease. His will gave a considerable estate to his sister, rather than to his mother. The testator was thirty-seven years old when he made his will. His sister assisted him in signing, due to his palsy. His mother's objections to probate survived demurrer where the sole basis of attack was his lack of capacity.

The handicapped testator's will may get rough treatment from his surviving family. Wills made by handicapped persons get crammed into the ancient Greenwood-Baker formula regardless of whether the type of handicap has anything at all to do with the three elements of the classical definition of testamentary capacity. In both Lynn and Nowlin the testator's organic impairment was neither discussed nor considered as a possible basis for generating a legal rule appropriate to this class of cases. In both cases, some hints of serious organic impairment of motivation can be found, but no discussion helps one to understand the real basis for decision. The expansive legalisms applied obscure the problems of each testator. In Lynn, most informed professionals would think the object of the will was not socially acceptable. In Nowlin, the undesirability of the object of the will is less clear.

C. The Senile Testator

The last and largest category of testators in this section are the senile testators. The cases appear to make no distinction between senile dementia and arteriosclerotic psychosis. Consequently, two kinds of mental impairment have been classed under "senility:" impairment without definite cause due in general to aging; and impairment caused by hardening of the brain arteries. Both types lead to shrinking or atrophy of the brain and loss of brain tissues caused by brain cells dying from lack of oxygen. Brain cells do not replace themselves; thus the loss of brain size as a result of cell death. This shrinking may or may not produce behavioral changes in affected people.

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186. 25 Ark. 26, 463 S.W.2d 651 (1971).
187. Id.
188. Id.
189. Senile psychosis and arteriosclerotic brain disease have different etiologies. Arteriosclerotic psychosis results from the decrease in the supply of blood to the brain as the arteries to the brain are narrowed by the aging process. Upon autopsy, an older person will show marked changes in the shape and size of the brain. This shrinking or atrophy of the brain occurs because brain cells die from lack of oxygen and do not replace themselves. See Smith & Hager, supra note 93, at 413-14. This shrinking may or may not produce behavioral changes in affected people. Id.
The accepted medical diagnosis for behavioral change produced by these organic changes is "chronic brain syndrome-psychosis due to cerebral arteriosclerosis." 190 These organic behavior changes probably form the greatest single source of will contests. 191 The wills of very old people whose memory is failing, whose spacial orientation is defective, who may "see things" or "talk to the walls" or otherwise behave queerly or unacceptably, regularly get challenged, especially when such wills are disinheriting wills. Whether these behavioral changes result from hardening of the arteries or from some other source, 192 they clearly affect the willmaker's ability to function with respect to recall and motivation.

The courts generally hold that a testator may make a will, even if he or she is very old. 193 However, the changes associated

190. 3 C. FRANKEL, LAWYERS MEDICAL CYCLOPEDIA § 17.9 (1970). The symptoms which indicate this condition are (a) impairment of orientation, (b) impairment of memory, (c) impairment of other intellectual functions such as comprehension, calculation, knowledge, and learning, (d) impairment of judgment, and (e) instability of emotional reactions. These symptoms may be accompanied by vivid auditory or visual hallucinations, or both. A second diagnosis with corresponding indications is "chronic brain syndrome-psychosis due to senility." This, of course, is an organic condition produced by the loss of brain tissue. See note 197 supra.

191. See Appendix, Table IV.

192. Smith & Hager, supra note 93, at 415. The literature indicates that the two organic psychoses may be two sides or descriptions of the same condition.

193. See, e.g., the following cases:

Alabama: Cox v. Martin, 250 Ala. 401, 403, 34 So. 2d 463, 464 (1947); Yarbrough v. Moses, 223 Ark. 489, 497, 267 S.W.2d 289, 294 (1954); Tombs v. Blankenship, 215 Ark. 551, 557, 221 S.W.2d 417, 420 (1949); Pernot v. King, 194 Ark. 896, 910, 110 S.W.2d 539, 545 (1937);


Florida: In re Dunson's Estate, 141 So. 2d 601, 604 (Fla. 1962);


Indiana: Zawacki v. Drake, 149 Ind. App. 270, 273, 271 N.E.2d 511, 512 (1971);

Iowa: In re Ruedy's Estate, 245 Iowa 1307, 1314, 66 N.W.2d 387, 391 (1954); In re Groen's Estate, 245 Iowa 634, 637, 62 N.W.2d 143, 145 (1954); In re Sinfelt's Estate, 233 Iowa 800, 810, 10 N.W.2d 550, 554 (1943); Hanrahan v. O'Toole, 139 Iowa 229, 234, 117 N.W. 675, 678 (1908);

Kentucky: New v. Creamer, 275 S.W.2d 918, 920 (Ky. 1955); Tye v. Tye, 312 Ky. 812, 816, 229 S.W.2d 973, 975 (1950); Burgess v. Belford, 306 Ky. 711, 714, 209
with aging, such as memory loss, regressive behavior, personal un-

S.W.2d 90, 91 (1948); Perkins' Guardian v. Bell, 294 Ky. 767, 777, 172 S.W.2d 617, 622-23 (1943); Frazie's Ex'r v. Frazie, 186 Ky. 613, 622, 217 S.W. 668, 672 (1919); Robinson v. Davenport, 179 Ky. 598, 603, 201 S.W. 28, 30 (1918);

Maine: Appeal of Martin, 133 Me. 422, 427-28, 179 A. 655, 659 (1935); Appeal of Rogers, 126 Me. 267, 283, 138 A. 59, 66 (1927); In re Chandler's Will, 102 Me. 72, 88, 66 A. 215, 221 (1906);

Maryland: Gilbert v. Gaybrick, 195 Md. 297, 304, 73 A.2d 482, 484 (1950); Riggs v. Safe Deposit & Trust Co., 186 Md. 54, 61, 46 A.2d 97, 100 (1946); Drury v. King, 182 Md. 64, 73, 32 A.2d 371, 375 (1943); Cronin v. Kimble, 156 Md. 489, 494, 144 A. 698, 700 (1928);

Minnesota: Schmidt v. Schmidt, 47 Minn. 451, 457, 50 N.W. 598, 600 (1891);

Missouri: Ahmann v. Elmore, 211 S.W.2d 480, 489 (Mo. 1948); Lee v. Ullery, 346 Mo. 236, 244, 140 S.W.2d 5, 10 (1940); Proffer v. Proffer, 342 Mo. 184, 195, 114 S.W.2d 1035, 1040 (1938); Shearrer v. Shearrer, 259 S.W.2d 705, 719 (Mo. Ct. App. 1953);

Nebraska: In re Urbanowski's Estate, 191 Neb. 308, 311, 215 N.W.2d 74, 76 (1974); In re Scoville's Estate, 149 Neb. 415, 425, 31 N.W.2d 89, 290 (1948); In re Goist's Estate, 146 Neb. 1, 13, 18 N.W.2d 513, 520 (1945); In re Bose's Estate, 136 Neb. 156, 163, 285 N.W. 319, 324-25 (1939);

Nevada: In re Peterson's Estate, 77 Nev. 87, 109, 360 P.2d 259, 270 (1961);

New Jersey: In re Livingston's Estate, 5 N.J. 65, 77, 73 A.2d 916, 922-23 (1950); In re Herrman's Estate, 124 N.J. 542, 543, 3 A.2d 148, 148 (1938); In re Gotchel's Estate, 10 N.J. Super. 208, 212, 76 A.2d 901, 903 (1950);


Oklahoma: Dunkin v. Rice, 197 Okla. 150, 151, 169 P.2d 210, 211 (1946) (deed); In re Sixkillers' Estate, 168 Okla. 302, 305, 32 P.2d 936, 938 (1934);

Oregon: In re Bond's Estate, 172 Or. 509, 520, 143 P.2d 244, 249 (1943); McGreal v. Culhane, 172 Or. 337, 343, 141 P.2d 828, 831 (1943);

Pennsylvania: Williams v. McCarroll, 374 Pa. 281, 293, 97 A.2d 14, 20 (1953); In re Roberts' Estate, 373 Pa. 7, 16, 94 A.2d 780, 784 (1953);

South Dakota: In re Melcher's Estate, 232 N.W.2d 442, 445 (S.D. 1975); In re Anderson's Estate, 88 S.D. 631, 636, 226 N.W.2d 170, 173 (1975); Peterson v. Lihm, 46 S.D. 540, 546, 194 N.W. 842, 844 (1923);


Texas: Jowers v. Smith, 237 S.W.2d 805, 810 (Tex. Ct. App. 1950); Green v. Dickson, 208 S.W.2d 119, 124 (Tex. Ct. App. 1948);

Virginia: Ferguson v. Ferguson, 169 Va. 77, 89, 192 S.E. 774, 778 (1937); Jenkins v. Trice, 152 Va. 411, 421, 147 S.E. 251, 261 (1929);

Washington: In re Chapin's Estate, 17 Wash. 2d 196, 208, 135 P.2d 445, 450 (1943);

West Virginia: Prichard v. Prichard, 135 W. Va. 767, 778, 65 S.E.2d 65, 71 (1951);

Wisconsin: In re Washburn's Will, 248 Wis. 467, 474, 22 N.W.2d 512, 515 (1946).
tidiness, or peculiar behavior, are often the alleged basis for a will contest. None of these changes, unless psychotic, is totally dysfunctional. However, the courts have thrown around psychological and medical jargon about "senile dementia" for the past century with little care for precision or accuracy. It is therefore very difficult for students of the case method to determine what the courts are really doing with the senile testator.

1. The Foregetful Testator

The Greenwood-Baker rule, parenthetically, was designed for the senile testator. If a person can recall his family, his property, and make a plan for after-death disposition of his property, the Greenwood-Baker rule has been satisfied and the person's will is acceptable. Unfortunately, the legal test has been confused with diagnostics. In many cases, the testator has been described by his attending physician or an alienist194 as "having senile dementia" or suffering from "senility." Without differentiation, the case is treated as that of an old person's will without regard to the particular psychotic behavioral patterns. The will is usually admitted to probate.195 This is clearly true in those cases involving moderate to severe impairment of recall, or, in laymen's terms, the "failure of memory" cases. In most instances, the will of a person who has moderate to severe recall impairment will be probated even though he has manifested extensive difficulty in recalling what he owns or whom his next of kin may be.196

194. An alienist in this sense refers to a professional expert witness hired to testify at trial.
195. See, e.g., Walters v. Heaton, 223 Iowa 405, 271 N.W. 310 (1937); Albright v. Moeckly, 202 Iowa 565, 210 N.W. 813 (1926); Byrne v. Fulkerson, 254 Mo. 97, 162 S.W. 171 (1914); In re Scoville's Estate, 149 Neb. 415, 31 N.W.2d 284 (1948); In re Bose's Estate, 136 Neb. 156, 285 N.W. 319 (1939).
196. See, e.g., In re Dobrzensky's Estate, 105 Cal. App. 2d 134, 139, 232 P.2d 866, 889 (1951); In re Ridgeway's Estate, 92 Cal. App. 2d 325, 328, 206 P.2d 892, 894 (1949); In re Selb's Estate, 84 Cal. App. 2d 46, 49, 190 P.2d 277, 280 (1948); Children's Home of Rockford v. Andress, 311 Ill. App. 446, 456, 36 N.E.2d 596, 601 (1941); In re Richardson's Estate, 199 Iowa 1320, 1322, 202 N.W. 114, 116 (1925); In re Harris' Estate, 166 Kan. 368, 372, 201 P.2d 1062, 1065 (1949); Tye v. Tye, 312 Ky. 812, 816, 229 S.W.2d 973, 975 (1950); Sloan v. Sloan, 303 Ky. 180, 185, 197 S.W.2d 77, 79-80 (1946); Kentucky Trust Co. v. Gore, 302 Ky. 1, 8, 192 S.W.2d 749, 752 (1946); Perkins' Guardian v. Bell, 294 Ky. 767, 777, 172 S.W.2d 617, 622-23 (1943); McCrocklin's Adm'r v. Lee, 247 Ky. 31, 39, 56 S.W.2d 564, 568-69 (1933); In re Paquin's Estate, 328 Mich. 293, 302, 43 N.W.2d 858, 862 (1950); In re Nickel's Estate, 321 Mich. 519, 526, 32 N.W.2d 733, 736 (1948); In re Grow's Estate, 299 Mich. 133, 138, 299 N.W. 836, 838 (1941); In re Borstad's Appeal, 232 Minn. 365, 371, 45
An illustration of the type should suffice. In *McGreal v. Culhane*, Daniel Barrett, a seventy-six year old bachelor, died in Portland, Oregon as a result of kidney complications. He left the residue of his estate, about $10,000, to the surviving family of his late uncle Daniel Culhane of Rice County, Minnesota. Daniel Culhane died in 1902. The will was made May 10, 1940. When Barrett had immigrated from Ireland in the 1880's, he lived with his uncle Dan, who supported him for about a year. Barrett's two earlier wills had left his estate to his brother's family. When Barrett made his last will in 1940, he could no longer recall the names of Daniel Culhane's children to whom he was to leave his estate. Naturally, his brother's children filed a caveat charging that Barrett lacked capacity. The Oregon Supreme Court sustained probate of Barrett's will. So it would appear that a testator who cannot even give the number or names of the persons to whom he wishes to leave his estate has "capacity" despite severe recall problems.

2. *The Childish Testator*

In addition to the subclass of forgetful testators, there are the childish testators. The typical childish testator is an individual who regresses to very childish behavior patterns before or at the time of making a will. His will is attacked as the product of an unsound mind. Usually, such attacks fail. *In re Scoville's Estate* is a representative example of this genre. W.A. Scoville, the testator, had five daughters and a son named Bud. His wife and three

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197. 172 Or. 337, 141 P.2d 828 (1943).
198. *Id.* at 339, 141 P.2d at 829.
199. *Id.*
200. *Id.* at 340, 141 P.2d at 830.
201. *Id.* at 341, 141 P.2d at 829-30.
202. *Id.* at 344-45, 141 P.2d at 831-32.
204. 149 Neb. 415, 31 N.W.2d 824 (1948).
205. *Id.* at 419, 31 N.W.2d at 287.
of his five daughters survived him. Scoville made three wills in close proximity. One dated September 1942, left his home farm to one daughter, and cash gifts to the other two. A second will made July 8, 1943, devised the home farm to Scoville’s second daughter, Flossie Wensky. A third and last will executed in August 1943, when Scoville was eighty-three, shifted the home farm for a third time to his youngest daughter, Orpha Cross.

The trial produced much testimony showing that W.A. Scoville became very eccentric and childish after the death of his son in 1942. He accused his grandchildren of stealing his tools. He wanted all the turtledoves shot around his house. He threatened to take his gun and shoot some relatives he disliked. He alternatively quarrelled with Flossie and her husband, and begged and pleaded with them to stay and operate the home farm for him. He “made peculiar remarks about radio shows.” He tied up the family dog on the porch, with a chain so short it could not get off the porch to eliminate, then kicked the dog for making a mess. The contender produced an expert of unknown specialty who testified that in his opinion Scoville suffered from “senile dementia” and could not have understood except in a superficial way what he did when he changed his will. The Nebraska Supreme Court concluded that the trial court had not erred in refusing to submit the issue of testamentary capacity to the jury. The supreme court quoted extensively from In re Bose’s Estate in support of the conclusion that “senile dementia” does not mean the victim is totally disable from making a will. Nebraska law already classed “senile dementia” with “insanity.” In short, the case holds that a person who is insane due to the degenerative changes of aging and whose behavior is markedly bizarre and childish, may make a will if in the balance he can be said to have a superficial knowledge of his prop-

206. Id.
207. Id. at 420, 31 N.W.2d at 288. Orpha Cross offered this will for probate after her father’s death and Flossie objected to it. At that time, Scoville’s wife was mentally incompetent. Flossie Wensky had moved back to her father’s house in 1942 when Bud Scoville had suddenly died, leaving the two old people alone. The family situation broke down in 1943, and W.A. Scoville and his wife lived with other relatives for the two years prior to Scoville’s death on July 29, 1945. Id. at 424, 31 N.W.2d at 288-89.
208. Id.
209. Id. at 426, 31 N.W.2d at 291.
210. Id. at 431, 31 N.W.2d at 293.
212. 149 Neb. at 430, 31 N.W.2d at 292.
erty and his next of kin, and if a plan of disposition can be inferred from the operative scheme of the will itself.

3. The Hallucinating Testator

The third class of senile testator cases is the hallucinating testator. This subclass includes the testator who "sees things" or "hears things." The Greenwood-Baker rule is applied to this class of cases to determine whether the will of the hallucinating testator should be probated. Cubbage v. Gray\(^ {213} \) is a typical example of such cases. In this 1967 Kentucky case, the testator, at age eighty-two, exhibited some rather exotic behavior. He conversed with sticks and other inanimate objects, he thought that a vein of gold ran in the mountains behind his house, and he spent most of his time up on the mountain digging for gold.\(^ {214} \) His daughter and her husband attempted to get the old gentleman to stop his eccentric behavior by pleading with him to behave himself. The result was that the testator took to heart the conclusion that his daughter and her husband were out to kill him.\(^ {215} \) He promptly made a will disinheriting her. The resulting will contest ended in a jury verdict for the daughter. This verdict was sustained by the Kentucky Court of Appeals on the ground that the questions of fact raised by the case were proper issues for a jury trial verdict and would not be disturbed on appeal.\(^ {216} \) This holding sheds little light on the true basis for the court's decision below.

4. Empirical Analysis of Senile Testator Cases

The will of a senile testator has about a seventy-five percent chance of being probated after appellate review.\(^ {217} \) Eighty percent of the wills of persons legally under guardianship will be admitted to probate upon appellate review.\(^ {218} \) In order to clarify this analysis, one should keep in mind that being placed under guardianship is not an adjudication of insanity. Rather, it is a determination that the ward is incompetent by reason of mental or physical disability to manage his own affairs. However, nearly fifty percent

\(^ {213} \) 411 S.W.2d 28 (Ky. 1967).
\(^ {214} \) Id. at 28-29.
\(^ {215} \) Id.
\(^ {216} \) Id. at 29.
\(^ {217} \) See Appendix, Table V. The actual percentages are 68.9 for the proponent and 31.1 for the contestant out of 386 appellate decisions spanning 92 years.
\(^ {218} \) See Appendix, Table V. Out of 73 appellate decisions spanning 92 years, 75.3% went for the proponent and 24.7% for the contestant.
of the wills of persons adjudicated insane will be admitted to probate after appellate review. Consequently, the will of a senile testator will probably be probated, despite the fact that that same person may be incompetent to manage his own affairs or to make a simple contract. This result is outrageous.

D. The Drugged Testator

There is yet another class of impaired testators whose wills provoke litigation. The wills of opium eaters, morphine addicts, people under heavy sedation for pain, and alcoholics are regularly challenged by unsatisfied survivors. The lay assumption seems to

219. Appendix, Table V. Of the nine appellate decisions reviewed, 47.4% went for the proponent and 53.6% went for the contestant.

220. See, e.g., the following cases:
Alabama: Whitset v. Belue, 172 Ala. 256, 54 So. 677 (1911);
Arizona: Komadino v. Jack, 55 Ariz. 504, 103 P.2d 669 (1940);
Arkansas: Brown v. Emerson, 205 Ark. 735, 170 S.W.2d 1019 (1943);
Delaware: Ball v. Kane, 17 Del. (1 Penne.) 90, 39 A. 778 (1897);
Florida: In re Willmott's Estate, 66 So. 2d 465 (Fla. 1953) (opiates); Fernstrom v. Taylor, 107 Fla. 490, 145 So. 208 (1933);
Idaho: Yribar v. Fitzpatrick, 91 Idaho 105, 416 P.2d 164 (1966);
Illinois: Applehans v. Jurgenson, 336 Ill. 427, 168 N.E. 327 (1929);
Iowa: Heller v. Ripperger, 233 Iowa 1356, 11 N.W.2d 586 (1943);
Kentucky: Nunn v. Williams, 254 S.W.2d 698 (Ky. 1953) (under drugs); Tye v. Tye, 312 Ky. 812, 229 S.W.2d 973 (1950) (on opiates); Bickel v. Louisville Trust Co., 303 Ky. 356, 197 S.W.2d 444 (1946); Madden v. Cornett, 290 Ky. 268, 160 S.W.2d 607 (1942); Holliday v. Holliday, 161 Ky. 500, 171 S.W. 156 (1914);
Maryland: Lynn v. Magness, 191 Md. 674, 62 A.2d 604 (1948) (life insurance policy change of beneficiary);
Massachusetts: Simoneau v. O'Brien, 311 Mass. 68, 40 N.E.2d 1 (1942); Maynard v. Tyler, 168 Mass. 107, 46 N.E. 413 (1897);
Michigan: In re Leech's Estate, 227 Mich. 299, 269 N.W. 181 (1936);
Mississippi: O'Bannon v. Henrich, 191 Miss. 815, 4 So. 2d 208 (1941);
Missouri: Byars v. Buckley, 461 S.W.2d 817 (1970); Williams v. Lack, 328 Mo. 32, 40 S.W.2d 670 (1931); Naylor v. McRuer, 248 Mo. 423, 154 S.W. 772 (1913);
Montana: Akers v. Morton, 499 F.2d 44 (9th Cir. 1974) (Indian will);
New Jersey: Bannister v. Jackson, 46 N.J. Eq. 593, 21 A. 753 (1890);
New York: In re Heaton's Will, 224 N.Y. 22, 120 N.E. 83 (1918);
North Carolina: In re Rose's Will, 28 N.C. App. 38, 220 S.E.2d 425 (1975);
Oklahoma: Bigheart v. Pappan, 482 F.2d 1066 (10th Cir. 1973) (Indian will); Al-
be that persons under the influence of some drug at the time they make a will lack the capacity to make an acceptable post-death disposition of their property. This common assumption is not shared by the courts.

1. *Alcoholic Testators*

Alcoholics who make wills generally find their wills sustained by appellate courts if the contestant is unable to show by the requisite burden of proof that the alcoholic was actually, acutely intoxicated or experiencing delirium tremens at the time the will was signed. A representative case should suffice to show the point.

In *Applehans v. Jurgenson* 221 Christine Hagenow, the testator, owned a three story apartment house in Chicago. She made a will June 8, 1926, leaving her apartment house and a considerable amount of other property to her boarder, John C. Jurgenson.222 Her heirs were her sister Anna Applehans and two nephews. Christine Hagenow died twenty-two days later.223 Her sister filed objections to probate of the will.

A great deal of the evidence presented at trial related to Mrs. Hagenow's drinking. A dentist testified that she reported for a dental appointment in 1925 while intoxicated, and then made a pass

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221. 336 Ill. 427, 168 N.E. 327 (1929).
222. *Id.* at 429-30, 168 N.E. at 328-29.
223. *Id.* at 430, 168 N.E. at 329.
at him.224 Her physician testified that in 1916, when she was treated for a fall at a bowling alley, she was intoxicated. This physician, however, had not seen Mrs. Hagenow since 1922.225 The evidence was somewhat equivocal, but it was evident that Mrs. Hagenow was an alcoholic for some time before her death. The jury set aside her will, but the Illinois Supreme Court reversed the jury verdict as contrary to the manifest weight of the evidence.226 It applied the Greenwood-Baker rule to determine whether Mrs. Hagenow had testamentary capacity. It concluded that, unless the contestant showed that Mrs. Hagenow was actually drunk when she executed her will, her alcoholism made no difference to the court.227

2. Addicts

The wills of persons who are addicted to “hard drugs” such as morphine, opium, or heroin, are treated in about the same manner as those of alcoholics. If the contestant does not show the addict was actually “high” or mentally incompetent by reason of brain damage at the precise moment when the addict signed his will, the contestant loses the case.

In re Walz’ Estate228 is a typical addict case. Mrs. Gem Walz, the testator, had been addicted to morphine the last twenty-five years of her life.229 She had been under treatment at the Neal Institute in Detroit shortly before her death. She took excessive doses of paregoric. She appeared to be drowsy and her speech was affected by her addiction.230 She made exaggerated claims regarding her property and the kind of car she owned.231 On January 25, 1919, she made her will before three of her roomers in the rooming house she managed and owned. She left the house, her principal assets, to her brother Fred, disinheriting her two other brothers who contested the will.232

The trial court did not let the case go to the jury because the contestant’s experts could not state under examination sufficient

224. Id. at 431, 168 N.E. at 329.
225. Id. at 432, 168 N.E. at 329.
226. Id. at 437, 168 N.E. at 331.
227. Id. at 436-37, 168 N.E. at 330-31.
228. 215 Mich. 118, 183 N.W. 754 (1921).
229. Id. at 122, 183 N.W. at 755.
230. Id.
231. Id.
232. Id. at 121-22, 183 N.W. at 754-55.
evidence to show that taking morphine and paregoric would so affect the testator's mentality as to make her incapable of making a will at law under the Greenwood-Baker rule. The Michigan Supreme Court sustained the trial court's decision to withhold the case from the jury. 233

In these two cases, the trial and appellate courts were confronted with a single issue: whether an habitual user of drugs (alcohol is a drug) could have sufficient recall and appropriate motivation to make a will when the addiction had produced significant behavioral changes. When such behavioral changes occurred, the victim made a will altering an earlier post-death plan. In neither case did the reviewing court seem to care whether the testator had so lost touch with reality as to be considered psychotic. Such judicial reluctance to inquire into the actual psychological awareness of the individual testator persists under the cloak of the principle of testamentary freedom.

Assuming that the testator wishes to extend himself after death through his property, his motivation must either coincide or not coincide with his reality principle. That is, the motivation to make the post-death plan must be tied or linked up to "what is going on out there." Persistent use of alcohol, morphine, opium, and other depressive drugs, or of hallucinogens, alters one's perception and recall and affects motivation. 234 These side effects, in the case of chronic alcoholics and drug addicts, persist even when the user is not actually under the influence of his drug. If willmaking requires a "rational choice," and that selection of alternatives is in theory to coincide with socially acceptable ends, then a person under the grim sentence of addiction probably will not be able to make a socially acceptable choice. However, four out of five wills made by alcoholics are sustained at the appellate level, 235 and nine out of ten wills made by drug addicts or persons under heavy sedation are upheld by appellate courts. 236

233. Id. at 125, 183 N.W. at 756.
234. For a current analysis of the side effects of these products, see Appendix I of S. Snyder, Second Report of the National Commission on Marijuana and Drug Abuse (1974).
235. Appendix, Table V. Out of 68 decisions between 1885 and 1977, 80.9% went in favor of the proponent and 19.1% in favor of the contestant.
236. Appendix, Table V. Out of 19 cases over 92 years, 89.5% went for the proponent and 10.5% for the contestant.
IV. TESTING THE GREENWOOD-BAKER RULE: FUNCTIONALLY IMPAIRED TESTATORS

A. The Psychotic Testator

Courts have had a difficult time with nonorganic mental illness in testators. Judges seem to be unable to grasp psychiatric bafflegab used to describe functional mental illness. The results in such cases have been bizarre.237 Generally, a functionally impaired testator has about a four to one chance of having his will probated, unless, of course, he has been adjudicated insane, in which case his chances drop to fifty-fifty.238 Judges use a variety of legalistic notions to cope with functional disorder. Some courts employ a “presumption of continuing insanity,” other courts “presume a person to be competent,” and the usual “burden of proof” rhetoric allows courts to make decisions in this area of capacity law without coming to grips with the real problems of neurotic and psychotic behavior.

Two medical terms are generally employed to describe any malfunctioning of any person’s psychological processes: psychosis and neurosis. Psychosis denotes a serious illness in which the patient has nearly lost complete touch with reality.239 Neurosis is a less severe degree of loss of contact with reality.240 The various types of neuroses and psychoses are further broken down into organic and functional mental illness.241

Organic mental illness is caused by damage done to the brain or to the central nervous system. Organic mental disease usually begins with delirium and progresses through hallucination and forms of bizarre behavior. An organically ill patient’s mental processes are nearly always impaired, his level of awareness is inconsistent, and his memory is usually impaired. Unlike the functionally ill patient, this person is generally aware that something is wrong with him.242

237. Appendix, Table V. In 87 cases since 1885, the wills of functionally impaired testators have been probated in will contests 74.8% of the time and denied probate 25.2% of the time.

238. Id.

239. 3 C. FRANKEL, supra note 190, § 17.4a.

240. Id.

241. Id. § 17.4a & Table II, at 10-11. See also D. KRECH, R. CRUTCHFIELD, & N. LIVSON, supra note 128, at 772-84; A. WATSON, supra note 119, at 293-310.

242. See 3 C. FRANKEL, supra note 190, § 17.9. The following are the generally accepted classifications of organic illness.

(1) Arteriosclerotic psychosis. This condition arises from loss of brain tissue due to a decrease in blood supplied to the brain because of the hardening of the arteries. This
Functional mental illness, on the other hand, has no identifiable physical cause. Normally, functionally ill patients do not experience delirium and are unaware that anything is wrong with them. They are more capable of normal mental functioning, and are often less confused and disoriented, than organically ill patients. The most critical difference from organic illness is in intellectual functioning; a functional psychotic's intellect is usually not impaired. His level of awareness is consistent. His memory is generally intact. Functional mental illness is usually classified into four distinct types: schizophrenia, paranoia, manic depression, and organic psychosis.

1. Psychosis due to alcohol. This condition is similar to (1) above. It involves damage or loss of tissue resulting from chronic overuse of alcoholic beverages. It produces marked behavioral changes.
2. Psychosis due to drugs. Brain damage or shrinking of brain tissue can result from the persistent use of morphine, opium, and other narcotic and hallucinogenic drugs.
3. Psychosis due to syphilis. One of the frightening side effects of syphilis is the damage done to the central nervous system and brain tissue in the tertiary stage. This brain damage, resulting in organic impairment of muscular control (locomotor ataxia) and behavioral changes of marked and severe character, leads to another psychotic condition.
4. Psychosis due to convulsive disorders. A side effect of some forms of seizure disorders, either "psycho-motor" or "Jacksonian epilepsy," is marked behavioral change. This condition may persist after seizures and is a reflection of brain damage done by lesions which produce convulsive disorders.
5. Psychosis due to systemic infection. The most common form of this condition is the "hectic" behavior patterns once characteristic of persons in advanced stages of some varieties of tuberculosis. Through a combination of fever and cell death by hostile organisms, systemic infectious diseases can produce marked bizarre behavioral changes.
6. Psychosis due to brain trauma. Blows to the head, tumors, and wounds which penetrate the skull and actually destroy brain tissue may lead to behavioral changes in which the patient loses touch with reality.

Id. § 17.4a & Table II, at 10-11.

243. See id. § 17.4a & Table II, at 10-11.
244. Id. § 17.5. In the early 20th century, this disorder was called dementia praecox since it was thought to be a disease entity which arose in prepuberty. Schizophrenia is a severe illness characterized by delusions, hallucinations, or both, accompanied by infantile behavior patterns. These behavior patterns may include withdrawal, apathy, violent excitement, or sitting or lying in one position for hours while remaining mute. The most common type of schizophrenia is dementia simplex which is a gradual, progressive change of personality, with marked withdrawal and apathy. A second species, hebephrenic schizophrenia, is characterized by childlike behavior, peculiar mannerisms, and very disturbed speech patterns. This is the sort of illness that appears at the onset of puberty. A third type, cataleptic schizophrenia, can consist either of violent excitement, with rambling, incoherent speech, or of sitting or lying in one position for hours at a time while remaining mute. The fourth type involves delusions of persecution and is called paranoid schizophrenia.

245. Id. § 17.7. Paranoia is a distinct disease entity. The paranoiac has delu-
pressive disorder,247 and involutional disorder.248

B. Insanity in Will Contests: Dew v. Clark Rule

Unfortunately, the creaking rationalizations of the law have not caught up with the state of medical art. The law on capacity began with the notion that “idiots and persons of non-sane memory” should not make wills.249 This general statement, as elaborated in the Greenwood-Baker rule, may have at one evolutionary stage adequately handled organically impaired willmakers so long as making a will was thought to be as meaningful as making a simple contract. However, it never really dealt adequately with functional mental disorders in which the testator’s troubles did not impair his memory. A testator could be found otherwise capable of making a will, even if he would have been without criminal responsibility under the M’Naughton Rule.250 Naturally, this did not set well with English jurists, since a testator who could not tell right from wrong could still have capacity to make a will. In order to cover the problems of the fellow who knew the natural objects of his bounty, knew the nature and extent of his property, and could

247. Id. § 17.6. Manic depressive disorder is characterized by abnormal changes in mood. The illness has two phases: the manic, in which the individual becomes overactive and elated and engages in constant activities, and the depressive, which is the reverse. In the depressive stage, the patient becomes decidedly underactive, speech slows, and his mood is that of severe depression. In this stage, individuals often attempt suicide as a result of overwhelming feelings of unworthiness.

248. Id. § 17.8. This mental illness is a severe, prolonged depression occurring in men between the ages of 50 and 60 and in women between the ages of 40 and 50. It is a result of involutional (change of life) stress. It occurs most frequently in persons who are unusually clean, meticulous, and perfectionist. It is also characterized by delusions that one’s stomach has rotted away, the bowels have come out of one’s body, or one’s arms or legs have broken and fallen off. There is not a decrease in thinking as in the depressive state of manic depressive disease.

249. The notion that someone who is insane should not make a will goes back to the original Statute of Wills, 1534, 34 & 35 Hen. 7, c. 5 (1534). The term “idiot” in the 16th century probably covered both mental retardation and psychosis. “Persons of non-sane memory” seems to be a typical redundancy.

250. The M’Naughton rule has long been accepted as the test to be used for the defense of insanity. Under this rule, the accused is not criminally responsible for his actions if he did not know the nature and quality of the act he was doing or did not know that he was doing wrong at the time he committed the act. See W. LaFave & A. Scott, Criminal Law 273-74 (1972).
make a "rational" plan for disposition, but who nonetheless was as crazy as a March hare, these jurists invented the notion of the "insane delusion."

The judicial notion of "insane delusion" began with the strange case of Dew v. Clark.\textsuperscript{251} Ely Stott, the testator, was a physician by training. His first wife bore him two children, only one of whom survived infancy, a daughter named Charlotte Mary. Stott's wife died soon after the child's birth. Stott practiced electric medicine upon a large number of wealthy persons and accumulated a vast fortune. He married twice more, his third wife surviving him at his death in 1821.\textsuperscript{252}

According to much testimony given in the case, Stott developed an intense dislike for Charlotte Mary. She was packed off to boarding school as an infant. She was apparently a normal, affectionate, but somewhat lonely child.\textsuperscript{253} She was fairly well educated for the day, and later became a governess.\textsuperscript{254} Ely Stott, however, was a strict Calvinist. He had determined that Charlotte Mary, at a very young age, was sullen, evil, wicked, and vicious.\textsuperscript{255} Stott accused the child of lying without base, of being extremely depraved, immoral, and an abandoned profligate. These accusations were made of an eight- or nine-year-old girl. Stott rarely, if ever, saw Charlotte Mary, although he engaged in a letterwriting campaign to every boarding school the child attended, informing each headmistress of her evil and abandoned ways.\textsuperscript{256} He also regaled anyone who would listen with stories about his evil and depraved daughter.\textsuperscript{257}

Stott made a series of wills. Each will, including the last dated May 26, 1818, left a token bequest of about £2,000 to Charlotte Mary. Dr. Stott's remaining estate, some £40,000 in personalty alone, was divided between his nephews and friends, except for a pension for his third wife.\textsuperscript{258} In February 1821, Stott's third wife filed a lunacy process against him. He was adjudicated insane in January 1821 and remained insane until his death.\textsuperscript{259}

\textsuperscript{251} 162 Eng. Rep. 410 (Prerog. 1826).
\textsuperscript{252} Id. at 420.
\textsuperscript{253} Id.
\textsuperscript{254} Id. at 424.
\textsuperscript{255} Id. at 428-29.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 429-30.
\textsuperscript{258} Id. at 410-11.
\textsuperscript{259} Id. at 410.
When Stott's nephews attempted probate of the 1818 will, Charlotte Mary filed a caveat stating that Stott was not of sound mind when he made the will. Sir John Nicholl presided in Prerogative Court when this will contest was tried. He narrowed the issue to whether Stott was insane when he made his 1818 will. He formulated the following legal rationalization of the case:

The true criterion—the true test—of the absence or presence of insanity I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely—delusion. Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of the conception, such a patient is said to be under a delusion, in a peculiar, half-technical, sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity.

This, Sir John said, was compatible with the common notion of capacity to make a will:

It may be assumed that these authorities sufficiently fortify the Court's position, with respect to the true test or criterion of insanity, to justify it in pronouncing that, if the evidence in this cause be satisfactory to the existence of delusion in the mind of the deceased at the time of his making this will, it is also satisfactory to the existence in the mind of the deceased at that time of some degree of insanity; whether, indeed, of that degree of insanity; and whether of insanity of that kind, or rather on that subject, which should operate to defeat this will, is another question.

Sir John also dealt with the claim that there could be no such thing as a partially insane testator. He settled that debate by declaring that Lord Chief Justice Matthew Hale had already recognized the doctrine of partial insanity in criminal cases. Sir John felt free to apply the doctrine of partial insanity to a testator who

260. Id.
261. Id. at 414.
262. Id. at 415. The "authorities" cited by the court included J. LOCKE, TREATISE ON HUMAN UNDERSTANDING (1698) and F. WILLS, TREATISE ON MENTAL DERANGEMENT (1822).
made a will. The court then held the will invalid, citing the traditional Greenwood v. Greenwood rule in support of the decision.265

Dew v. Clark became part of American jurisprudence by 1890.266 Appellate decisions between 1835 and 1890 support the conclusion that partial insanity may be grounds to set aside a will, so long as the insanity runs to some factor which relates directly to the testamentary act.267 An early New York delusion case, Lathrop v. American Board of Foreign Missions,268 involved a testator who was committed to an insane asylum in New York from 1838 to 1840. Upon discharge in the latter year, he removed to Niles, Michigan. In 1866, he returned to New York and died there in 1870.269 His only living relatives were two brothers and two sisters. He made a will in March 1867, which disinherited his brothers and sisters. He believed quite erroneously that his brothers and sisters were either Masons or under the influence of the Masons and were out to do him bodily harm.270 This will was set aside. Judge E. Dawrin Smith said in affirming the denial of probate of the testator's will that, "It is quite apparent, I think, that his will was prepared, dictated and executed under the influence of these delusions, and that in this view it was an insane will, and that he was actually non compositum when it was made . . . ."271

Judge Smith relied upon American Seaman's Friend Society v. Hopper272 to set aside the will. Hopper was a bizarre and interesting New York case. Charles Hopper, the testator, died in New York City November 1, 1861. He was survived by his widow, a sister, six nephews, and a niece. Hopper's estate was valued at between $80,000 and $100,000.273 Hopper made his will four days before his death while he was very ill. It gave the bulk of his estate

266. See, e.g., Hall's Heirs v. Hall's Ex'r, 38 Ala. 131 (1861); Florey's Ex'r v. Florey, 24 Ala. 241 (1854); Mill's Appeal, 44 Conn. 484 (1877); Lucas v. Parsons, 24 Ga. 640 (1858); Barnes v. Barnes, 66 Me. 286 (1876); Stackhouse v. Horton, 15 N.J. Eq. 202 (1854); Jenckes v. Court of Probate, 2 R.I. 255 (1852).
268. 67 Barb. 590 (N.Y. 1876).
269. Id. at 592.
270. Id. at 593-94.
271. Id. at 594.
272. 33 N.Y. 619 (1865).
273. Id.
to two benevolent societies instead of his family. Evidence given upon the subsequent will contest showed that Hopper had been an active businessman up to about 1856. In that year he underwent a dramatic personality change. He began to believe that his wife and relatives were out to take over his property. He confided to his lawyer that his wife and sister had conspired to kill him. He then drove his wife out of the family home by assaaulting her and threatening to kill her. In 1859, Mrs. Hopper left her husband. Hopper persisted in his belief that his family was out to kill him. His will, of course, reflected his apprehension.\(^{274}\)

The trial court found no basis for Hopper’s belief that his family intended to murder him.\(^{275}\) Chief Justice Denio and the New York Court of Appeals affirmed the trial court, finding Hopper’s will to be the product of an unsound mind.\(^{276}\) Denio adopted the rationale of *Dew v. Clark* to explain his decision.\(^{277}\) Denio’s formulation of the insane delusion rule was:

\[
\text{If the deceased in the present case was unconsciously laboring under a delusion, as thus defined, in respect to his wife and his family connections, who would naturally have been the objects of his testamentary bounty when he executed his will or when he dictated it (if he did dictate it), and the court can see that its dispository provisions were or might have been caused or affected by the delusion, the instrument is not his will, and cannot be supported as such in a court of justice.}^{278}\]

**C. Acceptance of the Insane Delusion Rule**

The *Dew v. Clark* rule quickly wormed its way into American will contests. It became a standard alternative ground to the usual claim of lack of capacity and a typical form of alternative pleading. The actions of American courts over the past ninety or so years can be summarized rather effectively.

1. **Definition of Insane Delusion**

Judges have concocted a number of verbalizations to describe an insane delusion. Some courts, notably in Arkansas, define an

\(^{274}\) *Id.* at 622-23.  
\(^{275}\) *Id.* at 624.  
\(^{276}\) *Id.* at 635-36.  
\(^{277}\) *Id.* at 623-25.  
\(^{278}\) *Id.* at 625. In modern medical language, Hopper was probably psychotic. A skilled psychiatrist examining this case could find some basis for saying that Hopper had delusions and that he projected his own hostile feelings on others.
insane delusion as a “fixed belief in something which no rational person would believe in.” 279  Other jurisdictions call it a “mental disease in which persons believe in what they imagine as though it were real.” 280  Another popular formula says that an insane delusion is a “false and fixed belief not founded on reason and incapable of being removed by reason.” 281  All these formulations have the following common elements: If a testator is suffering from an “insane delusion,” he will (1) possess an irrational acceptance of a phenomenon as actual, when it is not actual, and (2) in contemplation of the phenomenon, will subsequently alter his testamentary plans. These concepts have been very difficult for judges and lawyers to describe and apply. An interesting number of cases have been classed as archetypal insane delusion cases. These cases generally deal with functional mental disorder as its affects one’s power to make a socially acceptable will. 282

2. “They’re Out To Get Me” Cases

This class of insane delusion cases has to do with the testator who believes that one or more persons are out to harm him by taking his property, or by doing him physical injury. The testator in these cases shows symptoms of paranoid schizophrenia or paranoia. The testator behaves rationally, except for the delusion, and generally disinherits the persons he believes to be his enemies. American Seaman’s Friend Society v. Hopper, analyzed in the preceding section, was this sort of case. According to empirical survey of appellate decisions since 1885, the will of such a testator has a seventy-five percent chance of admission to probate. 283  This


280. See, e.g., In re Cook’s Estate, 63 Ariz. 78, 89, 159 P.2d 797, 802 (1945); Brumbelow v. Hopkins, 197 Ga. 247, 250, 29 S.E. 42, 44-45 (1942); Trustees of Epworth Memorial M.E. Church v. Overman, 195 Ky. 773, 776, 215 S.W. 942, 944 (1919); Robinson v. Adams, 62 Me. 369, 370 (1870); Boardman v. Woodman, 47 N.H. 120, 139 (1865); Middleditch v. Williams, 45 N.J. Eq. 726, 733, 17 A. 826, 828-29 (1889); In re While, 121 N.Y. 406, 413-14, 24 N.E. 935, 936 (1890); Potter v. Jones, 20 Or. 239, 247-48, 25 P. 764, 771-72 (1891); In re Hensens’s Estate, 52 Utah 554, 568, 177 P. 982, 987 (1918); In re McGovern’s Will, 241 Wis. 99, N.W.2d 717, 720-21 (1942).


282. See Appendix, Table IV.

283. See Appendix, Table V(6). For representative cases, see Mosser v. Mosser, 32 Ala. 551 (1858); In re Lingenfelter’s Estate, 38 Cal. 2d 571, 241 P.2d 990 (1952);
result follows from the rationalistic, voluntaristic approach to deciding will contests embodied in the Greenwood-Baker rule. The following is an examination of some representative cases of this type.

Benjamin F. Tyler, the testator in Maynard v. Tyler, died February 10, 1895, at the age of seventy-two. He was survived by his widow, Annie Simonds Tyler, and three children by a previous marriage, Marie Tyler, Emeline B. Maynard, and John Tyler. Tyler had married Annie Simonds, thirty-five years his junior, after living with her for about a year. Tyler, a heavy drinker, had picked her up in a Boston hotel during one of his sprees. His children disapproved of his exploits with Simonds. After his 1893 marriage, Tyler avoided his children and eventually cut them all out of his will, leaving his property to Annie. The evidence at trial showed the children disapproved of their parent’s hasty marriage. The only evidence of delusional conduct on Tyler’s part had to do with his hard drinking and incoherent speech. Tyler’s will was probated over the objections of the disinherited children. The Massachusetts Supreme Judicial Court sustained the will and found it not to be the product of an insane delusion respecting the three Tyler children. This illustrates the kind of disinheriting will structure in which family antipathy between a testator and the natural objects of his bounty appears to the court to have a “rational” basis.

In Salter v. Ely, Joseph J. Ely’s will, executed November 10, 1893 with an August 15, 1895 codicil, was offered for probate on his death in 1896. Ely had four children, Stephen, Addison, Catherine, and Matilda. After his first wife’s death in 1872, he had moved in with Stephen. Ely lived with Stephen until his death, even after his remarriage in 1886. In 1880, Ely had fallen and cut himself, eventually coming down with blood poisoning. He was physically feeble thereafter, but was active mentally and certainly had the rudiments of testamentary capacity when he made his will. Ely’s will split his estate between his sons and disinherited

In re Ruffino’s Estate, 116 Cal. 304, 48 P. 127 (1897); Appeal of Kimberley, 68 Conn. 428, 36 A. 847 (1896); Shorb v. Brubaker, 94 Ind. 165 (1883); Maynard v. Tyler, 168 Mass. 107, 46 N.E. 413 (1897); Salters v. Ely, 56 N.J. Eq. 357, 39 A. 365 (1898); In re White’s Will, 121 N.Y. 406, 24 N.E. 935 (1890); Coit v. Patchen, 77 N.Y. 533 (1879); Martin v. Tahyer, 37 W. Va. 38, 16 S.E. 489 (1892).

284. 168 Mass. 107, 46 N.E. 413 (1897).
285. Id. at 108, 46 N.E. at 414.
286. Id. at 115-16, 46 N.E. at 414-15.
287. 56 N.J. Eq. 357, 39 A. 365 (1898).
288. Id. at 359, 39 A. at 366.
289. Id.
his daughters. The daughters filed objections to probate, which were denied. There was no evidence showing Ely had any convictions about his daughters, but there was some evidence showing that the two women disliked their stepmother. The New Jersey Chancellor sustained probate of Ely’s will, despite “insane delusion” objections from the outraged Ely girls. This, too, appears to be the kind of case in which “insane delusion” is dragged in as a makeweight argument, rather than a correct recapitulation of the testator’s behavior.

*In re Lingenfelter’s Estate* presented a grimmer pattern. Vivian Lingenfelter, the testator, was married to Homer Lingenfelter, an attorney who was in partnership with one Arthur Powell. Homer contracted terminal cancer. During his final illness, Vivian made a holographic will cutting out her brothers from her estate. She showed it to Powell. The holograph left her estate to Madge Tucker, Homer’s sister. In explaining the devise, she told Powell, “They are only my in laws but they have always helped Homer and myself when we have needed them most and they have done more for me than my own family ever has.” Vivian also accused one brother of unfairly receiving Vivian’s share of her mother’s estate. This accusation had no rational foundation. Vivian had Powell transcribe her holograph, executed the will formally in the firm’s offices, and then committed suicide. A number of witnesses at trial described Vivian Lingenfelter as highly emotional and unstable. She was jealous of Homer and unjustly accused him of infidelity. Her physician described her as “an advanced psycho-neurotic and a borderline case between sanity and insanity in the medical sense.”

Objections to probate of the will were filed by Homer’s legal secretary, Mrs. De Armond. She alleged Homer had made oral representations to her that she would be taken care of in his and

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290. Id. at 364, 39 A. at 368.
292. Id. at 575, 241 P.2d at 993.
293. Id. at 575-76, 241 P.2d at 993-94.
294. Id. at 575, 241 P.2d at 994. When emotionally disturbed, she would abuse any person who did not entertain her political opinions about Franco, Stalin, and the stability of the United States and world economy.
295. Id. at 576, 241 P.2d at 997. There was also testimony that Homer Lingenfelter was convinced that Madge Tucker and her husband were out to get their hands on the Lingenfelter money. Homer Lingenfelter violently disliked his sister and her husband.
Vivian’s wills for long and faithful services.\textsuperscript{296} Just how Mrs. De Armond had standing to attack Vivian’s will does not appear from the case report. Mrs. De Armond contended that Vivian suffered from insanity or an insane delusion. The trial court ordered the will probated, and the California Supreme Court affirmed the trial court decision. In doing so, the supreme court seemed to ignore Vivian’s basic responses to reality:

The fact that Vivian committed suicide is relevant upon the question of sanity, but standing alone it is insufficient to show an insanity so complete as to destroy testamentary capacity . . .

Likewise, there is no evidence that Vivian suffered from an insane delusion which influenced her will. Unquestionably she was extremely jealous of, and very much in love with, Homer . . . [b]ut this jealousy has not been connected with Vivian’s testamentary disposition in any way. Moreover, her jealousy was not a delusion, for it was based upon conduct which had a tendency to create her momentary beliefs.\textsuperscript{297}

The supreme court did not pursue her antagonism to her brothers and its possible influence on her disposition. If it had, it might have considered the combination of circumstances surrounding the making of Vivian Lingenfelter’s will to be sufficient to set it aside. Again, the real issues of defective motivation and impaired recall were neither discussed, nor resolved.

Finally, the classic program reappears in a case like \textit{Dumas v. Dumas}.\textsuperscript{298} Wray Dumas died in October 1975, when he was sixty-seven. He had divorced his wife of forty-six years in 1974. Dumas was apparently a solid citizen until 1957. In that year he had an affair with another woman and came to believe that people in his church knew about his affair and were watching him. He then took to drink. In 1969, Wray’s daughter, Cecile, filed a process to have him committed to the state mental hospital. He was diagnosed at that time as an involutional paranoid, who was, in the opinion of the staff psychiatrist at the Arkansas State Hospital, unable to relate to reality and suffering from delusions of persecution.\textsuperscript{299} Wray, after divorcing his wife, made out a deed of gift and a will in favor of his brother, disinheriting his daughter who later filed objections

\textsuperscript{296} \textit{Id.} at 578-79, 241 P.2d at 995.
\textsuperscript{297} \textit{Id.} at 581-82, 241 P.2d at 997 (citation omitted).
\textsuperscript{298} 547 S.W.2d 417 (Ark. 1977).
\textsuperscript{299} \textit{Id.} at 418.
to probate of his will. Evidence at trial showed that Dumas was obsessed by his delusion that the people in his church were "out to get him," and when his wife and daughter refused to stop going to church, he singled them out for retribution as part of the conspiracy against him. The trial court voided both the will and the deed of gift. The Arkansas Supreme Court sustained the trial court.

These four cases show the range of the classical application of *Dew v. Clark*. In each instance, someone thought the deceased testator had mental problems. In each case, the principal attack was along the line of *Dew v. Clark*, trying to mold the facts of the case into the iron maiden of an "insane delusion." Two of the cases were pretty clearly decided in an acceptable way. Two were pretty clearly off the mark. The poor sot in *Maynard v. Tyler* appeared to have been exploited and bamboozled by his mistress. If he in fact was psychotic as a result of alcoholism, his will ought not to have been probated. Vivian Lingenfelter exhibited many of the signs of involutional psychosis. During a period of extreme stress arising from her husband's terminal illness she made a disinheriting will. If the will was the result of her condition, then it ought not to have been probated, whether or not it fitted the scheme of *Dew v. Clark*.

3. The "Crank" Cases

One of the more shameful exploitations of the "insane delusion" principle, the case of the harmless crank's will, concerns persons who entertain socially unacceptable philosophical, religious, or political views. For example, any number of persons believe they can, and do, communicate with dead people through the use of a medium. For many years, the wills of spiritualists have been the focus of attack on the ground that belief in spiritualism was an "insane delusion." Those people who believe in witchcraft can ex-

300. *Id.* at 417-18.
301. *Id.* at 419.
pect their wills to be challenged, as can those who claim to have received direct divine revelation. Faith healers and charismatics, too, can expect their survivors to war over their estate on the ground that they had an “insane delusion.” None of these opinions or beliefs relates to the Greenwood-Baker rule of capacity. Therefore, the wills of cranks would normally be probated. These people are probably not psychotic and may not be mentally ill at all. However, their wills are often viciously attacked by disappointed relatives. The following cases are typical “crank” decisions.

In Owen v. Crumbaugh, the testator died April 3, 1905, at age eighty-three. He was survived by his widow, Elizabeth. He had no living children or descendants. Crumbaugh’s will placed most of his real and personal property in trust for his wife for life, and at her death, the rents and profits and proceeds of sale, if necessary, were to be applied to building a spiritualist church and a public library in the town of Leroy, Illinois. After making the devise in trust, the will contained the following statement:

(12) Twelfth—Now, be it understood that I do hope it will never be questioned but that I have been in my right mind and natural mind in the making of this my last will and testament, and I have not been influenced by any person or spirits, but have only made same after many weeks of study, thought and consideration. As before expressed, I have talked and conversed freely with my dear wife, and she heartily approves and with me desires such a bequest as I have made . . . . Our property has all

(1907); McClary v. Stull, 44 Neb. 175, 62 N.W. 501 (1895); Middleditch v. Williams, 45 N.J. Eq. 726, 17 A. 826 (1889); In re Rohe’s Will, 50 N.Y.S. 392 (Sur. Ct. 1898); General Convention v. Crocker, 7 Ohio C.C. 327 (1893); In re Murray’s Estate, 173 Or. 209, 144 P.2d 1016 (1944); Buchanan v. Pierie, 205 Pa. 123, 54 A. 583 (1903); Irwin v. Lattin, 29 S.D. 1, 135 N.W. 759 (1912); In re Hanson’s Estate, 87 Wash. 113, 151 P. 264 (1915); In re Sieb’s Estate, 70 Wash. 374, 126 P. 912 (1912); In re Smith’s Will, 52 Wis. 543, 8 N.W. 616 (1881); Chafin Will Case, 32 Wis. 557 (1873).

303. Carnahan v. Hamilton, 265 Ill. 508, 107 N.E. 210 (1914); Addington v. Wilson, 5 Ind. 137 (1854); Schildnicht v. Rompf, 9 K.L.R. 120, 4 S.W. 235 (1887); Kelly v. Miller, 39 Miss. 17 (1860); Fullbright v. Perry Co., 145 Mo. 432, 46 S.W. 955 (1898); Van Guysling v. Van Kuren, 35 N.Y. 70 (1866).


305. Spencer v. Spencer, 221 S.W. 58 (Mo. 1920); In re Tritch’s Will, 165 Pa. 586, 30 A. 1053 (1895).

306. 228 Ill. 380, 81 N.E. 1044 (1907).

307. Id. at 384, 81 N.E. at 1045. He owned 1033 acres of farm land in eastern McLean County, Illinois, and his estate was estimated to be worth about $250,000.

308. Id. at 385-86, 81 N.E. at 1045-46.
been made by us in our efforts to save and apply, and the clos­ing joy of my life is the ability of my wife and I to leave some­thing of a permanent nature that will always be a monument in Leroy to the memory of my dear wife and I. . . .309

Crumbaugh’s disinherited nieces and nephews attacked his will on the ground of lack of capacity and insane delusion.310 The evidence showed that Crumbaugh had become a convert to spiritualism five or six years prior to his death. Crumbaugh had traveled extensively in order to attend spiritualist meetings. Once he brought home from a seance a picture of his son, who had died thirty years earlier in childhood. The picture showed him as a grown man.311 According to Crumbaugh, his son was called “Bright Eyes” in the spirit land, and “Bright Eyes” was Crumbaugh’s spirit guide who would keep him from harm. Crumbaugh insisted that “Bright Eyes” sometimes came to his room and bade him good night. He attributed a close escape from injury while dynamiting tree stumps to “Bright Eyes’” intervention.312 Outside of his spiritualistic persuasion, Crumbaugh came across as a hard-driving midwestern farmer-banker.313 The trial court set aside the will. The Illinois Supreme Court reversed.314 The court, relying on the somewhat earlier case of Whipple v. Eddy,315 held that a belief in spiritualism was not sufficient grounds to set aside a will.316 The court discussed the tenets of spiritualism and a long hypothetical question put to an expert alienist who concluded anyone who believed in spiritualism was insane.317 The court said that the trial court should have directed a verdict for the proponent and not have allowed the case to go to the jury.318

309. Id. at 391, 81 N.E. at 1047.
310. Id. at 391-92, 81 N.E. at 1048. The trustees of the will were members of the Spiritualist Movement in Bloomington, Illinois. During the course of the protracted trial, 24 lay witnesses and 8 physicians testified.
311. Id. at 394, 81 N.E. at 1049.
312. Id. at 395, 81 N.E. at 1049.
313. Id. at 397, 81 N.E. at 1049-50.
314. Id. at 414, 81 N.E. at 1056.
315. 161 Ill. 114, 43 N.E. 789 (1896).
316. 228 Ill. at 407-08, 81 N.E. at 1053.
317. Id. at 408, 81 N.E. at 1053.
318. Id. at 413-14, 81 N.E. at 1055-56. On remand, the bill was dismissed by the trial court. The supreme court reversed and remanded for trial. Crumbaugh v. Owen, 232 Ill. 191, 83 N.E. 803 (1908). Later, the case was retried by the circuit court, resulting in a jury verdict for the contestant. The supreme court, this time, reversed without remand and ordered judgment for the proponent. Crumbaugh v. Owen, 238 Ill. 497, 87 N.E. 312 (1909).
In *Middleditch v. Williams*, William H. Livingston made a will on January 11, 1887, and died on February 4, 1888. He was survived by his daughter, Lillian, and his mother-in-law, Marie Williams. Livingston's will left his estate to his mother-in-law, in trust for his daughter, to pay income to her until she reached age twenty-five or married. Then, after making provisions for a gift to his mother-in-law and her son, the trust principal would be paid to his daughter, Lillian. If Lillian did not survive him, Marie Williams or her son would take the estate. Livingston's blood relatives filed objections to probate. The evidence at trial showed Livingston to be quite ordinary, except for his belief that he could communicate with spirits. Livingston resorted to mediums. When he was thinking about making a will, he asked a New York City medium to contact his wife. The medium told Livingston that his wife wanted him to put something in his will for her mother.

The New Jersey Chancellor, citing *Banks v. Goodfellow* and *Dew v. Clark*, concluded that belief in spiritualism and in the power of mediums to communicate with the dead was not an insane delusion. He offered no opinion on whether or not the medium or Livingston's dead wife engaged in unduly influencing Livingston's will.

In the two cases which have been analyzed, the testator's behavior was pretty clearly in touch with reality. In each case disappointed family members filed objections to probate, alleging that the decedent's will was the product of an "insane delusion." Neither testator can be labeled "psychotic" according to modern medical terminology. Neither testator showed the memory loss, delirium, or hallucinations which characterize organic senile psychosis. Neither testator showed such a divorce from reality to classify them as functionally psychotic. Eventually, both wills were probated after long, expensive jury trials. Objections to probate in each instance should have been dismissed as a matter of law since the beliefs were clearly not "insane delusions" under the *Dew v. Clark* formulation.

The insane delusion formula adds nothing to the *Greenwood-Baker* test for capacity except a further verbal formula which may

319. 45 N.J. Eq. 726, 17 A. 826 (1889).
320. *Id.* at 728, 17 A. at 827.
321. *Id.* at 729, 17 A. at 827.
322. *Id.* at 730, 17 A. at 828.
323. *Id.* at 731, 17 A. at 828.
325. 45 N.J. Eq. at 735-36, 17 A. at 830.
be used to instruct and thus confuse the jury on the real issues of the case. The usual way that this occurs is by giving a general instruction on the Greenwood-Baker rule of capacity, followed by an instruction which in substance says that if you assume that the testator had capacity, you may still find his will to be invalid if you find that it was the product of an insane delusion. Since delusional states characterize a wide variety of organic and functional mental illness, the "insane delusion" rule erroneously focuses on only a symptom for an underlying disease. The rule attempts to build a legal prohibition against only the symptom, without attempting to understand the illness itself. This formulation may actually be unnecessary since the "insane delusion" rule's technical meaning is already included within the first and third elements of the Greenwood-Baker rule. 326

The Greenwood-Baker rule and the insane delusion rule cannot be understood completely, however, without an understanding of the problems of burden of proof and relevancy particularly occurring in will contests. In the following section, a brief examination of burden of proof and relevancy will establish a further basis for evaluating the present state of the law of testamentary capacity.

V. THE MECHANICS OF DISPROVING TESTAMENTARY CAPACITY

So far, this article has examined the structural law of testamentary capacity. It should be apparent that the substantive law of capacity is not the sole reason for the outcome of will contests. Three additional factors must be explored. First, one needs to know what kind of evidence will be admissible in a jury trial will contest relating to testamentary capacity. Second, one must know who has the burden of proof on the issue of testamentary capacity. Finally, there are several presumptions used in will contests which affect the outcome. The following is an examination of evidence admissible in will contests on the issue of capacity.

A. Evidence Showing Lack of Capacity

Over the past nine decades, the courts have stubbornly insisted that the crucial time to review testamentary capacity is the moment the testator executes his will. 327 This insistence ignores

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326. See text following note 97 supra.
327. See, e.g., the following cases:
Alabama: Burke v. Thomas, 282 Ala. 412, 417, 211 So. 2d 903, 908 (1968);
California: In re Martin's Estate, 270 Cal. App. 2d 506, 509, 75 Cal. Rptr. 911,

Colorado: In re Gardner's Estate, 31 Colo. App. 361, 366, 505 P.2d 50, 52 (1972);

Florida: In re Coles's Estate, 205 So. 2d 554, 554 (Fla. Dist. Ct. App. 1968);


Illinois: Trojcak v. Hafliger, 7 Ill. App. 3d 495, 499, 288 N.E.2d 82, 85 (1972);

Iowa: In re Corey's Estate, 169 N.W.2d 837, 842 (Iowa 1969);

Kansas: In re Barnes' Estate, 218 Kan. 275, 281, 543 P.2d 1004, 1009 (1975); In re Perkins' Estate, 210 Kan. 619, 627, 504 P.2d 564, 570 (1972); In re Bernatzki's Estate, 204 Kan. 131, 134, 460 P.2d 527, 529-30 (1969);

Louisiana: Succession of Bush, 292 So. 2d 915, 917 (La. Ct. App. 1974); Succession of Brown, 251 So. 2d 465, 467 (La. Ct. App. 1971);

Maine: In re Leonard, 321 A.2d 486, 489 (Me. 1974);

Maryland: Webster v. Lormar, 268 Md. 153, 158, 299 A.2d 814, 816 (1973);

Michigan: In re Getchell's Estate, 295 Mich. 681, 686, 295 N.W. 360, 362 (1940); In re Rowling's Estate, 291 Mich. 218, 224, 289 N.W. 136, 139 (1939);

Nebraska: In re O'Donnell's Estate, 158 Neb. 583, 586, 64 N.W.2d 116, 119 (1954); In re Fehrenkamp's Estate, 154 Neb. 488, 497, 48 N.W.2d 421, 427 (1951); In re Inda's Estate, 146 Neb. 179, 184, 19 N.W.2d 427, 43 (1945);

New Jersey: In re Livingston's Estate, 5 N.J. Eq. 65, 76, 73 A.2d 816, 816 (1947), aff'd per curiam, 141 N.J. Eq. 362, 57 A.2d 387 (1948);


North Dakota: In re Elmer's Estate, 210 N.W.2d 815, 819 (N.D. 1973); Stormon v. Weiss, 65 N.W.2d 475, 483 (N.D. 1954);

Oklahoma: In re Samochee's Estate, 542 P.2d 498, 502 (Okla. 1975) (Indian will); In re Bennight's Estate, 503 P.2d 203, 207 (Okla. 1972); In re Lacy's Estate, 431 P.2d 366, 368 (Okla. 1967) (per curiam); In re Fletcher's Estate, 269 P.2d 349, 353 (Okla. 1954);


Pennsylvania: In re Clark's Estate, 461 Pa. 52, 64, 334 A.2d 628, 634 (1975); In re Skrtic's Estate, 379 Pa. 95, 100, 108 A.2d 750, 752 (1954); Williams v. McCarroll, 374 Pa. 281, 293, 97 A.2d 14, 19-20 (1953); In re Higbee's Estate, 365 Pa. 381, 384, 75 A.2d 599, 601 (1950); Farmers Trust Co. v. Wilson, 361 Pa. 43, 46, 63 A.2d 14, 16-17 (1949) (ejectment);

South Carolina: Matheson v. Matheson, 125 S.C. 165, 170-71, 118 S.E. 312, 313 (1923);

the process of schema recall and of motivational factors which pre­
date actual execution by a considerable period of time.\textsuperscript{328} It also
ignores the process of communicating the testator’s post-death pro­
gram to an attorney, its reduction to “legal” terms, and the
modification of the “legal” version by the testator. Clearly, the
principle of focusing only on the actual moment of execution de­
veloped because that is the point of no return. Once the will is
signed it cannot be called back without some form of legally ac­
ceptable revocation. Such an hypothesis, however, is overly ration­
alistic. It ignores the process of developing a will and concentrates
only on a “doormouse view” of the physical act of making a will.
With this in mind, an examination of the kinds of evidence admis­
sible in a will contest will make some sense.

1. Acts and Conduct of the Testator

What the testator did and did not do during his life, relevant
to the making of his will in point of time, may be admitted to show
competency or its absence. Wigmore says that “the first and fun­
damental rule then, will be that any and all conduct of the person
is admissible in evidence. There is no restriction as to the kind of
conduct. There can be none. . . .”\textsuperscript{329} The limitation on oral evi­
dence describing the testator’s actions prior to the making of his
will is that the acts must not be too remote from the date of execu­
tion of the will. This limitation is questionable considering that
some testamentary schemes arise many years before a willmaker
puts them into a will. Acts and conduct of the testator clearly in­
clude statements made by the deceased willmaker. Such state­
ments are admissible as an exception to the hearsay prohibition\textsuperscript{330}
if they are not too remote from the triumphal moment when the
will is signed.\textsuperscript{331}

\textsuperscript{934} (Tex. Ct. App. 1967); Venner v. Layton, 244 S.W.2d 852, 856 (Tex. Ct. App.
1952); Bell v. Bell, 237 S.W.2d 688, 690 (Tex. Ct. App. 1951);
\textit{West Virginia:} Prichard v. Prichard, 135 W. Va. 767, 777, 65 S.E.2d 65, 71 (1951);
Martin v. Thayer, 37 W. Va. 38, 52, 16 S.E. 489, 494 (1892);
\textit{Wisconsin:} \textit{In re} Ruden’s Estate, 55 Wis. 2d 365, 372, 198 N.W.2d 583, 585
(1972); \textit{In re} Klagstad’s Estate, 264 Wis. 269, 271, 58 N.W.2d, 636, 637 (1953);
\textsuperscript{328} See text accompanying notes 114-41 supra.
\textsuperscript{329} 2 J. WIGMORE, EVIDENCE § 228 (3d ed. 1940).
\textsuperscript{330} 6 J. WIGMORE, supra note 329, § 1789.
\textsuperscript{331} See, e.g., Waterman v. Whitney, 11 N.Y. 157 (1854).
Similarly, the "verbal acts" of the testator, though hearsay, may be admitted into evidence, with the usual qualification about remoteness. Such "verbal acts" include walking, imbecility, lack of coordination, suffering from Parkinson's disease, palsy, or the like. It is hard to see how these "statements" can even be considered hearsay in the first place, but a number of courts have concluded that they are, yet are nonetheless admissible.

2. Former Wills of the Testator

The court and jury in a will contest are permitted to see and to compare older wills made by the testator with the will offered for probate. The leading case authorizing admission of former wills is Embery v. Beaver, an Indiana case decided in 1922. In that case, an earlier will not offered for probate was admitted into evidence over a hearsay objection. The trial court was sustained on its decision to admit the old will. The Indiana Supreme Court stated, "The acts and declarations and previous wills and codicils of the testator are competent evidence to be considered on the question of soundness of mind, and constitute an exception to the hearsay rule. . . ."

3. Internal Evidence from the Document Attacked

Without doubt, the purported will itself is a key item of evidence in a will contest. First, it may show on its face that the testator lacked any rational plan for disposing of his property. Second, if it is "unnatural" because it disinherits one or more blood relations, it tends to show the testator was behaving unreasonably when he made the will. It may also be altered or marked to

333. See, e.g., Minturn v. Conception Abbey, 227 Mo. App. 1179, 1195, 61 S.W.2d 352, 360 (1933).
334. See, e.g., In re Teed’s Estate, 112 Cal. App. 2d 638, 643, 247 P.2d 54, 57 (1952); In re Loomis’ Will, 133 Me. 81, 84, 174 A. 38, 40 (1934); In re Forsythe’s Estate, 221 Minn. 303, 313, 22 N.W.2d 19, 25 (1946); In re Frank’s Will, 231 N.C. 252, 257, 56 S.E.2d 668, 672-73 (1949), rehearing denied, 57 S.E.2d 315 (1950); Brown v. Mitchell, 87 Tex. 140, 141, 26 S.W. 1059, 1060 (1894); Redford v. Booker, 166 Va. 561, 582, 185 S.E. 879, 888 (1936).
335. 192 Ind. 471, 137 N.E. 55 (1922).
336. Id. at 473, 137 N.E. at 56.
337. See, e.g., In re Sturdevant’s Appeal, 71 Conn. 392, 397, 42 A. 70, 72 (1899); Slaughter v. Heath, 127 Ga. 747, 755, 57 S.E. 69, 73 (1907); In re Lunder’s Estate, 74 Idaho 448, 451, 263 P.2d 1002, 1004 (1953); Ergang v. Anderson, 378 Ill. 312, 317, 38 N.E.2d 26, 28-29 (1941); Heseman v. Vogt, 181 Ill. 400, 407, 55 N.E. 151, 154 (1899); In re Alexander’s Estate, 216 Miss. 26, 33-34, 61 So. 2d 683, 687 (1952).
indicate a lack of comprehension of the testamentary act. Clearly it is a useful and relevant item of evidence.

4. *Lay Witnesses' Opinions on Capacity*

There are two kinds of lay witnesses whose opinions are solicited in court on the issue of capacity: subscribing witnesses to the will, and all other kinds of witnesses. In some instances, special rules apply to subscribing witnesses which do not apply to ordinary lay witnesses.

In Illinois, subscribing witnesses are required to testify on whether the testator was of sound mind when he made his will. A number of states attach great importance to the testimony of subscribing witnesses because they actually observed the testator execute his will, and the courts attach much magical significance to the behavior of the testator at the precise moment of signing. Since subscribing witnesses to a will seldom have any intimate acquaintance with a testator before signing time, their judgment on


339. Those states which indicate that the testimony of subscribing witnesses will have greater weight than that of ordinary laypersons include the following: 
*Connecticut*: Wheat v. Wheat, 156 Conn. 575, 584, 244 A.2d 359, 364 (1958); 
*Illinois*: Lewis v. Deamude, 376 Ill. 219, 221, 33 N.E.2d 440, 442 (1941); 
*Maine*: *In re* Leonard, 321 A.2d 486, 489 (Me. 1974); 
*New Jersey*: *In re* Delaney's Estate, 131 N.J. Eq. 454, 455, 25 A.2d 901, 902 (1942); 
*North Carolina*: *In re* Couble's Will, 272 N.C. 706, 709, 158 S.E.2d 796, 798 (1968); 
*North Dakota*: Stormon v. Weiss, 65 N.W.2d 475, 501-03 (N.D. 1954); 
*Pennsylvania*: *In re* Olshefski's Estate, 337 Pa. 420, 423-24, 11 A.2d 487, 489 (1940); 
*Texas*: Lee v. Lee, 424 S.W.2d 609, 610-11 (Tex. 1968); 
*Virginia*: Tate v. Chumbley, 190 Va. 480, 501-02, 52 S.E.2d 151, 161 (1950); 
*Washington*: *In re* Mitchell's Estate, 41 Wash. 2d 326, 342, 249 P.2d 385, 395 (1952); 
*West Virginia*: Prichard v. Prichard, 135 W. Va. 767, 772-73, 65 S.E.2d 65, 68-69 (1951); Martin v. Thayer, 37 W. Va. 38, 53, 16 S.E. 489, 494 (1892); 
that person's capacity is bound to be limited in scope and worth. Nonetheless, it receives great weight, particularly when the attesting witness is the testator's lawyer.\footnote{340}

It is also clear that the opinion of any lay person based on personal observation of the testator may be admissible, if the period of observation is reasonably close to the time of willmaking.\footnote{341} There is some rhetorical conflict between the states on whether the lay witness must first give the facts upon which he based his opinion. The majority of states that have considered this issue hold that the witness ought first to restate the facts on which his observation rests.\footnote{342}

The usual will contest consists of a parade of lay witnesses, the attorney for the testator, and his secretary, all of whom testify to the testator's apparent capacity. The probative value of such opinion evidence is not clear. The observations and characterizations of the witnesses are probably much more valuable as grist for expert evidence than as the bare recitation of opinion.

5. Expert Witnesses

Following the parade of lay witnesses, it is customary in will contests for both sides to offer one or more hired medical or psychological witnesses to pontificate on the mental condition of

\footnote{340}{\textit{See, e.g.}, \textit{In re} Fordyee's Estate, 130 Ill. App. 2d 755, 757, 265 N.E.2d 886, 887 (1971); \textit{In re} Bennight's Estate, 503 P.2d 203, 205 (Okla. 1972); \textit{In re} Szperka's Will, 254 Wis. 153, 158, 35 N.W.2d 209, 211 (1948), \textit{vacated on other grounds}, 35 N.W.2d 911 (1949); \textit{In re} Scherrer’s Estate, 242 Wis. 211, 224, 7 N.W.2d 848, 853 (1943).

\footnote{341}{Dean Wigmore treated this as beyond argument. 7 J. \textit{WIGMORE}, supra note 329, §§ 1933-1939. In general, layperson’s opinions are today everywhere conceded to be admissible, but are subject to broad qualifications and quibbles. \textit{Id}.

\footnote{342}{\textit{See, e.g.}, \textit{Wear v. Wear}, 200 Ala. 345, 349-50, 76 So. 111, 115-16 (1916); \textit{In re} Rich's Estate, 79 Cal. App. 2d 22, 25-27, 179 P.2d 373, 375 (1947) (form of question); \textit{Espy v. Preston}, 199 Ga. 608, 609, 34 S.E.2d 705, 715 (1945); \textit{Trojca v. Haffliger}, 7 Ill. App. 3d 495, 500-01, 288 N.E.2d 82, 86 (1972); \textit{Swygart v. Willard}, 166 Ind. 25, 30, 76 N.E. 755, 758 (1906); \textit{In re} Heller’s Estate, 233 Iowa 1356, 1362, 11 N.W.2d 586, 590 (1945); \textit{In re} Prine's Estate, 208 So. 2d 187, 190 (Miss. 1968); \textit{Lee v. Ullery}, 346 Mo. 236, 244-47, 140 S.W.2d 5, 9-11 (1940); \textit{Williford v. Masten}, 521 S.W.2d 878, 884-85 (Tex. Ct. App. 1975). \textit{See also} \textit{In re} Powers' Estate, 375 Mich. 150, 168-69, 134 N.W.2d 148, 157-58 (1965), in which testimony relating to an opinion on capacity, which showed the witness did not comprehend the nature of testamentary capacity under the \textit{Greenwood-Baker} rule, was stricken as irrelevant. This limitation seems to be much too strict in view of the universal requirement—save for Illinois’ attesting witnesses—that lay opinion be premised on actual observations which are related by the lay witness to the trier of fact prior to the witness’s rendition of an opinion.}
the testator. The usual vehicle for eliciting this evidence is the hypothetical question, except in those instances where the deceased testator’s attending physician is permitted to testify. Such testimony is admissible, subject to the usual warning relating to assumptions of “facts not in evidence” by the expert.\footnote{343}

Unfortunately, expert testimony in will contests tends to be discounted. Many courts have adopted the view that such testimony has little probative value unless it originates from the testator’s attending physician.\footnote{344} An illustration of this discounting process, \textit{In re Powers’ Estate},\footnote{345} seems to make little sense to anyone not involved in the litigation. Lunette Powers, the testator, was a physician. She never married. In 1919 she met Loretta Rogoski who became her companion and intimate friend. Loretta’s husband was a lawyer.\footnote{346} In December 1955, Dr. Powers had Attorney Rogoski draw up a will which disinherited her blood relatives and left the bulk of her estate to Loretta Rogoski.\footnote{347} Upon Dr. Powers’ death, the 1955 will, with two later codicils of December 22, 1955 and November 14, 1956, was offered for probate. Dr. Powers’ blood relatives filed objections. The case was tried twice and appealed three times.\footnote{348} The evidence at both trials showed that Dr. Powers’ sight began to fail in 1951. In 1955 she had a slight stroke, and gradually deteriorated mentally until she was confined to the Traverse City State Hospital as a senile psychotic.\footnote{349} Her narcotics license was terminated in June 1956. Her professional associates testified at length about her unprofessional and incompetent behavior in 1955 and 1956.\footnote{350} The contestants had re-

\footnote{343. 6 J. Wigmore, \textit{supra} note 329, §§ 1917-1919.}
\footnote{345. 375 Mich. 150, 134 N.W.2d 148 (1963).}
\footnote{346. Id. at 156, 134 N.W.2d at 151.}
\footnote{347. Id.}
\footnote{349. 375 Mich. at 165-66, 134 N.W.2d at 156.}
\footnote{350. Id.}
tained Dr. Andrew S. Watson, a psychiatrist, as an expert. The lawyer for the contestant attempted to broach the subject of undue influence by discussing the relation between attorney and client. The trial judge allowed Dr. Watson to spend a great deal of time discussing transference phenomena relating to the lawyer-client relationship. The result was that Dr. Powers' will was broken. The Michigan Supreme Court reversed the trial court, precisely because it had permitted Watson to talk about the real issue. The commentary of the Michigan Supreme Court is worth remembering for a long time:

The function of the expert witness is to supply expert testimony. This includes, where proper foundation is laid, opinion evidence. This opinion evidence may even embrace ultimate issues of fact.

What the opinion of an expert does not yet extend to is the creation of new legal definitions and standards, and legal conclusions. Nor does it extend to the creation of a new legal definition of a will, nor a new legal standard for testamentary capacity. There must be some point, objection or no, at which a court sua sponte is obligated to say judicial determination is still something more than choosing between conflicting theories of expertise. That point was reached in this case.

In short, the training of the psychiatrist and behavioral scientist does not satisfy the limitations imposed on litigants in court.

B. Burden of Proof on Issue of Capacity

As usual in this sort of problem, lawyers try to take refuge in the concepts of burden of proof and such presumptions as are available to litigants. Will contests are highly emotional dramas involving the litigant's notions of death, property, and lawyers. The conflicts raised by attempting to break a family member's will may be very hard to deal with up front. Thus, lawyers are apt to use rationalizations to defend against the existential terror liberated by a will contest. There are two such rationalizations normally employed; the burden of proof and the presumption.

351. Id.
352. Id. at 170-71, 134 N.W.2d at 158-59.
353. Id. at 172-73, 134 N.W.2d at 159-60.
1. **Burden of Proof**

Essentially, the jurisdictions line up on two sides. The majority of states have determined that once the proponent proves the will was duly executed, the burden of going forward with the evidence, and the risk of non-persuasion, shifts to the contestant who is then required to establish all the elements of lack of capacity by at least a preponderance of the evidence.\(^{354}\) However, a respect-

354. See, e.g., the following cases:

**Alabama:** Flowler v. Flowler, 292 Ala. 340, 341-43, 294 So. 2d 156, 157-59 (1974); King v. Aird, 251 Ala. 613, 617, 38 So. 2d 883, 887 (1949); Dersis v. Dersis, 210 Ala. 308, 312, 98 So. 27, 31 (1923);

**Arizona:** In re Westfall's Estate, 74 Ariz. 181, 185, 245 P.2d 951, 954 (1952);

**Arkansas:** Sullivant v. Sullivant, 236 Ark. 95, 99, 364 S.W.2d 665, 668 (1963); Tatum v. Chandler, 229 Ark. 864, 869, 319 S.W.2d 513, 516 (1959); Shippen v. Shippen, 213 Ark. 517, 520, 211 S.W.2d 433, 435 (1948); Taylor v. McClintock, 87 Ark. 243, 280, 112 S.W. 405, 414 (1908); McCulloch v. Campbell, 49 Ark. 367, 373, 5 S.W. 590, 592 (1887);

**California:** In re Wright's Estate, 7 Cal. 2d 348, 356, 60 P.2d 434, 438 (1936); In re Perkins' Estate, 195 Cal. 699, 703, 235 P. 45, 46 (1925); In re Casarotti's Estate, 184 Cal. 73, 75, 192 P. 1085, 1085 (1920); In re Wochos' Estate, 23 Cal. App. 3d 47, 55, 99 Cal. Rptr. 782, 787 (1972); In re Goetz' Estate, 253 Cal. App. 2d 107, 113, 61 Cal. Rptr. 181, 185 (1967); In re Llewellyn's Estate, 83 Cal. App. 2d 534, 555, 189 P.2d 822, 833 (1948); In re Johanson's Estate, 62 Cal. App. 2d 41, 54, 144 P.2d 72, 79 (1944);

**Colorado:** In re Grimes' Estate, 500 P.2d 169, 170 (Colo. Ct. App. 1972);

**Delaware:** In re Reed's Estate, 300 A.2d 1, 2 (Del. 1972) (per curiam);

**District of Columbia:** In re Himmelfarb's Estate, 345 A.2d 477, 482 (D.C. 1975) (burden on proponent in original probate, on contestant after will probated and subsequently attacked);

**Florida:** Neal v. Harrington, 159 Fla. 381, 384, 31 So. 2d 391, 392 (1947); In re Carnegie's Estate, 153 Fla. 7, 9, 13 So. 2d 299, 300 (1943); In re Tobias' Estate, 192 So. 2d 83, 85 (Fla. App. 1966);

**Idaho:** In re Goan's Estate, 83 Idaho 568, 573, 366 P.2d 831, 834 (1961);

**Indiana:** Kaiser v. Happel, 219 Ind. 28, 31, 36 N.E.2d 784, 785 (1941); Young v. Miller, 145 Ind. 652, 656, 44 N.E. 757, 759 (1896);

**Iowa:** In re Gruis' Estate, 207 N.W.2d 571, 573 (Iowa 1973); In re Ruedy's Estate, 245 Iowa 1307, 1314, 66 N.W.2d 387, 391 (1954); In re Ransom's Estate, 244 Iowa 343, 377-78, 57 N.W.2d 89, 108 (1953);

**Kansas:** In re Estate of Carothers, 220 Kan. 437, 443, 522 P.2d 1354, 1359 (1967); In re Barnes' Estate, 218 Kan. 275, 281, 543 P.2d 1004, 1009 (1975); In re Peirano's Estate, 155 Kan. 48, 54, 122 P.2d 772, 776 (1942);

**Kentucky:** Self v. Schooling, 462 S.W.2d 932, 933-34 (Ky. 1975); Trust Dep't, First Nat'l Bank v. Heflin, 426 S.W.2d 128, 132 (Ky. 1968); Bodine v. Bodine, 241 Ky. 706, 714, 44 S.W.2d 840, 844 (1932); Langford's Ex'r v. Miles, 189 Ky. 515, 521, 225 S.W. 246, 249 (1920);

**Louisiana:** Succession of Schmidt, 219 La. 675, 679, 53 So. 2d 834, 836 (1951);
Succession of Pizzati, 218 La. 549, 554, 50 So. 2d 189, 190 (1951); Guidry v. Hardy, 254 So. 2d 675, 681 (La. Ct. App. 1971);


Missouri: Brug v. Manufacturer's Bank & Trust Co., 461 S.W.2d 269, 276 (Mo. 1970); Houghton v. Jones, 418 S.W.2d 32, 39 (Mo. 1967); Delaney v. Coy, 407 S.W.2d 902, 903 (Mo. 1966); Cockrum v. Cockrum, 550 S.W.2d 202, 206 (Mo. Ct. App. 1977);


Nebraska: In re Cain's Estate, 186 Neb. 159, 160, 181 N.W.2d 441, 442 (1970); In re Benson's Estate, 153 Neb. 824, 828, 46 N.W.2d 176, 179 (1951); In re Kaiser's Estate, 150 Neb. 295, 302-03, 34 N.W.2d 366, 372 (1948); In re Hagan's Estate, 143 Neb. 459, 466, 9 N.W.2d 794, 799-800 (1943);

New Jersey: In re Weeks' Estate, 29 N.J. Super. 533, 543, 103 A.2d 43, 48 (1953); In re Loori's Will, 20 N.J. Misc. 376, 384, 28 A.2d 281, 286 (1941);

North Carolina: In re Kemp's Will, 234 N.C. 495, 499, 67 S.E.2d 672, 675-76 (1951); In re Frank's Will, 231 N.C. 252, 257, 56 S.E.2d 668, 672 (1949), rehearing denied. 57 S.E.2d 315 (1950);

North Dakota: Stormon v. Weiss, 65 N.W.2d 475, 500, 519 (N.D. 1954);


Oklahoma: In re Wadsworth's Estate, 273 P.2d 997, 1001 (Okla. 1954) (burden on proponent to prove due execution, shifts to contestant thereafter); In re Holmes' Estate, 270 P.2d 320, 321 (Okla. 1954); In re Harjo's Estate, 206 Okla. 88, 91, 241 P.2d 373, 376 (1952); In re Anderson's Estate, 142 Okla. 197, 199, 286 P. 17, 19 (1929);

Pennsylvania: In re Heiney's Estate, 455 Pa. 574, 576-77, 318 A.2d 700, 701-02 (1974); In re Protyniak's Estate, 427 Pa. 524, 529, 235 A.2d 372, 375 (1967); In re O'Malley's Estate, 370 Pa. 281, 285, 88 A.2d 69, 72 (1952); In re Cookson's Estate, 325 Pa. 81, 86, 188 A. 904, 907 (1937);

South Carolina: Hellams v. Ross, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977); McCollum v. Banks, 213 S.C. 476, 483, 50 S.E.2d 199, 202 (1948);

South Dakota: In re Nelson's Estate, 250 N.W.2d 286, 289 (S.D. 1977);

Tennessee: In re Rhodes' Estate, 222 Tenn. 394, 406, 436 S.W.2d 429, 435 (1968); Thomas v. Hamlin, 56 Tenn. App. 13, 23, 404 S.W.2d 569, 573-74 (1964);


Utah: In re Ekker's Estate, 19 Utah 2d 414, 417, 432 P.2d 45, 47 (1967);

Washington: In re Riley's Estate, 78 Wash. 2d 623, 639, 479 P.2d 1, 11 (1970); In
able number of states hold a minority view. In this class, the burden of proof on capacity remains with the proponent throughout trial. The contestant has to present evidence to rebut any presumption of capacity raised by due execution in order to throw the burden of proof back to the proponent.\textsuperscript{355} Empirical analysis shows that con-

\begin{itemize}
\item \textit{re} Youngkings' Estate, 48 Wash. 2d 432, 434-35, 294 P.2d 426, 428 (1956); \textit{In re} Moulton's Estate, 1 Wash. App. 993, 995, 465 P.2d 419, 420 (1970);
\item \textit{Wisconsin}: \textit{In re} Bauer's Estate, 264 Wis. 556, 558-59, 59 N.W.2d 481, 482 (1953); \textit{In re} Bickner's Estate, 259 Wis. 425, 433, 49 N.W.2d 404, 408 (1951); \textit{In re} Delmadry's Will, 251 Wis. 98, 100, 28 N.W.2d 301, 302 (1947);
\item \textit{Wyoming}: \textit{In re} Carey's Estate, 504 P.2d 793, 797 (Wyo. 1972).
\end{itemize}

Note: In Hawaii and Nevada, the question of who has the burden of proof on the issue of capacity has not been decided. In McCabe v. Pearson, 87 Nev. 177, 510 P.2d 875 (1973), the Nevada Supreme Court reversed a trial court judgment setting aside a will on lack of capacity and undue influence, but expressly refused to decide what the burden of proof was. It indicated, however, that the moving party had failed to produce sufficient evidence to sustain a finding in its favor.

355. The minority position is taken by the following states:
\begin{itemize}
\item \textit{Alaska}: \textit{In re} Kraft's Estate, 374 P.2d 413, 416 (Alaska 1963);
\item \textit{Connecticut}: Falk v. Schuster, 171 Conn. 5, 9, 368 A.2d 40, 42 (1976);
\item \textit{Illinois}: Milne v. McFadden, 385 Ill. 11, 13, 52 N.E.2d 146, 147 (1944); Gilbert v. Oneale, 371 Ill. 427, 434, 21 N.E.2d 283, 286 (1939); Pendarvis v. Gibb, 328 Ill. 282, 293, 159 N.E. 353, 357 (1927); Kellan v. Kellan, 258 Ill. 256, 272, 101 N.E. 614, 620 (1913); Wilkinson v. Service, 249 Ill. 146, 150, 94 N.E. 50, 52 (1911); Hess v. Killebrew, 209 Ill. 193, 200, 70 N.E. 675, 678 (1904); \textit{In re} Estate of Fordyce, 130 Ill. App. 2d 755, 757, 265 N.E.2d 886, 888 (1971); Auerbach v. Continental Ill. Nat'l Bank & Trust Co., 340 Ill. App. 64, 75, 91 N.E.2d 144, 150 (1950);
\item \textit{Maine}: \textit{In re} Leonard, 321 A.2d 486, 488 (Me. 1974);
\item \textit{Massachusetts}: Dobije v. Hopey, 353 Mass. 600, 603, 233 N.E.2d 920, 922 (1968); Crowninshield v. Crowninshield, 60 Mass. (2 Gray) 521, 522 (1854);
\item \textit{Minnesota}: \textit{In re} Jenks' Estate, 291 Minn. 138, 143-44, 189 N.W.2d 695, 698 (1971); \textit{In re} Estate of Healey, 243 Minn. 383, 386, 68 N.W.2d 401, 403 (1955);
\item \textit{Mississippi}: \textit{In re} Moses' Will, 227 So. 2d 829, 834-35 (Miss. 1969); Wallace v. Harrison, 218 Miss. 153, 161, 65 So. 2d 456, 458 (1953);
\item \textit{New Hampshire}: Albee v. Osgood, 79 N.H. 89, 90, 105 A. 1, 2 (1918);
\item \textit{Oregon}: \textit{In re} Knutson's Will, 149 Or. 467, 484, 41 P.2d 793, 799 (1935); Estate of Johnson, 24 Or. App. 897, 903-04, 547 P.2d 658, 663 (1976);
\end{itemize}
testants have a much better chance of success in those states which keep the burden of proof of testamentary capacity on the propo­
endent throughout trial.\textsuperscript{356}

2. 	extit{Presumption of Capacity}

Interlocking with the burden of proof rhetoric is the notion of a presumption of testamentary capacity which arises from proof of due execution of a will. Twenty-nine states allow a testator a pre­
sumption of capacity to make a will.\textsuperscript{357} This presumption, accord-

\textit{Rhode Island:} Apollonio v. Kenyon, 101 R.I. 578, 590-92, 225 A.2d 778, 785 (1967);

\textit{Vermont:} In re Barney's Will, 70 Vt. 352, 359, 369, 40 A. 1027, 1029, 1033 (1898);

\textit{Virginia:} Redford v. Booker, 166 Va. 561, 569, 185 S.E. 879, 883 (1936);


356. See Appendix, Table III for comparative analysis.

357. The following states grant a presumption of capacity:

\textit{Alabama:} Jones v. Blackman, 284 Ala. 684, 685-86, 228 So. 2d 1, 2-3 (1969); Cox v. Martin, 250 Ala. 401, 403, 34 So. 2d 463, 464 (1947); Tucker v. Tucker, 248 Ala. 602, 606, 28 So. 2d 637, 640 (1947);

\textit{Arizona:} In re Smith's Estate, 53 Ariz. 505, 508, 91 P.2d 254, 255, (1939);

\textit{Arkansas:} Gray v. Fulton, 205 Ark. 675, 680, 170 S.W.2d 384, 386 (1943);

\textit{California:} In re Sexton's Estate, 199 Cal. 759, 764, 25 P. 778, 781 (1926); In re Dow's Estate, 181 Cal. 106, 112, 183 P. 794, 797 (1919); In re Dunne's Estate, 130 Cal. App. 2d 216, 220, 278 P.2d 733, 734 (1955); In re Llewellyn's Estate, 83 Cal. App. 2d 343, 355, 189 P.2d 822, 833 (1948); In re Schwartz's Estate, 67 Cal. App. 2d 512, 519-20, 155 P.2d 76, 80 (1945); In re Agnew's Estate, 65 Cal. App. 2d 553, 559, 151 P.2d 126, 130 (1944) (expressed as presumption of sanity);


\textit{Delaware:} In re Hallett's Estate, 295 A.2d 755, 756 (Del. Ch. 1972);

\textit{Idaho:} In re Heazle's Estate, 74 Idaho 72, 76, 257 P.2d 556, 558 (1953);

\textit{Illinois:} Roller v. Kurtz, 6 Ill. 2d 618, 626, 129 N.E.2d 693, 697 (1955); Downey v. Lawler, 377 Ill. 298, 300-01, 36 N.E.2d 344, 346 (1941); Quahamer v. Schoon, 370 Ill. 606, 608, 19 N.E.2d 750, 751 (1939); Norton v. Clark, 253 Ill. 557, 566, 97 N.E. 1079, 1083 (1921); McGovern v. McGovern, 328 Ill. App. 316, mem., 65 N.E.2d 583, 583, (1946);

\textit{Indiana:} Kaiser v. Happel, 219 Ind. 28, 30, 36 N.E.2d 784, 785 (1941); Young v. Miller, 145 Ind. 652, 652, 44 N.E. 757, 758 (1896);

\textit{Iowa:} In re Houston's Estate, 238 Iowa 297, 298-99, 27 N.W.2d 26, 28 (1947); In re Behrend's Will, 233 Iowa 812, 816-17, 10 N.W.2d 651, 654 (1943); In re Cooper's Estate, 196 Iowa 116, 123, 194 N.W.2d 218, 221 (1923);

\textit{Kentucky:} Belcher v. Somerville, 413 S.W.2d 620, 623 (Ky. 1967); New v. Creamer, 275 S.W.2d 918, 921 (Ky. 1955); Madden v. Cornett, 290 Ky. 268, 275, 160 S.W.2d 607, 611 (1942); Ramsey v. Howard, 289 Ky. 389, 394, 158 S.W.2d 981, 984 (1942); Leary v. Leary, 203 Ky. 344, 346, 262 S.W. 293, 294 (1924);

\textit{Louisiana:} Lebleu v. Manning, 225 La. 1087, 1089-90, 74 So. 2d 384, 384 (1954);


Mississippi: Gathings v. Howard, 122 Miss. 355, 375, 84 So. 240, 243 (1920);

Missouri: Fields v. Luck, 335 Mo. 765, 782, 74 S.W.2d 35, 43-44 (1934);

Montana: In re Cissell’s Estate, 104 Mont. 306, 314-15, 66 P.2d 779, 782 (1937) (expressed as presumption of sanity);

Nebraska: In re Wal’s Estate, 151 Neb. 812, 815, 39 N.W.2d 783, 786 (1949); In re Hunter’s Estate, 151 Neb. 704, 711, 39 N.W.2d 418, 423 (1949); In re Kaiser’s Estate, 150 Neb. 295, 302-03, 34 N.W.2d 366, 372 (1948); In re White’s Estate, 145 Neb. 295, 300, 16 N.W.2d 203, 206 (1944);

New Jersey: In re Blake’s Will, 37 N.J. Super. 70, 73-74, 117 A.2d 33, 35 (1955); In re Week’s Will, 29 N.J. Super. 533, 543, 103 A.2d 43, 48 (1953); In re Hoover’s Estate, 21 N.J. Super. 323, 325, 91 A.2d 155, 156 (1952);


North Carolina: In re Frank’s Will, 231 N.C. 252, 259, 56 S.E.2d 668, 674 (1949), rehearing denied, 231 N.C. 70, 70, 55 S.E.2d 315 (1950); In re York’s Will, 231 N.C. 70, 70, 55 S.E.2d 791, 792 (1949);

North Dakota: In re Elmer’s Estate, 210 N.W.2d 815, 819 (N.D. 1973);

Oklahoma: In re Lay’s Estate, 431 P.2d 367, 368 (Okla. 1967) (per curiam); Brown v. Brown, 287 P.2d 913, 914 (Okla. 1955) (syllabus); In re Holmes’ Estate, 270 P.2d 320, 322 (Okla. 1954); In re Mason’s Estate, 185 Okla. 278, 280, 91 P.2d 657, 660 (1939); In re Anderson’s Estate, 142 Okla. 197, 199, 286 P. 17, 19 (1929);

Oregon: In re Fredrick’s Estate, 204 Or. 378, 385-86, 282 P.2d 352, 355-56 (1955); Detch v. Detch, 186 Or. 1, 9-10, 205 P.2d 180, 183 (1949); In re Christofessor’s Estate, 183 Or. 75, 84-85, 190 P.2d 928, 932 (1948); Vsetecka v. Novak, 4 Or. App. 463, 468, 478 P.2d 655, 657 (1971);


Tennessee: Thomas v. Hamlin, 56 Tenn. App. 13, 23, 404 S.W.2d 569, 574 (1964);

Virginia: Jenkins v. Trice, 152 Va. 411, 442, 147 S.E. 251, 261 (1929);

Washington: In re Peter’s Estate, 43 Wash. 2d 846, 861-62, 264 P.2d 1109, 1117 (1953); In re Larsen’s Estate, 191 Wash. 237, 259-60, 71 P.2d 47, 49 (1937);

West Virginia: Powell v. Sayres, 134 W. Va. 653, 663, 60 S.E.2d 740, 747 (1950);

Wisconsin: In re Goydynski’s Estate, 46 Wis. 2d 393, 398, 175 N.W.2d 272, 275
ing to the cases, is Thayerian, which means it disappears when credible evidence to the contrary appears.\footnote{358} The presumption is not evidence, and is only sufficient to stave off a directed verdict.\footnote{359} Wigmore also states that the burden of proof on the sanity of the testator is on the proponent of the will, but the presumption of sanity arises upon proof of due execution.\footnote{360} This shifts the burden of coming forward with evidence of lack of capacity to the contestant.\footnote{361} This is complicated, however, by the courts which treat the presumption of capacity as a Morgan-type presumption which remains alive after contrary evidence has been introduced.\footnote{362}

Three states reject the presumption of capacity altogether: Maine,\footnote{363} Texas,\footnote{364} and West Virginia.\footnote{365} Fifteen states have not decided whether such a thing as a presumption of capacity exists.\footnote{366}

\begin{itemize}
  \item (1970) (sanity); \textit{In re} Bauer's Estate, 264 Wis. 556, 559, 59 N.W.2d 481, 482 (1953); \textit{In re} Szperka's Will, 254 Wis. 153, 158, 35 N.W.2d 209, 211 (1948), vacated on other grounds, 35 N.W.2d 911 (1949).
  \item Note: The following states report no decisions on whether or not there is a presumption of capacity: Alaska, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Kansas, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Rhode Island, South Dakota, South Carolina, Utah, Vermont, and Wyoming.
  \item Texas clearly holds that there is no presumption of sanity or testamentary capacity running in favor of any testator. Kutchinski v. Zillion, 183 S.W.2d 237, 239 (Tex. Ct. App. 1944). Maine may also take a similar position. \textit{See In re} Haley's Estate, 147 Me. 173, 179, 84 A.2d 808, 812 (1951).
  \item \footnote{358} Kaiser v. Happel, 219 Ind. 28, 30, 36 N.E.2d 784, 785 (1941); Leary v. Leary, 203 Ky. 344, 346, 262 S.W. 293, 294 (1924); Santry v. France, 327 Mass. 174, 175-76, 97 N.E.2d 533, 534 (1951); \textit{In re} Hunter's Estate, 151 Neb. 704, 711, 39 N.W.2d 418, 423 (1949).
  \item \footnote{359} \textit{See In re} Dow's Estate, 181 Cal. 106, 113, 183 P. 794, 797 (1919). This presumption is not like the presumption of sanity in criminal law. According to Wigmore, the presumption of sanity in criminal law creates three positions on the sanity of criminal defendants: (a) The prosecution has the risk of non-persuasion on sanity as part of its burden of proof beyond reasonable doubt; (b) the prosecution establishes sanity by preponderance, shifting the evidentiary burden of disproof to the defendant; or (c) the accused has the burden of proof on the issue of demonstrating insanity by at least a preponderance of the evidence. 2 J. WIGMORE, \textit{supra} note 329, § 2501, at 359-61. None of these formulae have any relevance to establishing lack of testamentary capacity.
  \item \footnote{360} Id. § 2500, at 356.
  \item \footnote{361} Id. § 2500, at 357-58.
  \item \footnote{362} \textit{See, e.g.}, Sturdevant's Appeal, 71 Conn. 392, 42 A. 70 (1899).
  \item \footnote{363} \textit{In re} Haley's Estate, 147 Me. 173, 179, 84 A.2d 808, 812 (1951).
  \item \footnote{365} Powell v. Sayres, 134 W. Va. 653, 663, 60 S.E.2d 740, 747 (1950).
  \item \footnote{366} They are Alaska, Colorado, Hawaii, Minnesota, Nebraska, Nevada, New Hampshire, South Dakota, Tennessee, Utah, Vermont, and Wyoming.
\end{itemize}
The best way to gain an understanding of the distinctions made on burden of proof and presumptions of capacity is to review two essentially similar cases, one decided in a state in which the burden of proof is on the contestant to show lack of capacity, the other decided in a jurisdiction in which the burden of proof of capacity remains with the proponent. One of the more interesting issues to contrast is the juxtaposition of conflicting presumptions: that of capacity and that of continuing insanity. Normally, an adjudication of insanity raises a presumption that the person who is insane lacks testamentary capacity.\(^{367}\) In a state in which (a) a person is presumed not to have capacity, and (b) a person adjudicated insane is presumed not to have capacity until adjudicated sane, and (c) the burden of proof is on the proponent to establish capacity, the proponent should lose. In a jurisdiction in which (a) a person is presumed to have capacity, (b) a person is presumed to lack capacity if adjudicated insane, and (c) the burden of proof is on the contestant to show lack of capacity, the contestant should lose.

In *In re Duncan's Estate*,\(^{368}\) the testator, James Mills Duncan, died May 21, 1939, at age seventy-one. He left a holographic will written August 19, 1938. Duncan was judicially declared a lunatic in 1908 and placed under guardianship. He was committed in 1909 to the Harrisburg State Hospital for the Insane, and remained there until April 29, 1939, shortly before his death. A caveat was filed to the will by his nephews. The beneficiaries under the will were Frank A. Diehl and Nannie Diehl Lehman, the children of his tenant farmer in 1908.\(^{369}\) The proponent’s principal witness was Dr. Petree, the staff psychiatrist at the hospital. Dr. Petree stated that Duncan, a schizophrenic with a paranoid personality disorder,\(^{370}\) had an above normal IQ and knew the nature and extent of his property, the natural objects of his bounty, and what he was doing

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\(^{368}\) Id. at 135, 23 A.2d at 358.

\(^{369}\) Id. at 137, 23 A.2d at 359.
when he wrote the will. A contestant's witness, a psychiatrist who had not examined the testator, reached the opposite conclusion on the testator's ability to make a will. The orphans court probated the will. The superior court affirmed the orphans court, relying on the burden of proof, which, under Pennsylvania law, fell upon the contestant to show the testator lacked capacity. This case erroneously seems to suggest that the proponent has the burden of proof on capacity; but in light of Pennsylvania's standard, the court must be held to have said that the proponent had the burden of overcoming the presumption of continuing insanity by offering some evidence of probative value showing that the testator, although insane, had capacity. This burden was carried by the scintilla of expert testimony in the case.

Contrast the case of Western State Hospital of Staunton v. Winninger. There, the court dealt with essentially similar facts in a different way. Frederick S. Glassett, a childless widower, died an inmate of Western State Hospital in Staunton, Virginia, on January 27, 1950. He was adjudicated insane November 7, 1931, and had been confined since that time. He left two holographic wills, one executed before adjudication, dated March 21, 1931, and one executed February 3, 1942, leaving all of his property to the hospital. The 1942 will was made when Glassett was under strict custody after threatening to kill himself. His wife's brothers and sisters filed objections to probate of the 1942 will. At trial, six hospital staff members testified that Glassett knew his property, knew the natural objects of his bounty, and had a rational plan for disposition of his property in November 1942, when he made the second will. Nonetheless, the trial judge refused to probate the 1942 will. This decision was sustained by the court of appeals. The Virginia high court agreed that adjudication of insanity raised a re-

371. Id. at 138, 23 A.2d at 359. There was some evidence that Duncan was hostile toward his sister without any rational basis.
373. 147 Pa. Super. at 136, 23 A.2d at 358.
375. Id. at 301, 83 S.E.2d at 447.
376. Id. at 301, 83 S.E.2d at 447-48.
377. Id. at 303, 83 S.E.2d at 448.
378. Id. at 302, 83 S.E.2d at 448.
379. Id. at 308-10, 83 S.E.2d at 451-52.
buttable presumption of continuing insanity.\textsuperscript{380} It also agreed that the presumption could be overcome by clear and convincing evidence of Glasssett’s capacity.\textsuperscript{381} The court felt that no person had given testimony about the actual execution of the will or the state of the testator’s mind on that day. It therefore found that the proponent of the 1942 will failed to carry its burden of proof.\textsuperscript{382} This is consistent with the general Virginia rule that the burden of proof on capacity always rests with the proponent.

The preceding illustration demonstrates how the legal notions of burden of proof and presumption can be used to lead to a result the court finds acceptable. In \textit{Duncan}, the insane testator left his property to friends. In \textit{Winninger}, the testator, also legally insane, left his estate to a state institution in which he was confined. In both cases, the court did not want to resolve the hard issue of whether or not a psychotic could lawfully make an enforceable will. Instead, the court took refuge in the usual thicket of conflicting presumptions and in the burden of proof to justify its result.

VI. CONCLUSION: A MODEST PROPOSAL TO LIMIT TESTAMENTARY FREEDOM

So far, this article has attempted to demonstrate the ineffectiveness of the traditional Greenwood-Baker rules for testamentary capacity, and the way in which the \textit{Dew v. Clark} rule about insane delusions no longer satisfactorily handles the problem of the psychotic testator. All the evidence to date indicates that in close cases which reach the level of appellate review, the proponents of contested wills win much more frequently than the law of averages would indicate should be the result.\textsuperscript{383} In short, a vast number of

\textsuperscript{380} \textit{Id.} at 311, 83 S.E.2d at 452-53.

\textsuperscript{381} \textit{Id.} at 312, 83 S.E.2d at 453.

\textsuperscript{382} \textit{Id.} at 315, 83 S.E.2d at 454.

\textsuperscript{383} If one assumes that in a very large group of decisions, such as the appellate will contests analyzed for the purposes of this study, a totally dichotomous choice was at issue (win/lose), then the probabilities of the result coming out either way are equivalent to the probabilities of both win and lose added together, or 50-50. For a treatment of the "coin toss" theory of probability, see T. Anderson & S. Sclove, \textit{Introductory Statistical Analysis} 218-27 (1974). The inference drawn from empirical analysis is that the structure and attitude of our judicial decision-making process somehow operates to make the results in appellate will contest decisions different than the law of probabilities would suggest. There are several possible explanations for this difference. First, appellate cases are often taken up for reasons other than success on the merits; i.e., as a bargaining point for negotiating a favorable settlement. Second, there are the factors of precedent and social policy
wills which ought not to have been probated were in fact admitted to probate, due to the evolutionary advance of scientific and medical knowledge without a corresponding advance in the evolution of the test for testamentary capacity.

The limitations of capacity, due execution, lack of undue influence, and fraud are the only limitations on testamentary freedom in the Anglo-American legal system. Unlike the continental countries, our system does not have a forced heirship provision beyond the pittances allowed surviving spouses and children who are dependent. The sole limitations on freedom of testation are those of testamentary capacity, insane delusion, undue influence, or fraud.384 The kind of freedom which these principles include is the kind of freedom which the contractarians used to construct their model for political society. If man is prior to any social group, then the social group, through a fictitious agreement of the group to establish common regulations, can reach only the harmful external aspects of the individual's activities.385 This type of freedom also presupposes conscious selection of pleasurable results and conscious rejection of painful results, according to the utilitarian principles of psychology formulated by Jeremy Bentham. As a result, testamentary freedom as a legal principle of decisionmaking disregards the existence of operating in individual cases which may lead to a favoring of one side or another. There is no known way to precisely determine all of the factors which contribute to the results reached in any given case. However, when dealing with a vast number of individual cases, it is fair to say that the general laws of probability ought to apply. Empirical analysis of appellate will contest cases demonstrates that the decision-making process does not obey general probability theory for a simple dichotomous choice. This clearly indicates a systematic structuring of the decision-making process in this area which directly influences the results obtained. See generally Appendix, Tables I-VIII.


A vitriolic restatement of testamentary freedom appears in In re Heller’s Estate, 223 Iowa 1356, 11 N.W.2d 586 (1943).

The right of an individual to dispose of his property as he sees fit, even though he makes what others might think was an unequal or unjust disposition or give nothing to some or all of those who are regarded as naturally entitled to his bounty, is nevertheless a sacred right with which the courts must not interfere when it appears that he knew what he was doing. There is no such thing as a legal right in any relative, other that the surviving spouse of the testator, to the latter’s bounty. Standing alone, the deprivation of that bounty cannot destroy a will.

Id. at 1365, 11 N.W.2d at 591.

385. See text accompanying notes 34 and 35 supra.
unconscious motivation, although, as noted previously, Freud analyzed and described the unconscious more than seventy-five years ago. Testamentary freedom also relegates perception to secondary status, placing it in subordination to the absolute, uncontingent exercise of choice, although choice is as much conditioned by perception as any other human endeavor. Finally, testamentary freedom, because it posits an individual with appropriation rights who is prior to social control, rejects any social limitation on the vertical and horizontal extension of one's personality through property. In short, testamentary freedom stands for an asocial implementation of one's personality by appropriation and other means as opposed to a socially meaningful participation by use of property. As an ultimate ratio decidendi, the principle of testamentary freedom is unacceptable.

Testamentary freedom also goes beyond the limits of individual psychological analysis. As a principle of law, it is both a sociological and a political statement about the relationship of an individual to his or her family and to his or her society. In its present form, the principle of testamentary freedom imposes no restriction on a person's post-death disposition unless that person is adjudicated to lack capacity or to be under the influence of either undue influence or an insane delusion. The common law has shaped a modest limitation on giving to charities and reserved some of a person's estate for his or her spouse. But overall, testamentary freedom is a doctrine of irresponsibility, protected by a cloud of technical legal rationalizations. In its present form, testamentary freedom invites judges to support the judgment of testators who ignore the claims of family and society with respect to their property. It also has a double-barreled social impact. On one hand, as an instrument of the very rich, the principle of testamentary freedom permits dynastic concentration of wealth by allowing the very rich to agglomerate their holdings through dynastic post-death transfers, whether or not the dynastic concentration of wealth is in fact socially justifiable. Second, in the hands of the middle class, testamentary freedom becomes a tool by which wealth may be diffused to such an extent that familial economic support and sustenance is threatened. In both cases, dead persons are permitted to control the actions of living persons through post-death transfers, on the wholly indefensible theory of unfet-

386. See text following note 92 supra.
tered freedom of post-death dispositions. Testamentary freedom also contradicts the political statements made by the canons of descent by permitting and supporting variances from the system of post-death transfer which has been approved by the legislature. Finally, testamentary freedom is regularly used to defend socially unacceptable post-death transfers. It is the vehicle used to disinherit wives and children as punishment for fancied wrongs, or in an attempt to control persons' lives after death.387

The common expectation of most men and women is essentially that of the medieval moral theologian: a person should distribute most of his or her property at death among his or her family. This expectation is part of the continental legal system of legitimate heirship which prevents disinheritance of one's family. In this nation, Louisiana has retained legitimate heirship and the principle of collation at death by which lifetime distribution to legitimate heirs is treated in a manner similar to common law "advancement" principles.388 These two principles tend to limit testamentary freedom to prevent the type of disinheriting will which produces most reported will contest cases. Consequently, the first limitation on testamentary freedom which seems to be inherent in the way social life organized itself is the legitimate limitation: a testator should not be permitted to disinherit his wife, children, grandchildren, parents, and perhaps even his brothers and sisters. The principles of testamentary capacity do a very inefficient job of providing this outside limit to testamentary freedom.

Second, the legal rationalizing of testamentary freedom and its corresponding limitations has been embedded in 18th century philosophical and psychological notions, such that medical and psychological advances have not been received with due respect since 1830 or so. If there is such a thing as testamentary freedom, at least as to the portion of one's property not predestined for one's legitimate heirs, then it should be limited by relevant, known limitations on recall, motivation, and the perception of reality. In other words, the Greenwood-Baker test for testamentary capacity and the insane delusion rule should be restructured in terms of the present state of behavioral science.

387. See Appendix, Tables II, III, and IV for empirical evaluation of a long-term trend in appellate decisions.
388. See, e.g., LA. CIV. CODE ANN. arts. 1493, 1618, 1620, 1621 (West 1967) (pertaining to legitimate heirship); id. at arts. 2402-2406 (relating to community property); id. at arts. 1227-1280 (relating to collation).
A plausible restructuring of the law of testamentary capacity might take the following form.

(1) A person may make an instrument which effectuates a post-death distribution of his property if he or she is not organically or functionally psychotic.

(2) Any person who claims that a post-death distribution made by a decedent is invalid under (1) above must show to a court that, during the process of planning and execution of all dispositive instruments, the decedent was psychotic. Psychosis may be established by testimony of one or more psychiatrists, who need not be the attending physician of the decedent. In considering the mental condition of the decedent, the psychiatrist may examine and review the acts and conduct of the decedent during the relevant time period, any former dispositive instruments made by the decedent, medical and psychological reports relative to the decedent's condition, and the eyewitness testimony of those persons who had a reasonable opportunity to observe the decedent's conduct during the relevant period. Psychosis may not be established without one or more psychiatric reviews of the decedent's mental condition during the relevant period.

(3) If a decedent is not organically or functionally psychotic, his or her post-death plan may be set aside by a court if the court finds that the decedent did not comprehend the principle dispositive portions of his post-death plan. This lack of comprehension may result from the testator's inability to read the final reduction of his or her plan to writing, or have it read or explained to him or her, due to some impairment of sight or hearing, or brain damage resulting in a "scrambling" of cognitive symbols, or inability to understand the language in which the final disposition is written when no corresponding interpreter's version of the final dispositive program was made available to the decedent during the relevant time.

(4) The principle stated in (1) above is further limited by the following consideration:

(a) No decedent may make a post-death disposition of more than one-third of the value of his assets at death, if he is survived by:
   (i) a spouse;
   (ii) one or more children;
   (iii) one or more parents;
   (iv) one or more grandchildren; or
   (v) one or more brothers or sisters.
(b) For purposes of this principle, assets at death will include any distribution of assets to any of the persons listed in (a) (i) through (v) above made by the decedent by living gift. Such inter vivos distributions will be set off from the share provided by law for the classes of persons listed in (i) through (v).

(c) The persons listed in (a) (i) through (v) will take the two-thirds of the decedent's assets at death in accordance with the principles of law relating to interstate succession.

Naturally enough, this schema is likely to be argued over and attacked piecemeal. Such attack, like most rhetorical devices, clearly misses the mark. The author concedes that his schematic may be in part less desirable than some other person's schema, and may lead to unresolved problems which can be posed hypothetically. The broad basis for the schema, however, rests upon recognition of the inadequacy of the Greenwood-Baker rule and the Dew v. Clark rule. It also rests upon the empirical survey of appellate decisions which shows the proponents of wills winning a far greater percentage of the time than would be called for by the law of chance events. Finally, it rests upon a fundamental quarrel with the abstract principle of testamentary freedom as a justification for disinheriting wills. In order to respond to this schema, one must respond to these principles and defend them.
APPENDIX

A. Description of Basic Methodology

This appendix contains a statistical analysis of American will contest cases. It was designed to explore the type of testators that make wills which are contested, the kinds of dispositions made by these testators, and the comparative results in appellate decisions for each type of will and testator. This introduction will explain how the survey was compiled and will suggest its shortfalls and its utility.

The author attempted to find every reported appellate decision relating to testamentary capacity since 1885, the inception of the National Reporter System. Also added to this base were Northwest Reporter cases decided since 1881, and New York will contest decisions since 1780. The base was ranked according to state and according to outcome on appeal. Eventually, the New York cases were discarded from the base in order to maintain uniformity. The author examined and recorded all will contest cases decided by appellate courts since 1886, whether or not these decisions were confined to testamentary capacity alone. The data base became 1209 appellate decisions spanning ninety-two years.

1. State Ranking According to Number of Contests

The fifty states and the District of Columbia were ranked according to the number of reported appellate will contest decisions occurring in that jurisdiction over the time span of the survey. They were also ranked in accordance with the number of decisions for the proponent and for the contestant. Data from the United States census of population for 1970 was examined to determine if any correlation might exist between will contests, population, and geographic characteristics. In addition, the fifty states were ranked according to the frequency of reported will contest decisions to determine how often appellate courts in each jurisdiction passed on will contests.

2. Contests Ranked by Type of Testator

The reported decisions were ranked according to a classification of the type of testator making the will. The classification used was generated by the author. The cases were broken down into testators adjudicated insane, testators under guardianship, testators under the influence of drugs, testators with other organic impairment, testators with functional impairment, and unknown. The large number of cases reported in the "unknown" classification is accounted for by the great number of per curiam opinions that recited no facts of the case, and the many appellate decisions that recited a laundry list of legal principles and stated only that the court had examined the record and found the trial court judgment to be supported by the evidence, without reciting any of the evidence itself. This ranking was done to determine what kind of testators had the most difficulty having their wills probated.
3. **Contests Ranked by Type of Will**

The reported decisions were also ranked by the kind of will left by the testator. This classification was based on the dispositive scheme employed in the will. Wills were broken down into those which disinherit a spouse in favor of collateral relatives, those which disinherit a spouse in favor of children, those which disinherit a child in favor of other children, those which disinherit children in favor of a spouse, those which disinherit children in favor of collaterals, those which disinherit a spouse, lineal descendants, or collateral heirs in favor of a stranger to the family or a charity, and unknown types. Again, the vast number of unknown cases arises from the type of reporting described in (2) above. The kind of will was not reported in the majority of appellate decisions.

4. **Contests Analyzed by Combination of Testator Type and Will Type**

Finally, the 1209 reported appellate decisions were compared according to the combination of eight testator types and nine will types to discover if any patterns were detectible. The results appear to indicate definite patterns may exist between the type of testator and type of will most often invalidated in appellate will contest decisions.

**B. Tables**

The data in Table I are divided into three parts: total number of decisions by state, decisions decided for the proponent by state, and decisions decided for the contestant by state. Each of these parts is further divided into raw number of cases by state, percentage of total cases by state, and rank of the total number of cases for each state in comparison to the total number of states.

The top five states in terms of sheer number of will contest decisions are Illinois, California, Texas, New York, and Georgia. The states with the fewest cases decided are the District of Columbia, Wyoming, Nevada, Alaska, and Hawaii. The number of will contests decided appears to be a function of population; the more populous the state, the more likely it is to have a large number of appealed will contests. The less populated the state, the more likely it is to have fewer such contests. There are, however, some notable exceptions to this general rule. Georgia is ranked fifth in number of decisions but is not a state with a large population. Ohio, a highly populated state, is forty-first in number of cases.

Of the five states with the largest total number of will contest decisions, three, California, Texas, and Georgia, can be considered to be "sunbelt" jurisdictions which, as retirement havens, attract an inordinate number of persons over the age of sixty-five. Only one of the five, Illinois, lays the burden of proof of testamentary capacity on the proponent.

Eight hundred and seventy-nine cases were decided in favor of the
proponent of the will; 330 were decided in favor of the contestant. The top five states in terms of decisions for the proponent are again Illinois, California, New York, Texas, and Georgia. The states with the fewest decisions for the proponent are the District of Columbia, Alaska, Hawaii, New Mexico, and Nevada. These states are also among those having the fewest number of total decisions.

From the above two comparisons, it can be seen that there is a direct correlation between the total number of decisions and the number decided for the proponent. States with the largest total number of decisions also have the most cases decided for the proponent; states with the fewest number of total decisions have the fewest number decided for the proponent.

The correlation between total number of decisions and the number decided for the contestants is more tenuous. States with the largest number of total decisions, Texas, Illinois, California, and New York, do have the most cases decided for the contestant, with Kentucky replacing Georgia in the fifth spot. But when one looks at the other end of the scale, it is surprising to see that Ohio and Utah are among those states with the fewest decisions for the contestant. Also, more than half of the states (thirty-one) have five or fewer cases decided for the contestant, indicating that the contestant has a smaller chance of success on the whole than does the proponent. This conclusion is further substantiated by the statistics of Table II.

Most states were ranked in approximately the same position by total number of decisions and by number of decisions for the proponent. However, Alabama and Indiana were ranked much lower on proponent decisions than on total decisions, while Alaska was ranked much higher.

There is a wider divergence in rankings between total number of decisions and decisions for the contestant in each state. Four states, Maine, New Jersey, Oklahoma, and Oregon, rank much lower on number of contestant decisions than on total number of decisions. Seven states, Alabama, Idaho, Indiana, Massachusetts, New Mexico, North Carolina, and Virginia, rank much higher. These figures indicate that the number of decisions in favor of the contestants is not proportionate to the total number of decisions.

Table II plots forty-six of the reporting jurisdictions included in the survey. Only five states have more cases decided for the contestant than for the proponent, and these have relatively few total cases. Forty states have a majority of cases decided for the proponent, and these states contain the overwhelming majority of the total number of cases. Again, the conclusion can be drawn that the proponent is far more likely to win in an appellate will contest than is the contestant.

Most of the states which assign burden of proof on capacity to the proponent have a proponent win record below the national median and mean. Illinois is a significant exception to these comments, since its win/
TABLE I
Ranking Of States By Total Number Of Appellate Will Contest Decisions—Number And Percentage Of Total Decisions For Proponent And Contestant—Correlation To Percentage Of Total Population Over Age Sixty-Five.

<table>
<thead>
<tr>
<th>State Rank By Total Number Of Decisions</th>
<th>Number Of Decisions</th>
<th>Percent Of Decisions</th>
<th>State Population Over 65</th>
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<td>Number</td>
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<td>1. Illinois</td>
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<tr>
<td>24. Mississippi</td>
<td>19</td>
<td>14</td>
<td>5</td>
</tr>
<tr>
<td>25. North Carolina</td>
<td>18</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>26. Colorado</td>
<td>16</td>
<td>9</td>
<td>7</td>
</tr>
<tr>
<td>State</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>---------------</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Minnesota</td>
<td>13</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Indiana</td>
<td>13</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>Arizona</td>
<td>12</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Montana</td>
<td>11</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Delaware</td>
<td>11</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Maine</td>
<td>10</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>South Carolina</td>
<td>10</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Tennessee</td>
<td>10</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>South Dakota</td>
<td>9</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Virginia</td>
<td>9</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Idaho</td>
<td>9</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>8</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Utah</td>
<td>8</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Connecticut</td>
<td>8</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Ohio</td>
<td>7</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>New Mexico</td>
<td>5</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Vermont</td>
<td>5</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>West Virginia</td>
<td>5</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>North Dakota</td>
<td>5</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Dist. of Columbia</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Wyoming</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Nevada</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Alaska</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1209</td>
<td>879</td>
<td>330</td>
</tr>
</tbody>
</table>

A Total decisions in state.
B Total for proponent.
C Total for contestant.
D State percentage of total decisions.
E Percentage of total decisions for proponent.
F Percentage of total decisions for contestant.
G Total state population over 65 in 1975.
H Percentage of total state population over 65 in 1975.
I State's percentage of total national population over 65 in 1975.
### TABLE II
Ranking Of States By Outcome Of Appellate Will Contest Decisions—Number And Percentage Of State Decisions For Proponent And Contestant

<table>
<thead>
<tr>
<th>State Rank By Percentage For The Proponent (most to least)</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent*</td>
</tr>
<tr>
<td>1. New Hampshire</td>
<td>5</td>
<td>100.0</td>
</tr>
<tr>
<td>2. New Jersey</td>
<td>33</td>
<td>94.2</td>
</tr>
<tr>
<td>3. Maine</td>
<td>9</td>
<td>90.0</td>
</tr>
<tr>
<td>4. Utah</td>
<td>7</td>
<td>87.5</td>
</tr>
<tr>
<td>5. Oklahoma</td>
<td>34</td>
<td>87.2</td>
</tr>
<tr>
<td>6. Maryland</td>
<td>19</td>
<td>86.4</td>
</tr>
<tr>
<td>7. Oregon</td>
<td>25</td>
<td>86.2</td>
</tr>
<tr>
<td>8. Ohio</td>
<td>6</td>
<td>85.7</td>
</tr>
<tr>
<td>9. Arkansas</td>
<td>34</td>
<td>85.0</td>
</tr>
<tr>
<td>10. Louisiana</td>
<td>32</td>
<td>80.0</td>
</tr>
<tr>
<td>11. West Virginia</td>
<td>4</td>
<td>80.0</td>
</tr>
<tr>
<td>12. Missouri</td>
<td>34</td>
<td>79.1</td>
</tr>
<tr>
<td>13. Kansas</td>
<td>15</td>
<td>78.9</td>
</tr>
<tr>
<td>14. Wisconsin</td>
<td>18</td>
<td>78.3</td>
</tr>
<tr>
<td>15. Pennsylvania</td>
<td>34</td>
<td>77.3</td>
</tr>
<tr>
<td>16. Michigan</td>
<td>27</td>
<td>77.1</td>
</tr>
<tr>
<td>17. Minnesota</td>
<td>10</td>
<td>76.9</td>
</tr>
<tr>
<td>18. Nebraska</td>
<td>25</td>
<td>75.8</td>
</tr>
<tr>
<td>19. Iowa</td>
<td>28</td>
<td>75.7</td>
</tr>
<tr>
<td>20. California</td>
<td>62</td>
<td>75.6</td>
</tr>
<tr>
<td>21. Illinois</td>
<td>83</td>
<td>75.5</td>
</tr>
<tr>
<td>22. Mississippi</td>
<td>14</td>
<td>73.7</td>
</tr>
<tr>
<td>23. Georgia</td>
<td>36</td>
<td>73.5</td>
</tr>
<tr>
<td>24. New York</td>
<td>46</td>
<td>73.0</td>
</tr>
<tr>
<td>25. Florida</td>
<td>24</td>
<td>70.6</td>
</tr>
<tr>
<td>26. South Carolina</td>
<td>7</td>
<td>70.0</td>
</tr>
<tr>
<td>27. Tennessee</td>
<td>7</td>
<td>70.0</td>
</tr>
<tr>
<td>28. Washington</td>
<td>16</td>
<td>69.6</td>
</tr>
<tr>
<td>29. Arizona</td>
<td>8</td>
<td>66.7</td>
</tr>
<tr>
<td>30. Kentucky</td>
<td>32</td>
<td>66.7</td>
</tr>
<tr>
<td>31. South Dakota</td>
<td>6</td>
<td>66.7</td>
</tr>
<tr>
<td>32. Alabama</td>
<td>17</td>
<td>65.4</td>
</tr>
<tr>
<td>33. Delaware</td>
<td>7</td>
<td>63.6</td>
</tr>
<tr>
<td>34. Massachusetts</td>
<td>17</td>
<td>63.0</td>
</tr>
<tr>
<td>35. Connecticut</td>
<td>5</td>
<td>62.5</td>
</tr>
<tr>
<td>36. Vermont</td>
<td>3</td>
<td>60.0</td>
</tr>
<tr>
<td>37. North Dakota</td>
<td>3</td>
<td>60.0</td>
</tr>
<tr>
<td>38. Texas</td>
<td>40</td>
<td>57.1</td>
</tr>
<tr>
<td>39. Colorado</td>
<td>9</td>
<td>56.3</td>
</tr>
<tr>
<td>40. Montana</td>
<td>6</td>
<td>54.5</td>
</tr>
<tr>
<td>41. Rhode Island</td>
<td>4</td>
<td>50.0</td>
</tr>
<tr>
<td>42. North Carolina</td>
<td>8</td>
<td>44.4</td>
</tr>
<tr>
<td>43. Idaho</td>
<td>4</td>
<td>44.4</td>
</tr>
<tr>
<td>44. Virginia</td>
<td>4</td>
<td>44.4</td>
</tr>
<tr>
<td>45. Indiana</td>
<td>4</td>
<td>30.8</td>
</tr>
<tr>
<td>46. New Mexico</td>
<td>1</td>
<td>20.0</td>
</tr>
</tbody>
</table>

**States with fewer than five cases (Alaska, District of Columbia, Hawaii, Nevada, and Wyoming) have been excluded because percentages based on so few cases are probably not predictive of future outcome in those states.**

*Percentage of total state will contests.*
lose record is slightly higher than average. New York, a second such state, has about an average record and is the median case. On the other hand, except for the statistically uneven results in states having very few cases, the states which assign the burden of proof to the contestant consistently exceed the national mean and median proponent win/lose records. Where the contestant has the burden of proof, he or she is even less likely to win than where the proponent has the burden of proof. New Jersey, for example, has a 94.2% win record for the proponents. Wisconsin has a 78.3% proponent win record, while Louisiana has an 80.0% proponent win record. Two notable exceptions to this statement, Texas, with a 57.1% proponent win record, and Alabama, with a 65.4% proponent win record, indicate that burden of proof rules may not be as significant in determining the outcome as the general run of figures would indicate at first glance. There appears to be no correlation between geographical location and win/lose records.

Table III clearly shows that burden of proof allocation and assignment make a difference in the number and percent of will contests decided for the proponent and for the contestant. In those states in which the burden of proof of capacity remains with the proponent throughout trial, contestants tend to win approximately one out of every three will contests on an average, or about two out of five contests based on median win/lose records. "Average" here refers to the arithmetic mean. Contestants in those states which allocate to them the burden of proof, tend to win about one of four will contests on median win/lose records, and about three out of ten contests on the average.

<table>
<thead>
<tr>
<th>Allocation Of Burden Of Proof On Capacity</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden on Proponent</td>
<td>Median % 66.6</td>
<td>Average % 64.5</td>
</tr>
<tr>
<td>Burden on Contestant</td>
<td>Median % 75.0</td>
<td>Average % 71.3</td>
</tr>
<tr>
<td>Difference in Outcome on Appeal</td>
<td>+8.4</td>
<td>+6.8</td>
</tr>
</tbody>
</table>

Table IV analyzes appellate decisions in will contests according to seven varieties of testator types, plus unknowns. Of the seven varieties, the largest number of decisions for the proponent (266) come from cases involving senile testators. The next largest number of cases for the proponent involve persons with other organic problems, such as syphilis, dementia, Parkinson's disease, cancer, diabetes, and the like. Ten and eight-tenths per cent of all decisions for the proponent involve a testator who had a functional mental disorder. Fifty-five cases for the proponent involved alcoholics, fifty-five are assigned to persons who are under guard-
ianship at the time of willmaking, each representing 6.3% of the total number of decisions for the proponent.

The largest number of decisions for the contestant, 36.4% of the total number of decisions for the contestants, were the 120 cases involving the senile testator. The next largest category for the contestant was other organic problems, representing 14.6% of the total, followed by functional mental disorder, representing 9.7% of the total. Other decisions for the contestant by type of testator included 5.5% under guardianship, 3.9% alcoholic, 3.0% adjudicated insane, and 0.6% on drugs.

**TABLE IV**

Decisions For Proponent And Contestant By Type of Testator—Number And Percentage Of Total Decisions By Outcome

<table>
<thead>
<tr>
<th>Type Of Testator</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent*</td>
</tr>
<tr>
<td>1. Adjudicated insane</td>
<td>9</td>
<td>1.0</td>
</tr>
<tr>
<td>2. Under guardianship when will made</td>
<td>55</td>
<td>6.3</td>
</tr>
<tr>
<td>3. Taking drugs, or drug addict</td>
<td>17</td>
<td>1.9</td>
</tr>
<tr>
<td>4. Alcoholic</td>
<td>55</td>
<td>6.3</td>
</tr>
<tr>
<td>5. Senile</td>
<td>266</td>
<td>30.3</td>
</tr>
<tr>
<td>6. Other organic problems, including psychoses</td>
<td>135</td>
<td>15.4</td>
</tr>
<tr>
<td>7. Functional mental disorders</td>
<td>95</td>
<td>10.8</td>
</tr>
<tr>
<td>8. Others, or unknown</td>
<td>247</td>
<td>28.1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>879</td>
<td>100.1</td>
</tr>
</tbody>
</table>

* Percentage of total will contests decided in favor of proponent.
† Percentage of total will contests decided in favor of contestant.

Table V shows that testators adjudicated insane at the time they made their wills are the only kinds of testators who lose more than they win at the appellate level. Only senile testators have a win/lose ratio under 70-30 (68.9% for proponent, 31.1% for contestant), the remainder ranging up to a high of 89.5% of testators on drugs whose wills are sustained as against 10.5% whose wills are rejected. The total rate for all proponents is 72.7% win and 27.3% lose.

Table VI demonstrates that the leading kind of disinheriting will involved in appellate will contests is the will in which all family members are disinherited in favor of some stranger or charity. The second leading kind is the will in which one or more children or their descendants are disinherited in favor of one or more children or their descendants. This is the same classification as the will contest between Esau and Jacob. The third leading kind of disinheriting will is the one which picks and chooses between the testator's brothers, sisters, nieces, nephews, and cousins. Additionally, there are a large number of appellate decisions which do not report the type of will involved.
### TABLE V

Decisions For Proponent And Contestant By Type Of Testator—Number And Percentage Of Total Decisions For Each Testator Type

<table>
<thead>
<tr>
<th>Testator Type</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
<th>Total Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent*</td>
<td>Number</td>
</tr>
<tr>
<td>1. Adjudicated insane</td>
<td>9</td>
<td>47.4</td>
<td>10</td>
</tr>
<tr>
<td>2. Under guardianship</td>
<td>55</td>
<td>75.3</td>
<td>18</td>
</tr>
<tr>
<td>3. Taking drugs</td>
<td>17</td>
<td>89.5</td>
<td>2</td>
</tr>
<tr>
<td>4. Alcoholic</td>
<td>55</td>
<td>80.9</td>
<td>13</td>
</tr>
<tr>
<td>5. Senile</td>
<td>266</td>
<td>68.9</td>
<td>120</td>
</tr>
<tr>
<td>6. Organic problems</td>
<td>135</td>
<td>73.8</td>
<td>48</td>
</tr>
<tr>
<td>7. Functional disorder</td>
<td>95</td>
<td>74.8</td>
<td>32</td>
</tr>
<tr>
<td>8. Unknown</td>
<td>247</td>
<td>74.0</td>
<td>87</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>879</td>
<td>72.7</td>
<td>330</td>
</tr>
</tbody>
</table>

* Percentage of total will contests for that testator type.

### TABLE VI

Decisions For Proponent And Contestant By Type Of Will—Number And Percentage Of Total Decisions By Outcome

<table>
<thead>
<tr>
<th>Type of Will By Outcome</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent*</td>
</tr>
<tr>
<td>A. Spouse disinherited in favor of children of same or earlier marriage, or their descendants</td>
<td>17</td>
<td>1.9</td>
</tr>
<tr>
<td>B. Spouse disinherited in favor of ascendants or collaterals</td>
<td>6</td>
<td>0.6</td>
</tr>
<tr>
<td>C. One or more children disinherited in favor of one or more children or their descendants</td>
<td>179</td>
<td>10.4</td>
</tr>
<tr>
<td>D. One or more children disinherited in favor of spouse</td>
<td>48</td>
<td>5.5</td>
</tr>
<tr>
<td>E. One or more children disinherited in favor of ascendants or collaterals</td>
<td>31</td>
<td>3.5</td>
</tr>
<tr>
<td>F. One or more ascendants or collaterals disinherited in favor of one or more ascendants or collaterals</td>
<td>146</td>
<td>16.6</td>
</tr>
<tr>
<td>G. Spouse, children, descendants, ascendants, or collaterals disinherited in favor of a stranger to the estate</td>
<td>289</td>
<td>32.9</td>
</tr>
<tr>
<td>BE. Spouse and one or more children disinherited in favor of ascendants or collaterals</td>
<td>3</td>
<td>0.3</td>
</tr>
<tr>
<td>H. Other or unknown</td>
<td>160</td>
<td>18.1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>879</td>
<td>99.9</td>
</tr>
</tbody>
</table>

* Percentage of total will contests decided in favor of proponent.
† Percentage of total will contests decided in favor of contestant.
Of all the kinds of wills made by testators, there are no kinds which are defeated by appellate courts more often than they are sustained. The type of will with the lowest rate of success for the proponent is one involving the disinherance of a child or children in favor of collaters. This will is sustained 56.4% of the time, and rejected 43.6% of the time. The next lowest rate occurs in the unknown category (63.5% sustained, 36.5% rejected). The highest rate of proponent success is for wills in which the spouse is disinherited in favor of one or more of the testator’s children (89.5% sustained, 10.5% rejected). The next highest rate is for the will in which one or more children are disinherited in favor of one or more children or descendants (78.9% sustained, 21.1% rejected).

**TABLE VII**

Decisions For Proponent And Contestant By Type Of Will—Number And Percentage Of Total Decisions For Each Type Of Will

<table>
<thead>
<tr>
<th>Will Type</th>
<th>Decisions For Proponent</th>
<th>Decisions For Contestant</th>
<th>Total Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td>A.</td>
<td>17</td>
<td>89.5</td>
<td>2</td>
</tr>
<tr>
<td>B.</td>
<td>6</td>
<td>75.0</td>
<td>2</td>
</tr>
<tr>
<td>C.</td>
<td>179</td>
<td>78.9</td>
<td>48</td>
</tr>
<tr>
<td>D.</td>
<td>48</td>
<td>77.4</td>
<td>24</td>
</tr>
<tr>
<td>E.</td>
<td>31</td>
<td>56.4</td>
<td>24</td>
</tr>
<tr>
<td>F.</td>
<td>146</td>
<td>71.9</td>
<td>57</td>
</tr>
<tr>
<td>G.</td>
<td>289</td>
<td>76.1</td>
<td>91</td>
</tr>
<tr>
<td>BE.</td>
<td>3</td>
<td>100.0</td>
<td>0</td>
</tr>
<tr>
<td>H.</td>
<td>159</td>
<td>63.1</td>
<td>93</td>
</tr>
<tr>
<td>TOTAL</td>
<td>879</td>
<td>72.7</td>
<td>330</td>
</tr>
</tbody>
</table>

A The letters in this column refer to the type of will by outcome listed in column one of Table VI.
B Percentage of total will contests involving that type of will.

Table VIII attempts to determine if certain combinations of testator types and will types are more often than not rejected by appellate courts. Many cases occur too infrequently to be meaningful, and anyone’s guess about the outcome in such cases is as good as the author’s. Of all wills made by testators under guardianship, the most likely to be sustained is a will disinheriting a spouse, children, descendants, ascendants, or collaters in favor of a stranger. The least likely to be sustained, insofar as meaningful results are concerned, is a will disinheriting a child in favor of a spouse. Insofar as testators who are taking drugs, wills which give the testator’s estate to a stranger appear to be sustained significantly more than any other type. This is probably an anomaly, although the same result appears in the category of alcoholic testators.

The wills of senile testators are most often sustained in the case of a will disinheriting a spouse in favor of a child. Testators who have organic problems other than senility will find wills which choose between collat-
erals more often sustained than any other variety. Functionally disturbed testators' wills are most often sustained between children, the so-called type C will. A similar result is also found among the wills of testators whose classification is unknown. The will generally least likely to be sustained in all classes is the will of a testator who disinherits his children in favor of collaterals, the so-called type E will.
TABLE VIII
Decisions For Proponent And Contestant By Type Of Testator And Type Of Will—Number And Percentage Of Total Decisions For Each Combination Of Will And Testator Type

(1) Testators Adjudicated Insane

<table>
<thead>
<tr>
<th>Will Type</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#</td>
<td>%</td>
<td>#</td>
<td>%</td>
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(2) Testators Under Guardianship

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(3) Testators Taking Drugs Or Addicted To Drugs

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(6) Testator With Organic Disorder Other Than Senility

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(7) Testator With Functional Mental Disorder

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(8) Testator Unknown Type

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*These letters refer to the type of will by outcome listed in column one of Table VI.

Percentage of total will contests involving that combination of will and testator type.