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Empathy, Subjectivity, and Testamentary Capacity

JANE B. BARON*

The law of wills seems to set itself an impossible task. It is premised on the importance of effectuating a person's wishes as to the disposition of his or her property after death. Courts may not judge the wisdom of those wishes because the testator's ends are personal and individual to him or her alone. To ascertain the intent of persons who can no longer communicate with us directly, we must attempt, on some level, to know them, to enter into their personal experiences and the thoughts and feelings resulting from such experiences. In short, we must empathize with them. Yet if values are truly individual, empathy is problematic: the best faith attempts to understand another person may fail — indeed, they probably are doomed to fail. In such instances, we are left to impose our wishes and values on the testator instead of effectuating the testator's own desires.

This difficulty is inherent in liberal notions of individuality. If, as the law of wills seems to suppose, each individual's desires and values are subjective and personal to him or her alone, then they are necessarily unknowable to others. The goal of wills law appears impossible to achieve.

The law of testamentary capacity illustrates the dilemma. In assessing a testator's mental capacity to make a will, courts consistently and candidly hold that the fact finder may consider, along with other factors, whether the testator's disposition of his property is

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substantively "reasonable" or "natural." Indeed, it has been demonstrated persuasively that the substantive rationality of a testamentary disposition is often the primary determinant of results in capacity cases. If a particular disposition, in the abstract, can be proof of mental incapacity, then presumptively there must be some dispositions which no mentally competent person freely could intend. Such a presumption requires faith that there are some values that no sane person could hold and, conversely, that some values are held in common by everyone. This faith is wholly inconsistent with the idea that wills law must neutrally effectuate individual intent.

In practice, although courts freely admit wills as evidence in testamentary capacity cases, they rarely examine any will provision in the abstract without also evaluating other evidence of the testator's experiences and beliefs. Some courts adopt what appears to be an objective standard for evaluating mental capacity, a standard which turns on the testator's abstract ability to "reason." Yet in assessing whether the testator indeed has engaged in the requisite process of reasoning, the critical factor is not whether the will's provisions are rational in any abstract sense, but whether they are such as might have been expected from one in the testator's position. Other courts reach the same result directly, by defining capacity explicitly as conformity with a testator's peculiar and individual beliefs and concerns. In all cases, then, the finder of fact is effectively required to empathize with the testator.

This Article argues, on the basis of that empathy, that wills law is far less conventionally individualistic than oftentimes is thought. If each individual's values truly were subjective, then there would be no means by which those values could be discovered, and the purported premise of wills law would be empty and absurd. But in testamentary capacity cases courts manifest a faith that humans can know others without inappropriately imposing their own values.

Of course, empathy carries risks: the finder of fact may be unable totally to cast aside his or her own beliefs in the attempt to grasp another's. Those risks, however, are no different from those incurred in ordinary lifetime interactions between disparate individuals. "Testamentary intent" in reality differs but little from any person's wishes during life. Like lifetime thoughts and desires, all that can be known of the testator's intent is what can be imperfectly gleaned through empathy.

The first section of this Article describes the doctrine of testamentary capacity and explores its connection to liberal ideas of individualism. The task of the mental capacity requirement is to ensure that

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1. Green, Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271 (1944) [hereinafter Green, Proof of Mental Incompetency].
a legally enforceable testamentary intent exists. The task of the courts is to discover that intent without judging the testator's ends.

The second section describes the tests courts have adopted for assessing mental capacity, and demonstrates their potential to conflict with the notion that values are subjective. Attempts to define mental capacity reflect two themes, one focusing on the testator's ability to engage in a process of "reasoning," the other focusing on whether the testator's will is consistent with the beliefs and values he or she seemed to embrace during life. While both themes seek objectively to effectuate choices that they regard as fundamentally subjective and idiosyncratic, neither is capable of doing so.

The third section illustrates how pervasively courts rely on empathy as a means of assessing capacity when a will's dispositive provisions are unconventional and controversial. Even those courts which purport in such cases to evaluate the testator's abstract ability to reason actually assess capacity by comparing the testator's will with what is known of his or her lifetime preferences and peculiarities. To make that comparison, the fact finder is asked to empathize with the testator.

The fourth section explores the relation between the use of empathy and the premise of wills law. Wills law presupposes complete neutrality with respect to the testator's wishes. Empathy cannot achieve that neutrality. Thus, when courts utilize empathy to assess a testator's intent, they accept the impossibility of discovering the testator's pure subjectivity.

Finally this Article suggests that other doctrines of wills law depend more heavily on empathy than commonly has been assumed. In interpreting wills, as in determining capacity, courts require the finder of fact to step into the testator's shoes and see the world from his or her perspective. That requirement implies a distinct view of the world as a community, not of individuals isolated from each other in their own subjectivity, but of individuals linked to one another by their willingness to abandon themselves for others in the faith that others one day will do the same for them.

THE PREMISE OF WILLS LAW AND THE REQUIREMENT OF MENTAL CAPACITY

The "basic premise" of the law of wills is to ensure owners "the widest possible latitude in disposing of their property in accordance
with their own wishes whether they be wise or foolish.\(^2\) There are obvious and important limitations on the freedom granted the testator: elective share statutes prevent testators from completely disinheriting their spouses;\(^3\) pretermission statutes bar testators from disinheriting children without explicit mention;\(^4\) and estate taxes prevent testators from transmitting huge blocks of property intact.\(^5\)

These limitations are regulatory in purpose and effect. They are designed not to effectuate private intent, but to defeat it in furtherance of explicitly identified social goals.\(^6\) Nevertheless, outside the

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2. E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 1 (3d ed. 1985). Though some cases hold testamentary freedom to be a natural right (see, e.g., Nunnenmacher v. State, 129 Wts. 190, 108 N.W. 625 (1906)), the vast majority of courts agree that freedom of testation exists solely by virtue of legislative grant. See, e.g., Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead rules succession only by sufferance.")

No a priori reason exists to permit freedom of testation. The existence of statutes of descent and distribution demonstrates that the state is perfectly capable of disposing of property after its owner's death. This paper will not examine the numerous arguments for and against testamentary freedom. On free testation generally, see Cohen, The Birthright of Esau, in LAW AND THE SOCIAL ORDER 27 (1933); 1 R. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 415-43 (1914); Cahn, Restraints on Disinheritance, 85 U. Pa. L. Rev. 139, 145-46 (1936); Friedman, The Law of the Living, the Law of the Dead: Property, Succession, and Society, 1966 Wis. L. Rev. 340; Halbach, An Introduction to Chapters 1-4, in DEATH, TAXES AND FAMILY PROPERTY 3 (E. Halbach ed. 1977); McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 ILL. L. REV. 96 (1919); Morton, The Theory of Inheritance, 8 HARV. L. REV. 161 (1894).

3. Elective share statutes allow the surviving spouse a choice between taking under a decedent's will or renouncing the will and taking a statutory share of the decedent's estate. The share may be a third, a half, or an intestate share of the estate. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 400 (3d ed. 1984). States vary on whether and to what extent property other than that in the decedent's probate estate is included in the elective share. Id. at 408. For one approach, see U.P.C. §§ 2-201, 2-202 (1982).


regulatory limits, the premise of wills law is facilitative — individual intent, be it “wise or foolish,” controls.


Pretermission statutes do not require the testator to leave anything to his or her children, but provide some measure of protection to the children by requiring that disinheritance be express. Arguably the statutes in fact protect the testator, who is presumed to wish to benefit his or her children in the absence of explicit evidence to the contrary. For discussions of pretermission statutes, see Dainow, *Inheritance by Pretermitted Children*, 32 Ill. L. Rev. 1, 10 (1937); Evans, *Should Pretermitted Issue Be Entitled to Inherit?*, 31 Calif. L. Rev. 263 (1943); Haskell, supra, at 507; King, *Statutory Status of Pretermitted Heirs*, 13 B.U.L. Rev. 672 (1933); Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 Colum. L. Rev. 748 (1929).


Other statutes protecting the family are homestead laws, see generally 1 American Law of Property § 5.114 (A. Casner ed. 1952), and laws (now becoming rare) restricting property owners' power to make charitable gifts, see E. Clark, L. Lusky, & A. Murphy, supra note 2, at 192-94.


> [W]hen a court gives effect to a will as made by a testator it is granting to him certain limited powers of sovereignty. The legislature of the state has already declared in its statute of descents and distributions how property shall be distributed upon the death of its owner. But, by another statute — the statute of wills — it has permitted the testator to disregard the statute of descents and distributions, and, within certain limits, to legislate for himself.

The statement made in the text warrants one qualification. State statutes set forth detailed requirements for executing a will. Unless the requirements are satisfied, the document will not be given effect as a “will.” The execution formalities of wills law thus may defeat the testator's intent. Yet, despite their potential to defeat intent, formalities are facilitative in purpose:

> Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter. Their purpose is to make sure, first, that the parties know what they are doing, and, second, that the judge will know what they did. These are often referred to as the cautionary and evidentiary functions of formalities. 

> [T]he formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored. The reason for ignoring them, for applying the sanction of nullity, is to force them to be self conscious and to express themselves clearly, not to influence the substantive choice about whether or not to contract or what to contract for. 

Conceptually, this premise requires that the testator have an intent; if he or she does not, there is nothing for the law to effectuate. The requirement of mental capacity can be understood, then, as a function of wills law's premise: it guarantees that the testator is capable of forming the intent which the law is designed to protect. This perspective illustrates the individualism of wills law — the intent which the law carries out must be generated by the testator. The mental capacity requirement ensures that the wishes appearing in the will "truly" are the testator's own.

All state statutes governing wills therefore require mental capacity. They provide that a testator must have a sound mind, or sound mind and memory, or sound and disposing mind and memory. Yet, as a leading treatise notes, the mental capacity requirement "for all practical purposes, is a matter of case law, for the statutory requirement is so short and so general in its wording as to be meaningless and useless in arriving at a workable definition." While the cases vary in precise formulation, the following standard is accepted in substance in all jurisdictions:

Testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and [the] nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them.

If a testator meets this standard, his or her will must be carried

8. See Epstein, Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform, 35 TEMPLE L.Q. 231, 233 (1962) ("As the word 'will' denotes, the disposition is to be that which is intended by the testator. If the testator, as a result of insufficient mental capacity, is unaware of the fact or manner in which he is disposing of his property, he is not exercising his 'will.'") See also J. Alexander, Commentaries on the Law of Wills § 354 at 480 (1917) ("A will is the child of the mind, but when the mind is dead, there can be no offspring"); Langbein, supra note 7, at 491 ("The many rules governing testamentary capacity and the construction of wills are directed to two broad issues of testamentary intent: did the decedent intend to make a will, and, if so, what are its terms?").

It has been suggested that the view that "intent" or "will" is required for the making of a will "is more in accord with an earlier era in our law when mind was considered a separate and distinct entity." Green, Public Policies, supra note 7, at 1205. See also id. at 1194-97 (discussing the relation between certain views of mental disorder and philosophical dualism). Green elsewhere notes that courts "do not, like the psychologists and psychiatrists, purport to be examining behavior — they still purport to be examining the 'mind' of the individual, that distinct entity which exists separate and apart from the body." Green, Judicial Tests of Mental Incompetency, 6 MIZ L. REV. 141, 145 (1941) (hereinafter Green, Judicial Tests). However, he argues, courts in fact "base their judgments, just as the psychiatrists do, upon the behavior of the person investigated, only they do not admit they are doing it." Id. at 161.

9. 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 12.15 at 593 (1960). All states also require that the testator have attained a specified age. Id. § 12.8.

10. Id. § 12.15 at 593.

11. See id. § 12.21; Green, Judicial Tests, supra note 8.

12. 1 W. BOWE & D. PARKER, supra note 9, § 12.21.
out, whatever its substance.\textsuperscript{13} Courts repeatedly criticize juries' tendencies to strike down, on mental competency grounds, wills of which they disapprove.\textsuperscript{14} If the wishes set forth in the will are deemed to be the testator's own, they may not be judged by others.

In this respect, the doctrines of testamentary freedom and capacity reflect notions that are fundamental to liberal political theory. "The political doctrine of liberalism does not acknowledge communal values. . . . The individuality of values is the very basis of personal identity in liberal thought. . . ."\textsuperscript{15} Values must be subjective in this view: "an end is an end simply because someone holds it."\textsuperscript{16}
When judges admonish jurors not to strike down a will simply because it is not the will the jurors themselves would have made, those judges affirm the individuality and subjectivity of values.

On the other hand, courts and commentators agree that the dispositive provisions of a testator's will may be considered, along with other evidence, in determining mental capacity. Differences exist in the evidentiary weight accorded to the will. In some states the will may be considered only if there is additional evidence of incapacity apart from the will, while in other states the will's provisions alone may be sufficient to get the case to the jury. However, any use of the will's substance to prove incapacity is problematic if wills law truly is grounded in liberal individualism. If all values reflect individual choices which may not be judged by others, how can it be acceptable for a jury to find lack of capacity by looking at the individual testator's choices?

Some have answered this question by suggesting that the mental capacity requirement has little to do with effectuating individual choices but instead is designed to protect the testator's family from disinheritance. This view concedes that the use of the will's dispositive provisions as evidence of incapacity restricts individual freedom, but argues that "this is no innovation in law." The argument, at bottom, posits that it is acceptable for the court or the jury to consider the will because the policy of the mental capacity requirement is regulatory, not facilitative.

This argument is questionable on several levels. First, it confuses empirical observation with normative or prescriptive judgment. It is


17. See, e.g., Mileham v. Montague, 148 Iowa 476, 125 N.E. 664 (1910); Moran's Ex'r v. Moran, 248 Ky. 54, 59 S.W.2d 7 (1933); Ingalls v. Trustees of Mt. Oak Methodist Church Cemetery of Mitchellville, 244 Md. 243, 223 A.2d 778 (1966); T. Atkinson, supra note 13, § 51 at 232.

18. See, e.g., Hardenburgh v. Hardenburgh, 133 Iowa 1, 6-7, 109 N.W. 1014, 1016 (1906); Wigginton's Ex'r v. Wigginton, 194 Ky. 385, 398, 239 S.W. 455, 461 (1922); Scally v. Wardlaw, 123 Miss. 857, 879, 86 So. 625, 627 (1920).

19. See, e.g., In re Lawrence's Estate, 286 Pa. 58, 66, 132 A. 786, 789 (1926) (discussing, in dicta, the possibility of a disposition "so gross or ridiculous as to give rise to a presumption of insanity"). See also infra note 52.

20. Green states: [W]hen we seek the reason behind the rule that mental incompetency destroys the power to dispose of property by last will and testament, it is not sufficient to invoke the policy of protecting the afflicted individual. His will speaks only at the date of his death. By that time he is beyond the possibility of the law's protection. If [the protective policy of the law] is to be used as an explanation of the legal requirement of a sound and disposing mind, it must, then, be referred to the protection of the family or dependents of the deceased. Green, Public Policies, supra note 7, at 1216.

21. Green, Proof of Mental Incompetency, supra note 1, at 305. "In the field of wills we find individual freedom restricted by the common law devices of dower and curtesy and the statutory provisions which forbid a testator to leave less than a specified percentage of his estate to his surviving spouse." Id. (Footnote omitted).
possible that when a jury deems a testator mentally incompetent on the basis of a will provision giving the entire estate to, say, a religious sect, the jury may be seeking through its finding to protect the testator's family, who will receive the estate through the intestacy statutes if the will fails. It does not follow that the purpose of permitting consideration of the will, or of the mental competency requirement generally, is family protection. Certainly courts do not seem to regard family protection as a legitimate goal in the inquiry. On the contrary, their repeated reminders to juries not to substitute their notions of fairness for the testator's indicate a judicial belief that using the mental capacity requirement to protect the testator's family is inappropriate.

Second, the regulatory effects of holding a testator incompetent on mental incapacity grounds are considerably more draconian than the explicit regulations set forth in elective share statutes and the like. Unlike a decision holding a will invalid, family protection statutes do not defeat the testator's intent completely. Instead, under the statutes, the omitted share is supplied out of estate assets, with the remainder of the estate going to the beneficiaries named by the testator. The mental capacity doctrine, under which the entire will may be held to fail, is obviously inconsistent with the far less intrusive family protection policies embodied in elective share statutes.

Finally, assuming arguendo that family protection is the goal underlying the mental capacity requirement, the use of wills' dispositive provisions to prove capacity is a poor means to effectuate that goal. Given the large number of factors bearing on the issue of whether a will makes reasonable provision for the testator's family in the circumstances, and the likelihood that different courts or juries will have differing views of the fairness of the disposition under the circumstances, the cases — and their message as to what constitutes an acceptable degree of family protection — are bound to be inconsistent and unpredictable. If family protection is sought, obviously better ways exist to achieve it.

22. See, e.g., U.P.C. §§ 2-201 to 2-207, 2-301(b), 2-302(c).
23. See, e.g., T. Atkinson, supra note 13, § 52 at 245-46; Epstein, supra note 8, at 241-42; Green, Proof of Mental Incompetency, supra note 1, at 300-01.
25. "Society's views concerning the bounds of dispositive freedom should be expressed through a positive assertion of the legislature rather than manifested through the individual predilections of a judge under the pretense of determining a testator's mental competency." Epstein, supra note 8, at 247.
If family protection is not (or should not be) the policy behind the mental capacity requirement, and if "the individual's freedom of disposition is still regarded as a fundamental concept in the willmaking process," then the use of a will's substantive provisions as evidence of testamentary capacity remains problematic. Nevertheless, the courts in testamentary capacity cases seem surprisingly untroubled when they say in the same decision that, on the one hand, a competent testator is free to be irrational and, on the other, that an irrational disposition demonstrates incompetence. The apparent contradiction is avoided, in the eyes of most courts, by holding that the will's provisions are but some evidence of incapacity, to be considered along with other evidence bearing on the testator's mental condition. Although this strategy seems to satisfy the courts, it does not resolve the problem. If the testator's ends are for him or her alone to choose, then any outside judgment of those ends is questionable, even if that judgment is not given conclusive evidentiary weight. In point of fact, however, although the courts have sought to formulate tests of capacity that respect the testator's choices, the definitions they employ are not and cannot be neutral in regard to the testator's ends.

WHAT IS MENTAL CAPACITY?

The traditional doctrinal requirements for testamentary capacity — knowledge of property, the act to be performed, and the objects of one's bounty — in practice have provided hardly more guidance than the statutory standard of "sound mind." Thus courts and commentators have struggled to articulate precisely what it is that separates the competent from the incompetent testator. Two themes run throughout their efforts. The first theme requires the testator to be "rational" or to have exercised "reason." This test on its surface is an objective one, in the sense that it looks toward an abstract ability, something anyone can recognize, which one either has or does not have. The second theme, in contrast, focuses not directly on the testator's ability to reason, but on his or her consistency with his or her own "true" self. The testator is required to have made a will reflecting his or her own unique circumstances of belief, family and property. This self-consistency theme emphasizes not some abstract, objectively-recognizable ability, but instead requires the fact finder to

26. Id. at 246-47. See also Comment, A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity, 2 CONN. L. REV. 616, 621 (1970) ("[W]hen considering the statute of wills, it should be remembered that freedom from orthodox dispositions is the raison d'etre of the statute").

27. See, e.g., Coleman v. Robertson's Ex'rs, 17 Ala. 84 (1849); Donnan v. Donnan, 236 Ill. 341, 86 N.E. 279 (1908); Smith v. Fitzjohn, 354 Mo. 137, 188 S.W.2d 832 (1945); In re Estate of Gandynski, 46 Wis. 2d 393, 175 N.W.2d 272 (1970).
try to step into the testator’s shoes and see the world through the latter’s eyes.

The rationality and self-consistency themes constitute divergent visions of how individuals come to know one another and, ultimately, how much individuals share. The rationality theme posits that individuals recognize as common in each other only a mode of thinking — “rationality” or “reason.” The self-consistency theme takes the competing view that individuals can recognize and share other individuals’ self-chosen ends.

Both themes purport to give effect to the notion that values are subjective. Neither theme, however, can effectuate that notion neutrally. The rationality theme requires the finder of fact to analyze and judge the testator’s actual decisions in order to test the latter’s abstract ability to reason. Such judgment is inconsistent with the view that an individual’s choices may not be judged by others. The self-consistency theme requires the finder of fact to empathize with the testator in order to discover the latter’s chosen values. Yet if, as a strict view of the subjectivity of values suggests, one’s choices define one’s individuality, then true empathy is impossible: rather than entirely abandoning his or her own individuality, the fact finder is more likely to impose his or her own values than to “discover” the testator’s.

The following sections describe and contrast the rationality and self-consistency themes. They conclude by examining the potential of each theme to conflict with the strict view that values are subjective. The Article’s third section demonstrates that the courts which speak in terms of the rationality theme in fact employ the self-consistency standard and then implement that standard by requiring empathy on the part of the finder of fact. Thus the operative standard in all cases, whatever their rhetoric, is empathy. Moreover, courts are well aware of the limits of empathy. By requiring empathy nonetheless in the determination of capacity, courts implicitly reject the view that the intent which wills law carries out is or can be purely the testator’s own.

The Rationality Theme

From early on, American courts carefully have distinguished testators’ feelings and moral beliefs from their intellect and reason,
and have held that only defects in the latter bear on mental capacity. The inquiry, courts say, must be directed to the presence or absence of reason; if the abstract ability to reason is present, the quality of its exercise is unimportant. Capacity to comprehend, not actual comprehension, is what counts, and numerous cases hold that errors in reasoning are not evidence of lack of capacity.

Under the rationality theme, then, the ability to reason dictates nothing about its exercise. Indeed, some courts find the distinction between the presence of reason and its exercise to be critical to freedom of testamentation. In point of fact, the separation of reason from its exercise clarifies what freedom of testamentation is: it is the freedom to exercise reason in accordance with one's own unaccountable prejudices.

28. See, e.g., In re Forman's Will, 54 Barb. 274 (N.Y. App. Div. 1869) (“Moral insanity is a disorder of the feelings and propensities. Legal insanity is a disorder of the intellect. . . . Moral insanity . . . is insufficient to set aside a will.”) The following jury instruction, approved by the Supreme Court of New Jersey in 1849, is typical:

[T]he inquiry with you will be, was the man deranged, in the appropriate technical sense of the word, or was he merely the victim of unbridled passion? Was reason dethroned, or had passion seized the rein and acquired mastery? . . .

I need not say that there is a line, broad, clear, and well defined, though to our imperfect senses oftentimes imperceptible, between the maniac, the man irrational and irresponsible, and he whose soul is seared by the burning lava of human passions. . . .


29. See, e.g., J. Alexander, supra note 8, § 331 at 442-43: “[A] sound mind is not determined by how well a man may talk or reason, the soundness of his judgment or the propriety of his actions. The question is not how well he may talk and act, but can he talk and act rationally and sensibly, has he mind and reason, has he thought, judgment and reflection?” (emphasis added).


32. There is a clear distinction between having the capacity to comprehend [the deserts of the objects of one's bounty] and actually comprehending them. The former the law requires; the latter it does not . . . . Care, therefore, should be taken by the courts to see that the distinction mentioned is observed; for it is precisely the one that public policy dictates and the law requires in order to preserve the right and power of testamentary disposition.

McClintock, 87 Ark. at 274, 112 S.W. at 411. See also Kevil v. Kevil, 65 Ky. (2 Bush.) 614, 615 (1866) (“Gross inequality, apparently unjust or unreasonable, is not alone sufficient to invalidate a will. . . . The testamentary power is of great value both in its enjoyment and its results; and therefore it should be well guarded by the law, and sternly upheld by the judiciary”); Trumbull, 22 N.J.L. at 141 (to measure capacity with reference to a will's justice “would be certainly subversive of that absolute control and dominion which the law gives to every man over his own property”).

33. We all have likes and dislikes . . . for which we might not be able to give an intelligible reason, or one that would be satisfactory to another person, who did not see with our eyes and hear with our ears, . . . and yet . . . because we make a will according to these peculiarities of our views, must it be set aside? Better make a law that all a man's property should be divided
The notion that reason exists and can be recognized independently of feelings bears strong traces of liberalism. "The first principle of liberal psychology states that the self consists of understanding and desire, [and] that the two are distinct from one another. . . ."34 The notion that others may not judge the testator's actual exercise of his or her reasoning powers echoes the subjectivity of values. "What distinguishes men from one another is not that they understand the world differently, but that they desire different things even when they share the same understanding of the world. . . . The basis of [men's] individual identities . . . must be the choices they make, the ends they choose."38

**Rationality and the Insane Delusion**

In few cases is it argued that the testator lacked reason entirely. Most cases involve the allegation that the testator suffered from an "insane delusion" on one subject which affected particular dispositions in the will. In response to such allegations, courts have formulated varying definitions of "insane delusion."36

Many courts define delusion as a belief with "no basis in reason."37 Such definitions are consistent with the more general position that testamentary capacity exists only when a testator is capable of reasoning. A large number of the definitions in this vein state that an insane delusion exists where there is no evidence to support the testator's belief.38 Some cases define an insane delusion as that which no "rational" or "sane" person could believe, apparently postulating a hypothetically "normal" person akin to the abstract "reasonable per-

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35. *Id.* at 40.
37. A delusion is the mind's spontaneous conception and acceptance of that, as fact which has no real existence except in its imagination . . . . Mistake, whether of fact or law, moves from some external influence which is weighed by reason. Delusion arises from morbid internal impulse, and has no basis in reason.

Boardman v. Woodman, 47 N.H. 120, 139 (1866).
34. *See* also Hooper v. Stokes, 107 Fla. 607, 609, 145 So. 855, 856 (1933); *Crumbaugh*, 228 Ill. at 401, 81 N.E. at 1051; *In re Estate of Millar*, 167 Kan. 455, 460, 207 P.2d 483, 487 (1949).
38. *See*, e.g., *In re Estate of Kendrick*, 130 Cal. 360, 62 P. 605 (1900); Owen v. Crumbaugh, 228 Ill. 380, 81 N.E. 1044 (1907); Ahmann v. Elmore, 211 S.W.2d 480 (Mo. 1948).
son" of tort law. The two standards can be seen as closely related because "that which no sane mind would believe at all does not rise to the dignity of evidence" and thus "belief in something that no sane man could believe in is evidence of insanity."

The emphasis on external evidence for a belief, and on whether an objectively rational person could hold the belief, presupposes that the process of reasoning can be recognized wholly apart from the ends to which that process is applied. To reason is to move from an evidentiary premise to a conclusion; sane people reason and thus can recognize reasoning. An obvious kinship exists between these definitions of insane delusion and the broader definition of mental capacity as possession of the ability to reason.

The Self-Consistency Theme

The rationality theme in the law of mental capacity, with its emphasis on the testator's abstract ability to reason, suggests that mental capacity can be judged objectively, by reference to what any rational person would do in making a will. Yet many cases and treatises reject the idea of an objective standard, and suggest that an objective test is inconsistent with free testation. In this view, the abstract search for signs of reasoning is misguided. Instead, "the individual must be compared with himself" and "his ordinary modes


40. McClintock, 87 Ark. at 279, 112 S.W. at 414 (citation omitted). Evidence is the means by which facts are proved. All evidence must be addressed to the sane mind. That which no sane mind would believe at all does not rise to the dignity of evidence; A belief in something that no sane man could believe is evidence of insanity. Evidence, in a legal sense, is external. . . . A belief grounded on evidence, however slight, necessarily involves the exercise of the mental facilities of perception and reason.


41. Even those who disagree with this description of reasoning agree that there is a reasoning process common to all sane persons. See infra notes 48-50 and accompanying text.. See also In re Estate of Delaney, 131 N.J. Eq. 454, 457, 25 A.2d 901, 903 (N.J. Prerog. Ct. 1942) ("Not every discomposure of the mind will render one incapable of making a will; it must be such a discomposure, such a derangement, as to deprive one of the rational faculties common to man.") (emphasis added).

42. "[T]he law of wills, unlike the law of torts, does not create for testators a standard such as a reasonably prudent person, and demand that all testators and their wills conform to it. Each is left free to do with his property as he wishes. . . ." Cline v. Larson, 234 Or. 384, 394, 388 P.2d 74, 79 (1963). See also In re Estate of Alexander, 128 Neb. 334, 336, 258 N.W. 655, 656 (1935) ("[Testator] might have disinherited his son entirely if he was so disposed. That was his right. Such is the purpose of the law in empowering a man to dispose of his property by will.").
of speaking, thinking and acting."^{43}

This self-consistency theme of mental capacity law asks whether the testator has been true to his or her own unique experience and beliefs. To make that assessment, the jury must put itself in the position of the testator — it must empathize. Where the court can find, in the peculiar circumstances of the testator's family history, a reason that apparently explains the testator's disposition, it will uphold the will.^{45}

The self-consistency approach does not wholly abandon rationality as a criterion for evaluating mental capacity; it simply redefines rationality as that which makes sense in the testator's circumstances. Nor does the self-consistency theme necessarily deny that values are subjective. Indeed, it is precisely because a person's unique experiences give rise to his or her values that the fact finders must enter into those experiences in order to assess capacity.^{47}

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43. The individual must be compared with himself. . . . For the existence of lunacy is not, in general, characterized so much by extravagance of thought, compared with the average and ordinary mode of thinking of all men, as by marked divergence, without the interposition of any adequate external cause on the part of the person whose mental condition is in question, from his ordinary modes of speaking, thinking, and acting.

H. UNDERHILL, A TREATISE ON THE LAW OF WILLS § 90 at 117 (1900) (emphasis original). See also J. ROOD, A TREATISE ON THE LAW OF WILLS § 119 at 70 (1904) ("The thought, desire or act which is claimed to show insanity must not be tried by any ideal of propriety, but by comparison with the character of the sane person when he was sane").

44. See, e.g., In re Will of Mintzer, 5 Pa. 206, 211 (1863) ("[Y]ou must say by your verdict, not what, in your opinion, is the moral character . . . of the will, but is this will that of the testator — of Adam Mintzer, with all his natural peculiarities and frailties, or of Adam Mintzer, a monomaniac").

45. See, e.g., In re Estate of Shay, 196 Cal. 355, 237 P. 1079 (1925); Phillips v. Johnson, 303 Ky. 574, 198 S.W.2d 305 (1946); Jackson's Ex'r v. Semones, 266 Ky. 352, 98 S.W.2d 305 (1936); Smith v. Fitzjohn, 354 Mo. 137, 188 S.W.2d 832, 834 (1945).

46. See, e.g., Newcomb's Ex'r. v Newcomb, 96 Ky. 120, 27 S.W. 997 (1894); Jackson's Ex'r v. Semones, 266 Ky. 352, 98 S.W.2d 305 (1936); Smith v. Fitzjohn, 354 Mo. 137, 188 S.W.2d 832 (1945).

47. No greater injustice could be done, in many instances, by a testator, than to so dispose of his property as to be what the world would call just. There are so many circumstances occurring, in every family, that never reach the public eye or ear, in which the conduct of children or relatives is disclosed, affecting, in the most serious manner, the happiness of its members, that the parent alone is competent to determine how much each member of his family is fairly and justly entitled to, in the division of his estate. Reynolds v. Root, 62 Barb. 250, 252 (N.Y. App. Div. 1862). See also In re Alper's Will, 142 N.J. Eq. 529, 535, 60 A.2d 320, 324 (N.J. Prerog. Ct. 1948), aff'd, 2 N.J. 104, 65 A.2d 736 (1949) ("It is for [the testator] . . . alone to weigh those circumstances and influences which in his own mind and conscience justify such variances in bounty as he chooses to donate. This is true where the reason for the variance does not appear: a fortiori where the reason is so abundantly present").

Courts adopting the self-consistency theme may be just as concerned with the testa-
The real departure of the self-consistency theme from the rationality theme is not on the question of whether values are subjective, but on the ability of fact finders to discover the testator's values without inappropriately imposing their own. The divergence between the two themes is illustrated by a debate between two commentators early in the twentieth century. Page objected to the definition of an insane delusion as a mistake made without any evidence from which a sane man could draw the conclusion drawn by the testator. He argued that the definition was inherently defective because of its "assumption that it is well known what a sane man could or could not believe." A more valuable test, Page suggested, would assess whether the belief in question could be permanently removed by evidence, because "a mistake made by a sane person is always susceptible of correction." Page's new test was entirely consistent with the conventional test; the presence or absence of abstract reasoning ability remained crucial. He merely proposed that the presence of reasoning was better assessed by looking to whether a wrong belief could be corrected than by looking to the process by which the belief was reached.

Gardner disagreed entirely with Page's views:

If the jury-man assumes, as he must . . . that he is himself a rational man, he then can form an opinion as to what he, as a rational man, could believe. If, putting himself, with the help of the evidence, as nearly as may be in the place of the testator, he can say that he can conceive of himself as thinking or feeling as the testator felt or thought, he must then say that the testator was free of insane delusions. But if he cannot conceive of himself — a rational man — thinking or feeling after the manner of the testator, he must then say that the latter was insane.

In stark contrast to the rationality theme, Gardner's vision assumes that rational people can share more than just a way of thinking from a premise to a conclusion or from a conclusion to a premise. Rather, they can share a set of feelings, beliefs and responses. The latter is tor's ability to reason as courts employing the rationality theme, and may differ with the latter only as to the means by which reasoning ability is to be proved. For example, consider a devise to the Catholic Church. Such a devise on its face might not raise doubts as to the testator's reasoning ability. Yet if it were known that the testator had devoted the whole of his or her life to the study and practice of Judaism, there might be cause to question whether he or she was "reasoning" at the time the will was made. Thus, courts may employ self-consistency as a device to determine rationality. However, as is developed in the third section of this Article, all courts in practice rely on empathy, whatever the stated goal of their inquiry.

49. W. PAGE, supra note 48, § 154 at 264.
50. See supra note 41 and accompanying text.
made possible by empathy, by the fact finder putting himself or herself "as nearly as may be in the place of the testator." When a rational person exercises empathy he or she recognizes the testator not simply as another reasoning being, but as himself or herself.

**Rationality, Self-Consistency and the Use of the Will's Provisions as Evidence of Capacity**

Cases sounding the rationality theme and the self-consistency theme alike hold that the fact finder may consider the will's dispositive provisions in evaluating the testator's mental capacity. The cases are replete with statements that a natural, just or reasonable will tends to demonstrate capacity, while an unnatural, unjust or unreasonable will casts doubts on capacity. Predictably, courts differ on the meaning they give terms such as "natural," "just" and the like.

Some cases, reflecting the rationality theme, compare a will's dispositive provisions with those an abstract "reasoning" person would include. In these cases, courts often conclude that the will in question is "unnatural," "unjust" or "irrational" without defining those

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52. See, e.g., Newman v. Smith, 77 Fla. 633, 82 So. 236 (1919); In re Estate of Heazel, 74 Idaho 72, 257 P.2d 556 (1953); Moran's Ex'r v. Moran, 248 Ky. 554, 59 S.W.2d 7 (1933).

Despite some suggestions to the contrary (see, e.g., infra note 104 and accompanying text), courts and commentators agree that the will never is conclusive evidence. "If it is established that the testator lacked sufficient understanding when he executed his will, the instrument will be declared invalid, no matter how natural and just its provisions may seem." J. ALEXANDER, supra note 8, § 354 at 480. See also T. ATKINSON, supra note 13, § 51 at 222-33 ("[T]he will of a person whose mind is unsound for testamentary purposes is not valid, though the provisions are the same as he would likely have made if he had possessed capacity.").

One of the reasons most commonly given for the proposition that the will never can be conclusive is based on the utility of wills to command family loyalty and obedience:

The right [of a testator] to discriminate among his children in making a testamentary disposition of his property is one of the most valuable rights which he possesses. By the exercise of this right he is enabled to enforce his commands during his life. . . . He is enabled to punish the undutiful and disobedient, and to reward those of his children who have given heed to his commands. . . . He is enabled to secure for himself in his declining years the attention and care that his age and physical infirmities require. . . .

H. UNDERHILL, supra note 43, § 105 at 146. See also 2 W. BLACKSTONE, COMMENTARIES *10-13:

[When property] became inheritable, the inheritance was long indefeasible. . . . Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong . . . and prevented many provident fathers from dividing or charging their estates, as the exigencies of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by testament. . . . (emphasis original.)
terms, thus suggesting that it is possible to tell in the abstract, without regard to any of the testator’s specific views or experiences, what a “rational” or “natural” disposition looks like. This suggestion is found most strongly in insane delusion cases, where courts hold that a will’s dispositive provisions are relevant not on the issue of whether the testator actually was deluded, but on the issue of whether the delusion caused the testator to make the particular dispositions in the will.

In accepting the will’s admissibility on this issue, courts and commentators alike presume that the will — by itself and in the abstract — can demonstrate the influence of a delusion. The idea seems to be that a “rational” will can be distinguished confidently from an “irrational” will abstractly, by anyone, without reference to any facts about the testator. The distinction is to be drawn on the basis of the will’s “justice” and “naturalness” (as opposed to “harshness” or “injustice”), again considered abstractly and without reference to the testator’s particular experiences.

In adopting as their touchstone abstract notions of “justice” and “naturalness” rather than conformity to the testator’s lifetime beliefs, cases in this vein reflect the rationality theme. At the same time, however, they illustrate how problematic it is to divorce an inquiry into the testator’s ability to reason from the testator’s presumptively subjective and unjudgeable goals. The rationality theme posits that we can tell whether a testator has exercised reason without regard to the result the testator reached; “errors” in reasoning are said to be of no account. Yet courts which hold that a will’s abstract “injustice” is evidence of incapacity effectively define “reasoning” as reaching a particular result. This circularity is inevitable:

53. See, e.g., Maroncelli v. Starkweather, 104 Conn. 419, 426, 133 A. 209, 212 (1926); In re Estate of Heazle, 74 Idaho at 77, 257 P.2d at 558; Moran’s Ex’r, 248 Ky. at 559, 59 S.W.2d at 9.


55. [T]he essential question is whether the insane delusion . . . has affected the will and the particular disposition. If it has not, but the will appears just and natural in its provisions and duly executed, there is no reason why the will should be refused probate. But, if, on the contrary, the insane delusion has evidently affected the provisions of the will, so as to lead its maker to bestow harshly and unjustly . . . the will ought to be set aside . . . . [For] [t]he will which delusion most surely does not invalidate is, after all, a just and rational one.

J. Schouler, supra note 48, § 138 at 163-64 (emphasis added). See also Hardenburgh v. Hardenburgh, 133 Iowa 1, 7, 109 N.W. 1014, 1016 (1906) (“The children of the testator are the natural recipients of his bounty, and, when they are entirely ignored in the disposition of his property, it is prima facie an unnatural and unreasonable act”); In re Estate of Gunderson, 160 Wis. 468, 473, 152 N.W. 157, 158 (1915) (if the will is in accord with the “dictates of natural justice,” strong evidence of lack of capacity is necessary to nullify the will).

56. See supra notes 30-31 and accompanying text.
the only way to evaluate the reasoning process so critical to the rationality theme is to resort to the human decisions which embody that process and make it concrete.

Moreover, the particular result courts seek in considering the will — the "just" result — purports to be one that any responsible fact finder can recognize. That can be true only if all responsible people share a single concept of the "just will." Yet the idea of a shared concept of "justice" in this sense is at odds with the notion, ostensibly integral to both the rationality and self-consistency themes, that all values are subjective.

Another line of cases defines a "rational" will as one that accords with "the fixed purpose of the testator." Many of these cases hold that the contents of the will can be evaluated only in light of testimony or other evidence which may supply an explanation for an apparently unnatural, unjust or unreasonable disposition. If this evidence demonstrates that the testator had a reason for making what otherwise would seem a peculiar disposition, the apparently unreasonable disposition may be deemed to be no evidence of incapacity. Cases in this vein define an "unnatural" will as a will that does not conform to what is known of the testator's unique wishes. Thus, this second line of cases uses a will's dispositive provisions exactly as one would expect under the self-consistency theme: devises conforming to the testator's peculiar and individual views and circumstances are deemed to evidence capacity.

To summarize, the rationality theme focuses on the testator's ability to reason in order to avoid judging the result of the testator's reasoning process. Ironically, however, courts nonetheless are forced to rely on the result of the testator's reasoning process to assess the testator's ability to reason. Cases under the rationality theme ask

57. Newcomb's Ex'rs, 96 Ky. at 124, 27 S.W. at 998 (1894).
58. See, e.g., Bales v. Bales, 164 Iowa 257, 145 N.W. 673 (1914); In re Will of Mintzer, 5 Pa. 206, 210-11 (1863); In re Estate of Miller, 10 Wash. 2d 258, 116 P.2d 526 (1941); In re Estate of Von Ruden, 55 Wis. 2d 365, 198 N.W.2d 583 (1972).
59. See, e.g., New v. Creamer, 275 S.W.2d 918 (Ky. 1955); Smith v. Fitzjohn, 354 Mo. 137, 188 S.W.2d 832 (1945).
60. In a legal sense a will is unnatural only when contrary to what could be expected of the particular individual in question, considering the type of man he was as manifested by his views, his feelings, his intentions and the like. When natural by this test, it cannot be said to be unnatural in the legal sense, however much it may differ in [its] dispositions from those ordinary men make in similar circumstances.

whether the dispositive provisions of a will reflect some form of abstract “justice.” In so doing, courts must assume that a generally accepted and generally acceptable concept of justice exists against which to compare what the testator has done. Such an assumption flies in the face of the notion that values are purely subjective.

In contrast, cases under the self-consistency theme ask whether the dispositive provisions of a will reflect what is known of the testator’s values. This approach eliminates the need to posit a universal standard or vision of justice, but it, too, is problematic. The self-consistency theme requires a means by which the fact finder truly can come to know the testator’s values. The means the courts adopt is empathy. If the subjectivity of values is taken seriously, discovery of the testator’s values through empathy is difficult to conceive: if a person’s individuality consists of the ends that person chooses, then that person must abandon completely his or her identity to know another’s desires.

As is demonstrated below, even courts employing the rhetoric of rationality rely on empathy as a means to evaluate capacity. Like the quest for an abstract reasoning process, empathy is incapable of yielding the testator’s pure subjective intent. In adopting empathy nevertheless as the mechanism for determining capacity, courts implicitly reject the notion that the “testamentary intent” which the law of wills carries out is ever truly the testator’s own.

**UNCONVENTIONAL DEVISES**

If values truly are subjective and may not be judged by others, then courts must seek a means of assessing mental capacity that is neutral with respect to the value choices embodied in any particular devise. Two categories of devises bring the problem of neutrality into sharp focus: devises heavily influenced by the testator’s religious beliefs, and devises slighting some or all of the testator’s blood relations. In both categories, courts confront the tricky question of how to judge — or to avoid judging — choices which necessarily reflect the testator’s own values about spiritual and family matters.

As discussed below, courts dealing with these two categories of cases under the rationality theme often speak as if they were prepared to examine the will in question with reference to abstractly “normal” or “conventional” wills. In evaluating capacity, the courts seem to require testators’ wills to conform to some general or abstract norm, thus contradicting their own statements that testators’ religious or family loyalties are matters of personal choice. Yet the courts’ rhetoric in this regard differs sharply from their practice: almost every case contains a particularized examination of the testator’s religious or family history, and it is only in light of the testator’s unique experiences that his or her ability to reason is assessed.
Even those cases which appear most strongly to reflect the rationality theme in fact follow the standard which is explicit in cases reflecting the self-consistency theme. That standard holds that a will is "unnatural" or "unconventional" — and therefore is evidence of mental incapacity — only if it markedly departs from the testator's peculiar lifetime loyalties and beliefs. In the end, then, the courts' actual analyses manifest their view that empathy is the only way to discover whether the testator was capable of formulating the intent carried out by wills law.

**Devises Influenced by Religious Beliefs**

Courts broadly agree on the general proposition that an individual's religious beliefs are not evidence for or against capacity. The most common explanation for this proposition reflects the rationality theme of mental capacity law in that it focuses on the impossibility of demonstrating the truth or falsity of a religious belief. The concern of the rationality theme is a reasoning process, recognizable by movement from an evidentiary premise to a conclusion. Sane people recognize the process because they themselves engage in it. On the subject of religion, however, sane persons draw radically different conclusions from the same evidence because they all do not understand the world in the same way. As it is impossible either to assess whether a particular event is an acceptable evidentiary premise for a belief or to use evidence to prove a religious conclusion false, there

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61. See, e.g., Woodruff's Ex'r v. Woodruff, 233 Ky. 744, 746, 26 S.W.2d 751, 752 (1930); Whipple v. Eddy, 161 Ill. 114, 122, 43 N.E. 789, 792 (1896); O'Dell, 149 Mich. at 158, 112 N.W. at 738; Ingersoll v. Gourley, 78 Wash. 406, 411, 139 P. 207, 209 (1914).

62. [An insane] delusion does not exist unless it is one whose fallacy can be demonstrated, for except such demonstration can be made, it cannot be said that no rational person would entertain the belief. Consequently, no creed or religious belief, insofar as it pertains to an existence after death, can be regarded as delusion, because there is no test by which it can be tried and its truth or falsity demonstrated. . . .

Scott v. Scott, 212 Ill. 597, 603, 72 N.E. 708, 710 (1904). See also Irwin v. Lattin, 29 S.D. 1, 9, 135 N.W. 759, 763 (1912) (citations omitted) ("whether religious views . . . are true or false is not a subject for judicial inquiry. . . . [T]he courts are without adequate means of producing evidence on a question of this character, or to determine the value of such evidence.").

63. See supra note 41 and accompanying text.

64. See, e.g., Whipple, 161 Ill. at 122, 43 N.E. at 792 (1896).

65. See supra note 35 and accompanying text.

66. See, e.g., Crumbaugh, 228 Ill. at 407, 81 N.E. at 1053 (the fact that testator accounted for certain events "by means of spiritual guidance, while another person . . . who did not believe in spiritualism, would account for the same phenomena in some other
is no way to recognize whether the testator has "reasoned" where religious beliefs are concerned.

In holding that religious beliefs cannot evidence incapacity because their truth or falsity is indemonstrable, courts repeatedly emphasize the importance of individual choice in matters of faith: "Our Constitution guarantees religious liberty, and the statutory right to make a will is not limited to those who discard a belief in any particular cult, dogma, or principle."67 They note that if a court were to assume a testator insane because the testator held a given belief, "it would not fall very short, in principle, of assuming that all mankind who do not believe in the particular faith which the judge accepts . . . are more or less insane . . . ."68 They similarly disapprove of juries' inclinations to use incapacity verdicts to avoid devises to religious causes juries believe detrimental to society.69 These statements appear to affirm the now familiar notions that values are a matter of individual choice and should not be judged by others.

On the other hand, however, courts seem convinced that religious or other beliefs held too intensely can destroy testamentary capacity.70 Religious beliefs may become, on some level, insane delusions which render invalid will provisions affected by them.71 The question, of course, is how to determine whether a belief has become a delusion and, if so, whether the delusion caused the testator to make a challenged disposition. On this question, courts disagree.

One approach holds that a testator's belief rises to the level of an insane delusion if it "usurp[s] the place of reason and control[s] his

way" is irrelevant to testator's capacity); O'Dell, 149 Mich. at 158, 112 N.W. at 738 (1907) ("One accepts his religious faith on evidence that is satisfactory to his [own] mind."); Bonard's Will, 16 Abb. Pr. (n.s.) 128, 183 (N.Y. 1872) ("To almost every man there is, to him, some evidence that there is a higher power. . . . The manifestations which surround him on every side, confirm him in that belief").

67. Barr v. Sumner, 183 Ind. 402, 410, 107 N.E. 675, 677 (1915). See also Bonard's Will, 16 Abb. Pr. (n.s.) at 184:

[F]reedom of individual conscience [is] favored by the society in which we dwell, . . . and the multifarious forms and shades of opinion, on all subjects, which are consequently engendered among us . . . must be tolerated . . . as wise, or mistaken, methods of happiness, which each person has a right to select for himself.

See also In re Higbee's Estate, 365 Pa. 381, 384, 75 A.2d 599, 600-01 (1950) ("While it is difficult . . . to understand how or why a woman would bequeath her estate to an agnostic society, . . . we must remember that under the law of Pennsylvania 'a man's prejudices are a part of his liberty'").

68. Bonard's Will, 16 Abb. Pr. (n.s.) at 184-85.

69. See, e.g., Carnahan v. Hamilton, 265 Ill. 508, 527, 107 N.E. 210, 217 (1914); Crumbaugh, 228 Ill. at 412-13, 81 N.E. at 1055 (1907).

70. "A man may be insane about his religion, as well as about any other subject." Nalty's Adm'r v. Franzman's Ex'r, 221 Ky. 709, 710, 299 S.W. 583 (1927). See also Barr, 183 Ind. at 410, 107 N.E. at 677 ("[A] belief in any religious doctrine . . . may be vitally material, in connection with other facts and circumstances, in determining the question of one's testamentary capacity.").

71. See supra note 54 and accompanying text.

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Beliefs are the product of individual choice; delusions, in contrast, deprive the testator of the ability to choose. If the testator has lost the ability to make choices for himself, he can no longer reason or come to a rational judgment, and his will cannot be given effect because it is not truly his will at all.

Cases adopting this approach imply both that individuals necessarily will diverge in the conclusions they draw, and that they share a common mode of reaching conclusions — the process of "reasoning." The standard for distinguishing a belief (which supposedly is irrelevant to capacity) from a delusion (which may defeat capacity) again reflects the rationality theme by focusing on an abstract ability — the ability to choose. The emphasis on abstract reasoning ability or choice provides a means of assessing capacity that appears neutral as to any particular belief. Neutrality is essential if freedom of conscience is to be meaningful.

On the other hand, courts approaching cases in this way need some concrete piece of evidence that demonstrates whether the testator was or was not capable of making choices. Courts often speak as though that evidence is to be found in the will itself. For example, in Ingersoll v. Gourley, the testator devised half of his estate in trust to a fanatical religious leader named Gourley, for the benefit of widows, orphans and the poor. Gourley was given complete discretion as to the amount, time and manner of disbursement of the trust. The court held that "the will itself . . . evidences" that the testator "was . . . incapable of acting rationally upon matters within the area in which her delusions . . . manifested themselves." O'Dell, 149 Mich. at 158, 112 N.W. at 738.

[A] believer in Spiritualism may have such extraordinary confidence in spiritualistic communications . . . that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. O'Dell, 149 Mich. at 158, 112 N.W. at 738.

See id. See also In re Murray's Estate, 173 Or. 209, 227, 144 P.2d 1016, 1023 (1944) (testatrix's mental disorder "took the form of religious frenzy which, we think, absorbed and dominated her mind and judgment"); Taylor, 165 Pa. at 602, 30 A. at 1056 (approving trial court's instruction that testator's capacity must be upheld if his mind was not overpowered and controlled by his will so as to prevent him from making a rational judgment).

"We need not speculate as to the ground upon which this conclusion rests. It is utterly unimportant whether it rests upon the ground of absence of testamentary capacity, or upon the ground of undue influence." O'Dell, 149 Mich. at 158, 112 N.W. at 738 (1907).

72. Taylor v. Trich, 165 Pa. 586, 600, 30 A. 1053, 1056 (1895). See also In re Murray's Estate, 173 Or. 209, 227, 144 P.2d 1016, 1023 (1944) (testatrix's mental disorder "took the form of religious frenzy which, we think, absorbed and dominated her mind and judgment").

73. [A] believer in Spiritualism may have such extraordinary confidence in spiritualistic communications . . . that he is impelled to follow them blindly and implicitly, his free agency is destroyed, and he is constrained to do against his will what he is unable to resist. A will made under such circumstances is obviously not the will of testator, and is therefore not admissible to probate. O'Dell, 149 Mich. at 158, 112 N.W. at 738.

74. See id. See also In re Murray's Estate, 173 Or. 209, 227, 144 P.2d 1023 (1944) (due to her "religious frenzy," testatrix was "incapable of acting rationally upon matters within the area in which her delusions . . . manifested themselves"); Taylor, 165 Pa. at 602, 30 A. at 1056 (approving trial court's instruction that testator's capacity must be upheld if his mind was not overpowered and controlled by his will so as to prevent him from making a rational judgment).

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76. 78 Wash. 406, 139 P. 207 (1914).
under a morbid and insane delusion as to the character, power, and mission of Gourley" and that "in making his will he was influenced by that delusion." Such a holding apparently assumes that any will giving similarly absolute discretion to a relative stranger could not be an act of free agency. There must be some things that no sane testator would do.\footnote{117.}{117.} This approach illustrates the difficulty of using an "objective" test to effectuate the view that values are subjective. If each person's values are unique to him or her alone, then no disposition itself could be evidence of anything other than the testator's values. The value neutrality sought by a standard which purports to look solely towards the testator's ability to choose, as opposed to his or her actual choices, is undermined by the need to use the testator's actual choices as a means to evaluate capacity. Those choices necessarily must be compared to the choices an abstractly "capable" person could make. If there are some choices no such person could make, then there must be some values all such persons share.

It is not clear, however, that even the courts which purport to inquire into the testator's abstract ability to choose actually take that concern seriously. Whatever the rhetoric found in the opinion, almost every case contains a close examination of the testator's particular life experience, family relations and religious involvement.\footnote{78.}{78.} Even in the Ingersoll case, where the court purported to find evidence of incapacity in the "will itself," the court described in detail the testator's affliction with cancer and his decision to turn his lifetime business affairs over to Gourley.\footnote{80.}{80.} The court's determination of incapacity thus apparently was animated at least as much by the possibility of undue influence as by the "will itself."

The fact that courts consistently undertake this sort of examination suggests that, regardless of what courts say, the will in question rarely is assessed with reference to some abstractly "acceptable" or "sane" will, but rather with reference to what the testator, with his

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77. Id. at 411, 139 P. at 209.
78. See also Taylor, 165 Pa. at 604, 30 A. at 1057, defining the inquiry as whether the will provisions rested on "an existing state of facts such as might [have] influence[d] the action of a sane man[]." This approach assumes that even though individuals will draw divergent religious conclusions from identical facts (see supra text accompanying notes 61-65), nevertheless some facts exist which no sane person could find influential.

Courts which test rationality with reference to results, as the court in Ingersoll appeared to do, may hold a number of results to be "rational" or "reasonable." Yet they suggest that some results are or could be indicative per se of irrationality. That suggestion conflicts with the notion that courts neutrally must carry out testators' wishes even if they disapprove of those wishes.

79. See Green, Proof of Mental Incompetency, supra note 1, at 306 & n.181 (noting that "[e]videntiary facts occur in constellations. It is their combined effect which persuades the trier of fact").
80. 78 Wash. at 407, 139 P. at 208.
\end{flushright}
unique life and religious experience, would be expected to do. Indeed, courts often simply collapse the rhetoric of rationality into an inquiry into self-consistency by requiring that a testator’s ability to reason be evaluated empathetically. 

The standard actually adopted in cases purportedly asking whether the testator had the abstract ability to choose is used openly in cases reflecting the self-consistency theme. In these cases, courts explicitly connect mental capacity to the testator’s own history of beliefs. This second approach asks whether the testator’s beliefs and conduct conform to the beliefs and conduct of those who share his religious faith. The standard here is not ability to choose in the abstract, but actual choices consistent with the faith to which the testator has subscribed.

This approach also utilizes the will to assess capacity. However, rather than asking whether an abstractly rational person would dispose of his estate as the testator did, the court asks whether the testator’s disposition reflects the teachings of his or her religious faith. If it does, then it may not be assailed on capacity grounds. Thus, in In re Elston’s Estate, the testator was alleged to be under an insane delusion about his religion, causing him to disinherit four of his eight children. The church to which the testator belonged held that nonbelievers who behaved as had the four disinherited children should be “rejected” and given no financial assistance. Because

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81. A belief which results from a process of reasoning from evidence . . . is not an insane delusion. An insane delusion is not established when the court is able to understand how a person situated as the testator was might have believed all that the evidence shows that he did believe and still have been in full possession of his senses. Crumbaugh, 228 I11. at 401-02, 81 N.E. at 1051 (emphasis added).

82. “If [a testator] believes and practices things in connection with a religion which he accepts and to which a substantial number of people adhere, which things are contrary to the practices and beliefs of such religion, such beliefs and practices may be shown as proof of mental incapacity.” Nalty’s Adm’r, 221 Ky. at 710-11, 299 S.W. at 585-86.

83. This standard potentially involves the court in assessing which choices truly are consistent with the testator’s faith. That potential was realized in Compton v. Smith, 286 Ky. 179, 185, 150 S.W.2d 657, 660 (1941), where the court held:

It is our view that a belief in communication with dead people by letters and telephone and other physical and material means goes beyond a normal belief in spiritualism. The words “spiritualism” or “spirit” would indicate that such communication, if at all possible, would be by spiritual inspirations through a higher power . . . If Compton believed in spiritualism, it appears that such belief was carried to such an abnormal and unusual extent as to indicate insane delusions. . . . As might be expected, Compton has not been followed.

84. 262 P.2d 148 (Okla. 1953).
testator's disposition accorded with the beliefs of his church, and was not "a belief peculiar to, and subscribed to by, him alone," his capacity was upheld.\textsuperscript{85}

This approach, like the approach which purports to assess the testator's ability to reason, looks to what people other than the testator might do in their wills. Yet the people to whom the testator is compared are not abstractly rational people, but those who share the testator's beliefs. Their probable dispositions are examined to ascertain not what a rational testator would have done, but what this testator, with his or her unique faith, would have done had he or she acted on the basis of that faith. In this sense, the second approach clearly expresses the self-consistency theme.

The routine inquiries into the testator's life history, the reformulation of the rationality theme into self-consistency terms, and the explicit comparisons between the testator's beliefs and those of others who share his faith all evidence the courts' reluctance to posit universally held values and their suspicion of abstract standards. Regardless of what courts say, they in fact resort to empathy to evaluate mental capacity, thus suggesting that empathy is the only means by which it is possible to "know" the testator on any meaningful level. By embracing empathy, courts manifest a faith that we can know others without inappropriately imposing our values on them.

\textit{Devises Ignoring the "Natural" Objects of a Testator's Bounty}

Suits challenging a testator's mental capacity most often are brought by family members disappointed by the testator's will.\textsuperscript{86} Such suits find a ready-made basis in the requirement that, as a prerequisite to testamentary capacity, the testator must know the "natural objects of his bounty."\textsuperscript{87} The disappointed heir's claim, in substance, is that the testator's failure to devise to the heir evidences the testator's failure to recognize the heir as a "natural" object.

The dissatisfied heir's claim to be a "natural" object invariably rests on his or her status as a taker under state intestacy statutes.\textsuperscript{88}

\textsuperscript{85} It cannot be said that the testator's belief that the contestants, having been rejected from his church... should not inherit... was a belief peculiar to, and subscribed to by, him alone. On the contrary there is sufficient evidence to support the trial court's finding... that similar views were "commonly entertained by a considerable number" of other members of his church.\textsuperscript{id. at 151.}

\textsuperscript{86} See Epstein, supra note 8, at 241:

The attack on the testator's mental competency is often a mere litigative trapping which the contestants assume to give them a pretext for challenging the will, since the law presently provides no procedure by which they can argue the real basis of their claim - i.e., that the will is unfair to them and they are unhappy with the provisions made for them in it.

\textsuperscript{87} See Green, Judicial Tests, supra note 8, at 1204.

\textsuperscript{88} See Morris v. Morris, 279 S.W. 806, 807 (Tex. Civ. App. 1926) ("The theory
However, as one court put it, "'[n]o one makes a will except to prevent the operation of some law of descent. . . .'"\(^89\) Indeed, freedom of testation means that the testator has "the right to make a will disposing of . . . [his] property . . . as he may see fit."\(^90\) A testator may disinherit his or her children,\(^91\) his or her spouse,\(^92\) or any other family member\(^93\) because "the law does not undertake to prescribe the duties of a testator to his family."\(^94\) Nor does the law require "any particular grade of moral rectitude as an element of testamentary capacity."\(^95\)

which underlies the statutes of descent and distribution is . . . [a] natural one. In theory, such course is the one which a person, prompted by the instincts and natural impulses which in these matters ordinarily direct the actions of mankind, would have his property go."). This theory clearly presumes an objective standard for assessing who is a "natural" object.

In explaining the kind of knowledge necessary to satisfy the requirement that the testator know the natural objects of his or her bounty, courts often speak as if certain categories of blood relations are always (or never) "natural" objects. See, e.g., Norris v. Bristow, 358 Mo. 1177, 219 S.W.2d 367 (1949) (defining natural objects as "those who unless a will exists will inherit the property"). Compare Estate of Nolan, 25 Cal. App. 2d 738, 742, 78 P.2d 456, 458 (1938) ("collateral heirs are not, because of such relationship alone, natural or normal objects of bounty"). These statements seem to suggest that the courts have established an objective test of "naturalness" and that some dispositions are unnatural \(\text{per se}\). Yet, as is explained infra, courts are not prepared to rely on an objective test and instead tend to inquire whether a particular contestant would be a "natural" object in light of the history and circumstances of his or her connection to the individual testator.

90. Breadheft v. Cleveland, 184 Ind. 130, 138, 110 N.E. 662, 663 (1915). See also Estate of Shay, 196 Cal. at 364, 237 P. at 1083 (to say that testator did not provide equally for family members "is but to say that he exercised his legal right of testamentary disposition instead of leaving his estate to be distributed according to the law of succession"); Colorado Nat'l Bank v. Cole, 75 Colo. 264, 266, 226 P. 143, 144 (1924) ("[O]ne making a will is not bound to dispose of his property according to the rules of descent").

91. Coleman v. Robertson's Ex'rs, 17 Ala. 84, 87 (1849). See also Kinne v. Kinne, 9 Conn. 102, 106 (1831) ("Our law has kindly allowed our citizens to select the objects of their bounty. . . Dispositions of property, made in this way, are not unnecessarily to be disturbed"); In re Estate of Gorthy, 169 Neb. 769, 781, 100 N.W.2d 857, 864 (1960) ("No right of a citizen is more valued than the power to dispose of his property by will. . . The very purpose of a will is ordinarily to produce inequality among heirs of the same class for reasons that appear sufficient only to the testator.").

92. See, e.g., Kevil v. Kevil, 65 Ky. (2 Bush) 614 (1866). The testator's ability actually to disinherit his or her spouse is limited by elective share statutes. See supra notes 3 and 6 and accompanying text.


Courts recognize that even a wise person can be capricious in the disposition of his or her property. Yet "[t]he view which others may take of what they may think [the testator] ought to have done, can have no bearing on the construction of what [the testator] actually saw fit to do." The jury may not "say whether the testator made what they conceive to be a proper disposition of his property, and render a verdict accordingly." Others' views are irrelevant because the testator's choices may not be judged by others. The choice of beneficiaries expresses the subjectivity of values; it is a matter of the testator's "own mind and conscience" alone.

If the selection of devisees is up to the testator alone, the requirement that the testator know the "natural objects" of his or her bounty cannot be construed to demand any particular disposition to any particular person. As a result, what becomes critical "is not whether a testator actually remembers the natural objects of his bounty, but whether he has, when he makes his will, the capacity to do so." Here, again, the rationality theme is evident, with its focus on an abstract mental ability rather than a particular result.

Since capacity to recognize one's natural objects, rather than actual recognition, is the key to testamentary capacity, courts need some standard to gauge the capacity to recognize. Such a standard once again exemplifies the difficulty of using an abstract capability as the touchstone:

While prospective heirs have no present legal interest in the testator's property, the law regards their expectations as something which a competent testator will normally have in mind, for these expectations will by the very act of making a testamentary disposition, be changed. When viewed in this light it is obvious that the inquiry must be focused on whether the testator has the capacity to know who these objects of his

is a lamentable fact that the grossest immorality and considerable intelligence are found together".

96. Tomkins v. Tomkins, 17 S.C.L. (1 Bail.) 92 (1829).
99. Every testator . . . must be held to be the sole and final judge as to the manner of the distribution of his earthly estate amongst those who are the natural objects of his bounty. It is not the function or right of any court to obtrude itself into the heart or mind of a testator and determine for him which of his children, if any, shall be favored and to what extent . . . . It is for him and him alone to weigh those circumstances and influences which in his own mind and conscience justify such variances in bounty as he chooses to donate.

100. Down v. Comstock, 318 Ill. 445, 453, 149 N.E. 507, 511 (1925). See also In re Haness' Estate, 98 N.J. Eq. 645, 651-52, 130 A. 655, 658-59 (N.J. Prerog. Ct. 1925) ("It is not required . . . that [a testator] shall in fact correctly ascertain the legal status of each person who stands in natural relation to him . . . . The test is his ability to exercise reason . . . . with reference to them."); Morris, 279 S.W. at 807 (testator "must be mentally capable of comprehending . . . the natural claims of those he disinherits").
bounty are . . . and not whether in fact the testator appreciates his moral obligations and duties toward such heirs in accordance with some standard fixed by society, the courts or psychiatrists.\textsuperscript{101}

While ostensibly repudiating any objective, state-imposed standard, this formulation nonetheless posits a hypothetically “competent testator” who will “normally” have the claims of prospective heirs “in mind.” The capacity to reason about one’s natural objects effectively is defined as the recognition of the claims of one’s prospective heirs. Although the testator is free to disregard those claims, he lacks mental capacity unless he can “appreciate the fact that those united to him by ties of blood have natural claims upon his bounty.”\textsuperscript{102} If there are claims which all abstractly “competent” persons necessarily feel — whether or not they actually give effect to them in their wills — then there must be some values which all such persons share.

The concrete evidence demonstrating the testator’s ability or inability to recognize the claims of his or her “natural” objects is, of course, in the will itself. Courts with virtual unanimity hold that the (un)naturalness, (un)reasonableness and (in)justice of the will may be considered by the jury in assessing testamentary capacity.\textsuperscript{103} And some go so far as to hold that when the “natural recipients” of the testator’s bounty “are entirely ignored in the disposition of his property, it is \textit{prima facie} an unnatural and unreasonable act.”\textsuperscript{104} Here again, the neutrality sought by a standard focusing on the ability to recognize is eroded by the use of the testator’s actual choices to evaluate that ability.

As with devises influenced by controversial religious beliefs, courts which seem to hold the testator’s will to an abstract or universal standard do not in fact do so. In \textit{Bales v. Bales},\textsuperscript{105} for example, the court’s standard for evaluating mental capacity seemed to posit claims which all “rational” or “reasonable” persons would accept. The court thought it “proper” to examine which persons “naturally

\textsuperscript{101} \textit{In re Estate of Weil}, 21 Ariz. App. at 281-82, 518 P.2d at 998-99 (citations omitted; emphasis original).

\textsuperscript{102} \textit{Niemes v. Niemes}, 97 Ohio St. 145, 157, 119 N.E. 503, 506 (1917) (emphasis original). \textit{But see Jarrett v. Ellis}, 193 Ind. 687, 693, 141 N.E. 627, 629 (1923) (instruction which referred to testatrix’s capacity to comprehend “the nature of the claims of her daughter” disapproved on the ground that it “invaded the province of the jury by assuming that the daughter had claims on the testatrix. . . . The law does not presume the existence of any claim of a daughter to share in her mother’s estate”). \textit{See also supra} note 78.

\textsuperscript{103} \textit{See supra} notes 18-20.

\textsuperscript{104} \textit{Hardenburgh}, 133 Iowa at 7, 109 N.W. at 1016 (citations omitted).

\textsuperscript{105} 164 Iowa 257, 145 N.W. 673 (1914).
come” to mind as those “fairly entitled to recognition” by the testator.106

Contrary to what might have been expected, however, the Bales court did not discuss which relations and acquaintances might be considered by an abstractly “reasonable” person. Instead it made a particularized inquiry into the history of the testator’s relationships with those named in the will. Because the testator gave his property “to those to whom he had every reason to be grateful,”107 the court concluded that he had “recognized those ties and claims and obligations which a man of ordinary intelligence and rational judgment would have recognized as binding upon him.”108 Thus, what begins as an apparent concern for abstract rationality ends as an inquiry into self-consistency.

Many courts do not engage in the rhetoric of rationality. They insist that it is for the jury to determine whether in fact the will can be said to be unnatural,109 and hold that in making that determination, the will alone is not and cannot be conclusive.110 For a will is not “unnatural” at all, in this view, unless the omission or slighting of a “natural” object is without “reasonable grounds.”111

If the “reasonable grounds” for disliking or disinheriting a “natural” object were construed to mean reasons or motives that would satisfy an “ordinary reasonable” person, then clearly the testator’s right to choose his or her devisees would be hollow — the testator

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106. Id. at 261, 145 N.W. at 674.

107. Id. at 264-65, 145 N.W. at 676.

108. Id. at 264, 145 N.W. at 676.


110. See supra note 19.

111. [T]he will on its face is unnatural and unjust. It virtually disinherits the children of the testator . . . but this of itself, raises no presumption of mental incapacity . . . . When a testator has reasonable grounds to dislike those nearest him and has exercised his lawful right to disappoint them in the execution of his will, his conduct in doing so is not generally to be regarded as unreasonable in the sense of evidencing mental incapacity. Hamilton v. Morgan, 93 Fla. 311, 316, 112 So. 80, 82 (1927) (emphasis added). See also Sutton v. Combs, 419 S.W.2d 775, 776 (Ky. 1967) (“It is natural that a person recognizes his relatives as the natural objects of his bounty unless there is some reason not to do so. Many reasons may exist to justify such failure”); McGinnis v. Kempsey, 27 Mich. 362, 368, 376 (1873) (approving a jury instruction to the effect that “we are not to consider alone the fact that this person or that person is a blood relation to the testator . . . [T]he conduct of the child towards the parent [is] to be considered”).
could disinherit only for reasons acceptable to other people. Reason-
ableness in this objective sense, however, in fact is not required. In-
stead, a disposition must be assessed with reference to “what the
testator, from his known views, feelings and intentions would have
been expected to make.”[112] Reasonableness, in other words, must be
assessed from the testator’s point of view. The fact finder must seek
to stand in the testator’s shoes, to empathize.

Indeed, the most striking aspect of opinions on the subject of tes-
tamentary capacity is the similarity of their structure. Virtually all
such opinions, after describing the will contest and any challenged
rulings by a lower court, go on to examine the evidence concerning
the testator’s life — particularly in the years immediately preceding
and following the execution of the will — in minute detail.[113] If, on
the basis of that evidence, the court can find a reason for the testa-
tor’s disposition in the circumstances, the will is upheld.[114] The jury
must have access to both the will and the other evidence “in order
that they may determine whether the injustice of the disposition . . .
is apparent or real.”[115]

Devises reflecting unusual religious beliefs or family relations are
problematic for the law of testamentary capacity. Neutrality as to
those beliefs and relations is essential to wills law’s premise that the

112. A will is unnatural when it is contrary to what the testator, from his known
views, feelings and intentions would have been expected to make. If the will is in
accordance with such views it is not unnatural however much it may differ from
ordinary actions of men in similar circumstances.
In re Estate of Miller, 10 Wash. 2d 258, 267, 116 P.2d 526, 531 (1941). See also Reyn-
olds, 62 Barb. at 252 (“There are so many circumstances occurring, in every family, . . .
in which the conduct of children or relations is disclosed . . . that the parent alone is
competent to determine how much each member of his family is fairly and justly entitled
does not create . . . a standard such as a reasonably prudent person”); Cude, 30 Tenn.
App. at 669, 209 S.W. 2d at 524 (“[A] will is unnatural only when contrary to what
could be expected of the particular individual in question”).

113. Technically, this examination is necessary because the issue on appeal often is
whether the weight of the evidence supports the verdict or judgment or whether the lower
court properly instructed the jury on the evidence before it.
114. See, e.g., In re Estate of Hayes, 55 Colo. 340, 350, 135 P. 449, 453 (1913) (a
disposition consistent with testator’s situation, affections and previous declarations “is
itself a rational and legal evidence of no small weight to testamentary capacity”); Phil-
 lips v. Johnson, 303 Ky. 574, 579, 198 S.W.2d 305, 307 (1946) (“It is claimed that the
will under consideration here is an unnatural one. We do not so regard it. The close
relationship between the testatrix and the son who was favored in her will is a reasonable
basis for the terms of the will.”); In re Estate of Von Ruden, 55 Wis. 2d at 375-76, 198
N.W.2d at 587 (“Whether a will is unnatural . . . must be determined from a considera-
tion of all the surrounding circumstances.”) (undue influence case).
115. Young v. Ridenbaugh, 67 Mo. 574, 586 (1878).
testator's intent and choices, wise or foolish, must be given effect. Nevertheless, all courts resort to the choices in the will itself to assess capacity. Such resort seems to undermine neutrality.

Courts respond to the dilemma in two ways. Some courts, reflecting the rationality theme of the doctrine of testamentary capacity, look to the terms of the will for evidence of an abstract ability to reason — an ability which all individuals presumptively share, regardless of their own personal and divergent values. This strategy, however, seems doomed to be ineffective: it determines the testator's ability to reason by reference to the conclusion he or she reaches, contradicting the premise that a mentally competent testator is permitted to be irrational in the disposition of his or her property. Perhaps because this strategy is inherently circular, it is discussed more in rhetoric than it is utilized in fact.

The vast majority of cases, reflecting the self-consistency theme of testamentary capacity law, looks to the terms of the will for evidence that the testator has done what one in his or her position might have been expected to do. This strategy affirmatively requires the finder of fact to empathize with the testator and to ask, “What would I do, if I were the testator?”

This second strategy avoids the circularity of the first because it does not posit universally accepted and objectively assessable norms to which the will implicitly must be compared. Nonetheless, it is dangerous because it assumes that the finder of fact truly can know another person without imposing the fact finder's own values in substitution for the other person's. The most striking aspect of the law of testamentary capacity may well be the courts' willingness to accept this risk.

While courts resort to empathy in an attempt to effectuate the notion that values are subjective, empathy hardly is more neutral with respect to the testator's values than the approach which purports to focus on the testator's reasoning process. As is developed in the following part, the subjectivity of values, taken on its face, dooms even the best-intended efforts to know another person; such knowledge would require the fact finder to abandon completely his or her own identity. Nevertheless courts do rely on empathy. In so doing, they demonstrate a belief that "testamentary intent" may be understood only through the process we use to understand others during life. In that process, we give up our own identities to seek the identities of others. We do so because, as members of a community, we need others to do the same for us. To create the community that will recognize our individuality, we sometimes must leave that individuality behind. It is almost as if the subjectivity of values can be realized only by its negation.
THE IMPLICATIONS OF EMPATHY

In its strongest form, the notion that values are subjective renders empathy impossible. What makes a person an individual, distinct from other persons and worthy of recognition by them, is that person's unique values. To abandon one's own values, even for a moment, is to lose one's self. Yet this is precisely what is required of jury members instructed to evaluate a testator's mental capacity by standing in the testator's shoes. There is no way to guarantee — and, indeed, it is highly improbable — that the fact finder will repudiate his or her own self-defining values in the search for another's. The instruction itself embodies a value judgment — with which the fact finder may disagree — that it is "good" or "important" to know another person. Moreover, there is no way to ensure a fact finder's best efforts toward understanding or embracing the testator's peculiar experiences and beliefs.

The difficulties of imposing or policing empathy make it possible to abuse the doctrine of testamentary capacity. Without doubt, testamentary capacity cases are inconsistent and one easily finds opinions reaching divergent results on nearly identical facts. The ease with which the testator's choices may be overridden has given rise to the suggestion that public policies concerning family protection, rather than the policies of liberal individualism, are at the root of testamentary capacity law.

Undoubtedly some truth exists in the observation, easily made in any specific case involving a controversial devise, that courts or juries may hold a testator incompetent in order to avert what they perceive to be an unfair result. Nevertheless, the view that testamentary
capacity law ultimately is social in purpose is problematic. It assumes that the purpose of wills law is at least as regulatory as it is facilitative. Such an assumption reduces much of the law of wills to pure rhetoric.

This cynicism is unnecessary. Much of the case law can be explained in a manner somewhat more consistent with the traditional notion that the purpose of the law of wills is to carry out the individual intent of the testator. That explanation is found in the belief — implicit in almost every case — that individual fact finders are and must be ready, through empathy, to cast themselves aside in order to understand another person's intent.

To be meaningful, this explanation requires an inquiry into and reassessment of what it means to know another person's intent. The most extreme form of the notion that values are subjective would hold that such knowledge is impossible — desires ultimately are private, personal, self-chosen ends which cannot be justified through reason and therefore cannot be, in any meaningful sense, explained. Were this formulation accepted, wills law, which takes the testator's intent as its touchstone, would be absurd because its goal is to carry out an intent it never can discover.

The use of empathy suggests, however, that courts in fact do not in accept this formulation. Courts realize that fact finders see the testator through the window of their own values. This realization is implicit in the courts' repeated warnings that disapproval of the testator's wishes is insufficient grounds for overriding them. Yet, in admitting wills' dispositive provisions and evaluating them in light of the other available evidence about testators' experiences and values, courts accept that there is no way, other than through that window, that testators can be known. As one commentator put it: "Perhaps the party condemning is the one really in error. And yet can we judge of others (and we must judge) except by our own experience?" The only intent worth seeking, in this view, is the intent that can be found. The intent that can be found is never purely the testator's own. The testator cannot be known any better or differently than any individual knows any other. Discovering testamentary intent is fundamentally similar to discovering what another person means when he or she speaks to us.

When one individual listens to another, he or she does "judge,"

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Certain so-called truths must necessarily be obnoxious to public policy . . . . Opinions are held by individuals conscientiously and firmly — as, for instance, in favor of free love, community in property, subversion of civil authority, pure atheism — which courts, though disposed to leave speculation free, may well refrain from sanctioning, when it comes to an individual bequest to propagate.

J. Schouler, supra note 48, § 166 at 164.
121. J. Rood, supra note 43, § 130 at 75.
and the judgment is made on the basis of the listener’s “own experience.” But that experience consists of more than the sum of the physical events which have occurred in the listener’s life. Part of an individual’s set of experiences is learning that another does not mean by a single choice of words what the listener might mean by those same words. Communication requires that we abandon, if only fleetingly, our understanding of given words or circumstances in favor of another’s, however imperfectly we may grasp it. The abandonment of ourselves is not undertaken entirely for others. Only by reaching towards others’ individuality can we seek to ensure that our own individuality similarly will be recognized by others. Thus, we empathize, cast ourselves aside, to allow ourselves to be found. Individuality requires a community to recognize it. To be individuals in a community we must take and accept the risks of seeking to understand and to be understood. The law of testamentary capacity embraces empathy in precisely this spirit.

Of course, there is an obvious difference between understanding a testator and understanding a speaker during a lifetime conversation: unlike the living speaker, the testator cannot further explain what he or she meant. This only makes the need for empathy more pressing, for if the testator cannot tell us who he or she was, how are we to know but by giving ourselves up? And if we do not do so for others, who will do so for us?

**CONCLUSION**

“Testamentary intent” is fundamental to the law of wills. If a person lacks such intent, the instrument expressing his or her wishes as to the disposition of property after death will not be given effect as his or her “will.” If the instrument is admitted to probate, “testamentary intent” must be interpreted to determine what the testator meant by what he or she said. The irony of the law of wills is that the critical inquiry into the testator’s intent can never be confidently resolved, for the testator’s death removes the sole person who might provide the necessary answers.

If a testator had testamentary intent, the law generally will carry out his or her wishes regardless of their apparent wisdom. Yet the law often has recourse to those wishes — and especially to their wisdom — in ascertaining whether testamentary intent existed. The law of wills seems incapable of attaining the neutrality required of it.

The difficulty of discovering “testamentary intent” only mirrors the difficulty inherent in any communication between individuals.
Communication requires each person to ascertain what another means by the words he or she uses. The listener makes this discovery only by accepting that the speaker might not mean what the listener would mean by the same words, and by seeking to understand the speaker's words from the speaker's perspective.

This is exactly what courts do in mental capacity cases, though they do not always say so. The operative test of mental capacity requires the finder of fact to try and see the world from the testator's point of view — if the will's disposition reflects that point of view, the testator's capacity is upheld.

Of course, empathy is not an infallible way of knowing another person. Inevitably, there will be times when a listener/fact finder will fail truly to see things — or even to try to see things — from the vantage of the speaker/testator. And unlike a person listening to a living speaker, who can, when confused, ask, "What do you mean?", the finder of fact in a testamentary capacity case cannot obtain more information from the testator. Therefore, it is not surprising that cases on testamentary capacity are inconsistent and unpredictable. Yet the significance of testamentary cases lies not in their end results, but in the courts' consistent willingness to accept the risks of empathy rather than resorting to the sterile abstraction of an objective standard.

Testamentary capacity is not the only doctrine of wills law in which courts rely on empathy. The process of will interpretation also requires the finder of fact to step into the testator's shoes in order to ascertain what the writer meant by the words he or she used.122

Of course, neither interpretation generally nor empathy in particular would be necessary if words had fixed, inalterable meanings, as the much-criticized "plain meaning rule" implicitly supposes.123 Yet that view has been discredited as a "fallacy [which] consists in assuming that there is or ever can be some one real or absolute meaning. In truth there can be only some person's meaning; and that person, whose meaning the law is seeking, is the writer of the document."124

122. No one's mind is immediately accessible to any other. What we can observe are only those visible, audible, or otherwise sensible signs which others produce. As we produce signs ourselves for the purpose of communicating thoughts or emotions to others, we conclude that others produce their signs for the same purpose of communication . . . . This process of concluding from the signs used to the meaning meant to be conveyed is interpretation. M. Rheinstein, The Law Of Decedents' Estates 390 (2d ed. 1955) (emphasis original). For a more skeptical treatment of the process of interpretation, drawing on deconstructionist linguistic and literary theories, see Peller, The Metaphysics of American Law, 73 Calif. L. Rev. 1151, 1171-75 (1985).


124. Id. § 2462 at 198 (emphasis original). See also Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899) ("It is not true that in practice (and I know

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Assuming that interpretation is required to discover the writer's meaning, empathy would remain unnecessary if the meaning of a will could be determined objectively. Yet because wills are, in Wigmore's words, "unilateral acts," the "sense of the testator is therefore . . . the ultimate criterion of interpretation." The goal of will interpretation is to identify the meaning the testator sought to convey through the words he or she used because "interpretation seeks essentially to reconstruct the transferor's circumstances and state of mind . . . ."

The rules governing the admission of extrinsic evidence of the testator's intent are notoriously complex and controversial, and no attempt is made here to describe or analyze them. It is enough for present purposes to note that the discovery of "the sense of the testator" generally is seen as requiring empathy. As one English judge put it: "What you should do is to place yourself as far as possible in [the testator's] position, taking note of the facts and circumstances known to him at the time: and then say what he meant by his words." In the case of interpretation, as with the assessment of mental ca-
pacity, the process of empathy carries with it risks that the mental operations "of the judge and testator cannot fully correspond." Here again, what is remarkable is that, in resorting to empathy, courts implicitly redefine what is "testamentary intent."

The intent we seek in ascertaining "the sense of the testator" is not the testator's pure subjectivity. The testator himself, in writing his or her will, "knows that his words are to be applied . . . by others over whom he may have not control . . . and in a future in which he may have no part." Like lifetime speech, the act of writing a will presupposes an outside reader who necessarily is "other" to the testator. It equally supposes not that the reader will succeed, but that he will try to be the testator.

The law of wills, with its emphasis on effectuating the intent of the testator, seems to posit an atomistic world of individuals isolated from one another by their own subjectivity. The courts' actual treatment of the difficult issues raised in testamentary capacity and will interpretation cases suggests a different view. The standards adopted in these cases imply a vision of community in which each person, realizing that he or she needs others to recognize his or her individuality, is prepared — at least momentarily — to abandon his or her individuality in an attempt to know others. Whether such efforts at self-abnegation can ever be wholly successful is unclear, but that is not the point. What is significant about the cases is their assumption that each individual is and must be ready to try.

130. "Although [the] mind [of the judge] may be influenced by what he believes the testator . . . to have thought, the mental operations of the two men cannot fully correspond." Chafee, The Disorderly Conduct of Words, 41 COLUM. L. REV. 381, 399 (1941).

131. The meaning of words is to be sought, not in their author, but in the person addressed . . . not in the [testator] but in the [executor or legatee] . . . . Words are but delegations of the right to interpret them, in the first instance by the person addressed, in the second and ultimate instance by the courts who determine whether the person addressed has interpreted them within their authority. Curtis, A Better Theory of Legal Interpretation, 3 VAND. L. REV. 407, 424 (1950).

132. See id. at 409 ("It is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head.").

133. Id. at 423.

134. See Kennedy, The Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 205, 211-12 (1979):

Others . . . are necessary if we are to become persons at all — they provide us the stuff of our selves and protect us in crucial ways against destruction. . . . But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation. . . . Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society.

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