

THE COMPLETELY INSANE LAW OF PARTIAL INSANITY: THE IMPACT OF MONOMANIA ON TESTAMENTARY CAPACITY

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Editors' Synopsis: In this Article, the author discusses the doctrine of monomania, which permits a court to invalidate a will based on the testator's insane delusion if that insane delusion caused the testator to dispose of his property in a way that he otherwise would not have. The author argues that the monomania doctrine is fatally flawed and that the doctrine should be abandoned in favor of using the general test for capacity to make all testamentary capacity decisions.

I. INTRODUCTION	67
II. TESTAMENTARY FREEDOM AND TESTAMENTARY CAPACITY	72
III. MONOMANIA	83
A. Requirement One: An Insane Delusion	86
B. Requirement Two: The Will Must Be a Product of the Insane Delusion	92
IV. ELIMINATING THE DOCTRINE OF MONOMANIA	102
A. The Doctrine of Monomania Is Inherently Flawed and Should Be Abandoned	102
B. Replacing the Doctrine of Monomania with the General Test for Testamentary Capacity	107
V. CONCLUSION	110

I. INTRODUCTION

Is it possible to be just a *little* crazy? At what point (if any) does a delusion or hallucination become so significant that it destroys testamentary capacity? Can a delusion about a specific subject obviate

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testamentary capacity even though the testator is, in all other respects, sane?¹

Courts have long held that a testator² suffering from an insane delusion cannot execute a valid will if the will is a product of the delusion.³ For example, a testator who suffers from an insane delusion that she is the Holy Ghost may not be able to execute a valid will.⁴ If the will is a product of the insane delusion, the delusion renders the will invalid even if the testator had sufficient mental capacity in all other aspects of her life.⁵

The problem is that in creating a test for an insane delusion, or monomania, courts have fashioned rules that are simultaneously over and under inclusive. Insane delusion law considers the wrong issues. Instead of considering the testator's mental abilities—as is done in most capacity decisions⁶—the monomania doctrine attempts to determine why the testator believed what he believed and why he did what he did.⁷ This subjective state of mind is particularly difficult to prove because the best witness—the testator—is unavailable.

As discussed in more detail below, in order for a court to invalidate a will based on the testator's insane delusion, the contestant⁸ must prove

¹ Yes. *See, e.g.*, *Athey v. Rask (In re Estate of Rask)*, 214 N.W.2d 525, 529 (N.D. 1974).

² For grammatical ease, this Article will use “testator” to refer to individuals of either gender.

³ *See, e.g.*, *Kelly v. Reed*, 580 S.W.2d 682, 683 (Ark. 1979); *In re Estate of Romero*, 126 P.3d 228, 232 (Colo. Ct. App. 2005); *Kingdom v. Sybrant*, 158 N.W.2d 863, 866 (N.D. 1968).

⁴ *See Smith & Others v. Tebbitt & Others*, (1867) 1 L.R.P. & D. 398.

⁵ *See In re Sandman's Estate*, 8 P.2d 499, 500 (Cal. Dist. Ct. App. 1932) (“[M]ental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion”); *English v. Shivers*, 133 S.E.2d 867 (Ga. 1963).

⁶ *See infra* notes 78–80 and accompanying text.

⁷ *See infra* notes 230–62 and accompanying text.

⁸ Although it varies from state to state, generally the burden of proving an insane delusion is on the contestant. *See, e.g.*, *Balletti v. Muldoon*, 991 S.W.2d 633, 638 (Ark. Ct. App. 1999) (“[T]he party challenging the will's validity is required to prove by a preponderance of the evidence that the testator lacked mental capacity.” (citing *In re Estate of Davidson*, 839 S.W.2d 214 (Ark. 1992))); *Manion v. Hunt (In re Scherrer's Estate)*, 7 N.W.2d 848 (Wis. 1943) (discussing that when the issue in a will contest is “whether deceased [possessed] sufficient mental capacity, . . . contestants have the burden of proof by clear, convincing, and satisfactory evidence”).

In many states, the proponent must make out a prima facie case of capacity before the burden of proof shifts to the contestant. *See infra* notes 50–52 and accompanying text. The

two facts.⁹ First, the contestant must show that the testator suffered from an insane delusion. Proving that a delusion is insane, however, is more difficult than one might expect. Specifically, it is difficult to distinguish between a testator suffering from an insane delusion and a testator who has merely reached a wrong, mean-spirited, or “stupid” conclusion.¹⁰ An insane delusion could invalidate the will,¹¹ but a wrong, mean-spirited, or “stupid” conclusion should not.¹²

Second, the contestant also must show that the will was a “product” of the insane delusion.¹³ In essence, the contestant must show that the insane delusion caused the testator to dispose of his property in a way that he otherwise would not have done.¹⁴ For example, a delusion that the moon is made of green cheese¹⁵ might be an insane delusion. It is,

amount of proof required varies from state to state. *Compare Scherrer*, 7 N.W.2d at 850 (requiring “clear, convincing, and satisfactory evidence”), *with* *Hodges v. Cannon*, 5 S.W.3d 89, 95 (Ark. Ct. App. 1999) (“In a will-contest case, . . . the party challenging the validity of the will is required to prove by a *preponderance of the evidence* that the will is invalid.” (emphasis added)), *with* *Clabots v. Badeaux (In re Forsythe’s Estate)*, 22 N.W.2d 19, 22 (Minn. 1946) (“[A]lthough the setting aside of a will is no light matter, it is not to be assumed that the burden of proof is any less or any greater than in other civil cases involving fact issues.”).

⁹ The determination of whether a will is invalid because of the testator’s insane delusion is a question of fact. *See, e.g.,* *Murphy v. Warner (In re Murphy’s Estate)*, 483 P.2d 1364, 1365 (Colo. Ct. App. 1971); *Holcomb v. Drennan (In re Estate of Holcomb)*, 63 P.3d 9 (Okla. 2002).

¹⁰ *See infra* notes 31–44 and accompanying text.

¹¹ *See* *Pilon v. Pilon (In re Estate of Pilon)*, 780 N.Y.S.2d 810, 812 (App. Div. 2004); *In re Estate of Diaz*, 524 S.E.2d 219, 221 (Ga. 1999).

¹² *See, e.g.,* *M.I. Marshall & Isley Trust Co. of Ariz. v. McCannon (In re Estate of Killen)*, 937 P.2d 1368, 1372 (Ariz. Ct. App. 1996); *Smith v. Smith*, 25 A. 11, 12 (N.J. Prerog. Ct. 1891) (“Stupid error in either . . . reasoning or conclusion is not lack of testamentary capacity.”).

¹³ *See, e.g.,* *In re Estate of Aune*, 478 N.W.2d 561, 564 (N.D. 1991); *Pollard v. Hastings*, 862 A.2d 770, 778 (R.I. 2004).

¹⁴ *See* *Estate of Aune*, 478 N.W.2d at 564 (“The contestants must establish that the will was a product of the insane delusion and that the testator, if not laboring under the insane delusion, would have differently devised the property.”).

¹⁵ *See* *Hartung v. Holmes (In re Chevallier’s Estate)*, 113 P. 130, 133 (Cal. 1911).

It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established, in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act.

Generally, if there is any evidence in support of the testator’s belief, then such belief is not an insane delusion. *See* *Dillon v. Phillips*, 756 P.2d 1278, 1279 (Or. Ct. App. 1988)

however, unlikely that such a delusion would invalidate a will.¹⁶ On a less amusing note, many monomania cases involve paranoid delusions. For example, a testator might believe that her loved ones are trying to harm her¹⁷ or steal her property.¹⁸ In such a case, the contestant must show that the paranoid insane delusion, and not another motivation, such as dislike of an heir, affected the terms of the will.¹⁹

The difficulties of proof are palpable. For example, determining whether a testator disinherited his daughter because he suffered from an insane delusion that she was trying to steal his property or because she did not spend enough time with him is nearly impossible.²⁰ Of course these issues are addressed when the only reliable witness of the testator's subjective thoughts—the testator himself—is deceased.

As discussed below, the standards for monomania not only lead to arbitrary results, they also provide fact-finders—both judges and juries—with significant leeway to express their biases.²¹ Generally, these biases run in favor of traditional dispositive schemes, such as leaving property

(“An insane delusion is a belief which has absolutely no foundation in fact, and even slight evidence which provides a basis for the belief negates the existence of a delusion.”). This is true even if the testator's reasoning is absurd. *See Estate of Pilon*, 780 N.Y.S.2d at 812 (citing COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS § 7:49 (2003)).

On the Internet, it is possible to find support for the green cheese theory based on the “seismic velocity” of moon rocks. *See* *Is the Moon Made of Green Cheese?*, <http://www.planetfusion.co.uk/~pignut/cheese.html> (last visited May 16, 2007). Thus, it seems that a conclusion that the moon is made of green cheese might not be an *insane* delusion. This (admittedly silly) example highlights the limitations of the current law regarding insane delusions. *See infra* notes 118–71 and accompanying text.

¹⁶ *See Chevallier's Estate*, 113 P. at 133.

¹⁷ *See, e.g., Zielinski v. Moczulski (In re Estate of Zielinski)*, 623 N.Y.S.2d 653 (App. Div. 1995), *vacated on other grounds*, 664 N.E.2d 891 (N.Y. 1996).

¹⁸ *See, e.g., Johnson v. Dodgen*, 260 S.E.2d 332 (Ga. 1979).

¹⁹ *See M.I. Marshall & Isley Trust Co. of Ariz. v. McCannon (In re Estate of Killen)*, 937 P.2d 1368, 1373 (Ariz. Ct. App. 1996); *see also In re Morgan's Estate*, 68 A. 953, 953 (Pa. 1908) (finding that the testator had capacity even though there was no foundation for his dislike of some family members).

²⁰ *See Sanford v. Freeman (In re Estate of Watlack)*, 945 P.2d 1154, 1156–58 (Wash. Ct. App. 1997).

²¹ *See* E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 286–87 (1999).

only to close family²² and treating all children equally.²³ Thus, the doctrine of monomania conflicts with the policy of testamentary freedom—an individual's freedom to control the disposition of his property at his death.

It has been noted that the aging of the population²⁴ will likely lead to increased litigation regarding testamentary capacity over the next few decades.²⁵ This aging of the population is particularly likely to increase the number of monomania cases. The occurrence of Alzheimer's disease, for example, is strongly correlated with age.²⁶ Three percent of individuals between ages sixty-five and seventy-four are expected to suffer from the disease,²⁷ and forty-seven percent of individuals over age eighty-five.²⁸ A common symptom of the disease is paranoid delusions;²⁹ therefore, this aging of the population likely will result in a greater number of decedents that suffered from paranoid delusions. Because paranoid delusions are a common source of monomania cases,³⁰ the increased number

²² See William M. McGovern, *Facts and Rules in the Construction of Wills*, 26 UCLA L. REV. 285, 307–10 (1978).

²³ See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 300 (1944); see also *Fletcher v. DeLoach*, 360 So. 2d 316, 319 (Ala. 1978) (“The fact that the . . . will left all of the estate to . . . the testatrix's daughter, thus making no provision for her son or granddaughter, could be evidence of an unnatural disposition of her property, and could be considered by the jury on the issue of testamentary capacity.”).

²⁴ See U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, & Hispanic Origin (Mar. 18, 2004), available at <http://www.census.gov/ipc/www/usinterimproj/> (click on “Table 2a”) (last visited May 16, 2007) (noting that 12.4% of the U.S. population was over age sixty-five as of the 2000 census). By 2050, that percentage is expected to increase to 20.7%. Moreover, the percentage of residents age eighty-five or older is expected to increase from 1.5% as of calendar year 2000 to 5% in 2050. See *id.*

²⁵ See Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547, 552 (2002–2003). But see Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 628–32 (1987) (noting that the age of the testator has little significance in determining if a will contest will be filed).

²⁶ See Dennis A. Evans et al., *Prevalence of Alzheimer's Disease in a Community Population of Older Persons: Higher than Previously Reported*, 262 JAMA 2551 (1989).

²⁷ See *id.* at 2554.

²⁸ See Evans, *supra* note 26, at 2554.

²⁹ See Robin E. Wragg & Dilip V. Jeste, *Overview of Depression and Psychosis in Alzheimer's Disease*, 146 AM. J. PSYCHIATRY, 577, 580–82 (1989).

³⁰ See, e.g., *Alegria v. Alegria (In re Alegria's Estate)*, 197 P.2d 571 (Cal. Dist. Ct. App. 1948); *Johnson v. Dodgen*, 260 S.E.2d 332 (Ga. 1979). Indeed, many monomania cases involve Alzheimer's patients. See, e.g., *In re Estate of Washburn*, 690 A.2d 1024 (N.H. 1997). In *Kottke v. Parker (In re Estate of Kottke)*, 6 P.3d 243 (Alaska 2000), the testator likely was suffering from Alzheimer's disease, although he actually died of cancer. See Brief

of decedents that suffered from paranoid delusions may lead to an increase in the number of monomania cases.

Part Two of this Article briefly discusses the issue of testamentary freedom and addresses the conflict between respect for testamentary freedom and the requirements of testamentary capacity. This Part also discusses the general test for testamentary capacity.

Part Three of this Article discusses the issue of monomania as it relates to testamentary capacity. Specifically, Part Three addresses when an insane delusion obviates testamentary capacity. As mentioned, the law regarding insane delusions creates unworkable standards. These amorphous standards invite fact-finders to substitute their judgment for that of the testator. This exacerbates the bias in favor of traditional estate plans that is inherent in the usual test for general testamentary capacity.

Part Four argues that the doctrine of monomania is unnecessary. If the testator truly lacks capacity, the will should be found invalid under the test for general testamentary capacity. In addition, eschewing the law of monomania allows fact-finders to consider more probative issues in determining the testator's capacity and reduces fact-finder bias in favor of traditional estate plans.

Part Four concludes that the doctrine of monomania serves no useful purpose, leads to arbitrary results, and injects additional fact-finder bias into determinations of testamentary capacity.

II. TESTAMENTARY FREEDOM AND TESTAMENTARY CAPACITY

Testamentary freedom—the ability of a decedent to control the disposition of his property at death—is a fundamental tenet of American law.³¹ Explicit limitations on testamentary freedom are relatively minor,³² with

of Appellants at 2, *In re Estate of Kottke*, 6 P.3d 243 (No. S-8932).

³¹ See *United States v. Perkins*, 163 U.S. 625, 627–28 (1896); *Middleditch v. Williams*, 17 A. 826, 827 (N.J. Prerog. Ct. 1889); Suzanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 959, 966 (2006); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975); Daniel Marson, Justin Huthwaite, & Katina Hebert, *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 L. & PSYCHOL. REV. 71, 71 (2004); Orrin K. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96, 117 (1919–1920).

³² In addition to a surviving spouse's elective share rights, many states provide the surviving spouse, the decedent's minor children, or both, with rights to relatively small amounts of property. Generally, the most significant of these so-called offsets is the homestead allowance. Although it varies from state to state, the homestead allowance tends not to be terribly valuable. See, e.g., MICH. COMP. LAWS. ANN. § 700-2402 (West 2002)

the notable exception of elective share statutes that prevent testators from disinheriting a surviving spouse.³³ Indeed, many people are surprised to learn that, for the most part, testators are free to completely disinherit their children—even their minor children.³⁴

In addressing the constitutionality of elective share statutes, the Supreme Court has held that “the dead hand rules succession only by sufferance.”³⁵ Later Supreme Court cases, however, make it clear that there is some constitutional right to testamentary freedom, although its metes and bounds are unclear.³⁶

Regardless of the scope of the constitutional right, it is clear that the right to control the disposition of property at death is fundamental to Anglo-American wills law.³⁷ Indeed, the right to dispose of personal

(granting a homestead allowance of \$15,000); MO. ANN. STAT. § 474.290 (West 2006) (granting a homestead allowance of up to one-half of the estate, subject to a \$15,000 maximum).

³³ All common law property states, except Georgia, have an elective share statute that prevents a testator from freely disinheriting her surviving spouse. See Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667, 701 n.168 (2005). These statutes vary greatly from state to state. For example, in Connecticut a surviving spouse is entitled to a life estate in one-third of the decedent’s probate estate. See CONN. GEN. STAT. ANN. § 45a–43b (West 2002). In Missouri, the surviving spouse would be entitled to one-half of the decedent’s estate, if she left no surviving descendants; one-third if the decedent also left surviving descendants. See MO. ANN. STAT. § 474.160 (West 1992). In Missouri, unlike Connecticut, the surviving spouse receives his elective share outright. See *id.* In contrast, under the Uniform Probate Code, the surviving spouse is entitled to a portion of the “augmented estate,” an artificial construct that includes much more than merely the decedent’s probate estate. See UNIF. PROBATE CODE §§ 2-202, 2-203 (amended 1993), 8 U.L.A. 102–04 (1998). Further, under the Uniform Probate Code, the surviving spouse’s share of the augmented estate depends on how long the decedent and surviving spouse were married, not on whether the decedent left any surviving descendants. See *id.* § 2-202.

³⁴ Generally, an individual is free to disinherit all heirs other than a surviving spouse. See Louis S. Harrison, *Defensive Strategies for Potential Will and Trust Contests*, PROB. & PROP., Nov.–Dec. 1999, at 7, 9–10. Exceptions include Louisiana’s forced heirship laws and, to a lesser extent, homestead laws. See, e.g., FLA. STAT. ANN. § 732.4015 (West 2005); LA. CIV. CODE ANN. arts. 1493–1495 (2000 & Supp. 2007).

³⁵ *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 hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

³⁶ See *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

³⁷ See *United States v. Perkins*, 163 U.S. 625, 627–28 (1896) (stating that control is fundamental, although subject to limitations); *Middleditch v. Williams*, 17 A. 826, 827 (N.J.

property by will was established in England in the thirteenth century.³⁸ Although primogenitor³⁹ and other limitations on the freedom to dispose of real property lingered for several centuries, freedom of testation over real property was established by the middle of the nineteenth century.⁴⁰

Any discussion of testamentary capacity—and especially a discussion of insane delusions—must recognize the importance of testamentary freedom. Many of the cases discussed in this Article involve testators who capriciously disinherited their heirs.⁴¹ In these situations, it is tempting to use the requirement of testamentary capacity to invalidate the will and allow the property to descend to the heirs.⁴² Indeed, numerous commentators have noted the inclination of fact-finders to do just this.⁴³ However, courts frequently state that, out of respect for testamentary freedom, wills are not invalid merely because the estate plan is arbitrary, mean-spirited, or prejudiced.⁴⁴

To some extent, the requirement of testamentary capacity inherently conflicts with respect for testamentary freedom. When a court rejects a will, the court is failing to implement the testator's desires as expressed in

Prerog. Ct. 1889).

³⁸ See McMurray, *supra* note 31, at 105–06.

³⁹ “Primogenitor” is the right of the testator’s eldest male son to take the testator’s real property at his death. See WEBSTER’S III NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1802 (Phillip Babcock Gove ed., 2002).

⁴⁰ See McMurray, *supra* note 31, at 105–06.

⁴¹ For example, in *Hardy v. Barbour*, 304 S.W.2d 21 (Mo. 1957), the testator disinherited her daughter largely because the testator had always wanted a son. See *id.* at 27. In fact, the testator named her daughter Werdna, because she had hoped to name a male child Andrew. Obviously, “Werdna” is “Andrew” spelled backwards.

⁴² An “heir” is an individual who would receive a portion of the decedent’s estate if he died intestate. See BLACK’S LAW DICTIONARY 740 (8th ed. 1990). Generally, the decedent’s heirs are his surviving spouse, if any, and his closest living blood relatives. See, e.g., MO. ANN. STAT. § 474.010 (West Supp. 2006); UNIF. PROBATE CODE §§ 2-112 to 2-113, 8 U.L.A. 90–91 (1998). In most cases, if a will is denied probate, the decedent’s estate will be distributed according to the state’s intestacy statute. Thus, the decedent’s heirs will divide the estate. However, in cases in which the decedent leaves an earlier executed will and a later will that is disputed, if the later will is rejected, the earlier will may still be probated. See, e.g., *Estate of Karabatian v. Hnot*, 170 N.W.2d 166 (Mich. Ct. App. 1969); see also N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 1998).

⁴³ See, e.g., Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235–37 (1996); McMurray, *supra* note 31, at 116–17; Spitko, *supra* note 21, at 278–85.

⁴⁴ See M.I. Marshall & Isley Trust Co. of Ariz. (*In re Estate of Killen*), 937 P.2d 1368, 1372 (Ariz. Ct. App. 1996); *Bohler v. Hicks*, 48 S.E. 306, 307–08 (Ga. 1904); *Karris v. Frustaglio (In re Estate of Sarras)*, 384 N.W.2d 119, 121 (Mich. Ct. App. 1986).

the purported will.⁴⁵ Despite frequent pronouncements of judicial respect for testamentary freedom,⁴⁶ numerous commentators have noted courts' willingness to refuse to probate a will when the estate plan is non-traditional.⁴⁷ Some of this bias is explicit. For example, an "unnatural" estate plan is evidence of testamentary incapacity.⁴⁸

Testamentary capacity is a question of fact to be determined by the fact-finder.⁴⁹ Generally, the burden of proving testamentary capacity is on the proponent of the will.⁵⁰ Once the proponent has made a prima facie case of capacity, however, the burden shifts to the contestant to prove incapacity.⁵¹ In most cases, the proponent can make her prima facie case relatively easily. The fact that the will is properly executed may suffice.⁵²

A will is valid only if the testator had testamentary capacity at the moment the will was executed.⁵³ Thus, an individual who is usually incompetent may execute a valid will if she is enjoying a "lucid interval"

⁴⁵ Of course, if the testator did not have capacity when he executed the will, it is unclear whether the purported will is an accurate statement of the testator's testamentary intent. In these cases, it is arguable that the rejection of the will is done out of respect for testamentary freedom. See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 621 (1988).

⁴⁶ See, e.g., *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998).

⁴⁷ See *supra* note 43.

⁴⁸ See, e.g., *Palmore v. Inghran*, 373 So. 2d 312, 313 (Ala. 1979); *Carpenter v. Horace Mann Life Ins. Co.*, 730 S.W.2d 502, 507 (Ark. Ct. App. 1987); see also *infra* notes 86–91 and accompanying text.

⁴⁹ See *Stanton v. Grigley*, 418 A.2d 923, 927 (Conn. 1979); *In re Succession of Pardue*, 915 So. 2d 415, 421 (La. Ct. App. 2005).

⁵⁰ See *In re Estate of Farr*, 49 P.3d 415, 419 (Kan. 2002); *In re Estate of Broderick*, 125 P.3d 564, 572 (Kan. Ct. App. 2005).

⁵¹ See *Estate of Farr*, 49 P.3d at 419; *Estate of Broderick*, 125 P.3d at 572.

⁵² See *Gathings v. Howard*, 84 So. 240, 241 (Miss. 1920); *Rocco v. Sims (In re Estate of McQueen)*, 918 So. 2d 864, 870–71 (Miss. Ct. App. 2005); *Chrisman v. Chrisman*, 18 P. 6, 7 (Or. 1888).

Many wills are executed contemporaneously with "self proving affidavits." Generally, in these affidavits the witnesses attest to the various requirements for probate, such as due execution and testamentary capacity. See, e.g., MO. ANN. STAT. §§ 474.337, 473.065 (West 1992); N.Y. SURR. CT. PROC. ACT § 1406 (McKinney 1995); UNIF. PROBATE CODE § 2-504, 8 U.L.A. 362–63 (1998). These affidavits should establish the proponents' prima facie case. See *Achterg v. Farmers State Bank & Trust Co. (In re Estate of Camin)*, 323 N.W.2d 827, 833 (Neb. 1982). Indeed, if the will is not contested, wills may be admitted to probate solely on the strength of the affidavit. See, e.g., MO. ANN. STAT. § 473.065 (West 1992); N.Y. SURR. CT. PROC. ACT § 1406 (McKinney 1995).

⁵³ See *Noland v. Noland*, 956 S.W.2d 173, 176 (Ark. 1997); *Mask v. Elrod (In re Estate of Mask)*, 703 So. 2d 852, 856 (Miss. 1997); *Chrisman*, 18 P. at 12.

at the time the will was executed.⁵⁴ The requirement that capacity be determined at the moment of the will's execution makes capacity determinations particularly difficult. Generally, evidence of the testator's capacity at that moment (other than the testimony of the subscribing witnesses) is likely to be limited. Therefore, courts frequently rely on evidence regarding capacity at other times to determine capacity at the moment of the will's execution.⁵⁵

In most states, by statute, a testator must be of "sound mind" in order to make a will.⁵⁶ This requirement is also sometimes referred to as a "disposing mind and memory."⁵⁷ Neither standard is particularly helpful in determining whether a testator had testamentary capacity. Fortunately, case law in most states⁵⁸ provides a more complete definition of

⁵⁴ See *In re Carnegie's Estate*, 13 So. 2d 299, 300 (Fla. 1943); *In re Estate of Washburn*, 690 A.2d 1024, 1028 (N.H. 1997).

⁵⁵ See *Noland*, 956 S.W.2d at 176 ("The time to look at a testator's mental capacity is at the time the will is executed. However, proof may be taken as to the testator's condition both before and after the will's execution as being relevant to his condition at the time the will was executed."); *Chrisman*, 18 P. at 12 ("What his mental condition was before or after executing it is of no importance, only as it throws light upon his mind, and shows what its actual condition was when the will was executed.").

⁵⁶ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (McKinney 1998); NEV. REV. STAT. ANN. § 133.020 (LexisNexis 2000); N.J. STAT. ANN. § 3B:3-1 (West 1983); UNIF. PROBATE CODE § 2-501, 8 U.L.A. 144 (1998).

⁵⁷ *Wells v. Jackson*, 453 S.E.2d 690, 691 (Ga. 1995); *Allee v. Ruby Scott Sigears Estate*, 182 S.W.3d 772, 780 (Mo. Ct. App. 2006).

⁵⁸ In a few states, the standard for testamentary capacity has been codified into the statutes. For example, section 6100.5 of the California Probate Code provides:

(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

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

CAL. PROB. CODE § 6100.5 (West Supp. 2004).

In Georgia, the statute dealing with testamentary capacity mentions that the testator must be free from monomania. See GA. CODE ANN. § 53-2-23 (1997):

An insane person generally may not make a will; however, during a lucid interval he may do so. A monomaniac may make a will if the will is in no way the result of or connected with his monomania. In all such cases it must appear that the will speaks the wishes of the testator, unbiased by the mental disease with which he is affected.

testamentary capacity. The *Restatement (Third) of the Law of Property* provides the following definition of testamentary capacity:

To be “of sound mind,” the testator must, when executing a will, be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.⁵⁹

Although the definitions vary from state to state,⁶⁰ and even from case to case within a state,⁶¹ most definitions are similar to the *Restatement* definition quoted above. Generally, the testator must have the ability to know the natural objects of his bounty, know the nature and extent of his property, and understand the consequences of making a will.⁶²

One should not, however, overemphasize the importance of the precise language used in the various tests for capacity. Although most

⁵⁹ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. c (2003).

⁶⁰ Compare *In re Clapper*, 718 N.Y.S.2d 468, 470 (App. Div. 2001) (stating that a testator has testamentary capacity if “(1) he understood the nature and consequences of executing a will, (2) he knew the nature and extent of the property he was disposing of, and (3) he knew those who are the natural objects of his bounty and his relationship to them”) with *Rogers v. Overton (In re Estate of Rogers)*, 47 N.W.2d 818, 820 (Iowa 1951) (stating that the test for testamentary capacity requires the testator “1. To understand the nature of the instrument he is executing; 2, to know and understand the nature and extent of his property; 3, to remember the natural objects of his bounty; and 4, to know the distribution he desires to make”).

⁶¹ Compare *Fridline v. Dolby*, No. 19115, 1929 WL 2381, at *2 (Ohio Ct. Com. Pl. Dec. 2, 1929) (“The law, therefore, requires that a testator, or testatrix, shall be able to hold in his or her mind the nature and extent of his or her property; the persons who would be the natural objects of his or her bounty, and their relationship to him or her.”) with *Niemes v. Niemes*, 119 N.E. 503, 506 (Ohio 1917).

Testamentary capacity exists when the testator has sufficient mind to *understand the nature of the business in which he is engaged*, to comprehend generally the nature and extent of the property which constitutes his estate, and which it is his intention to dispose of, . . . to hold in his mind the names and identity of those who have natural claims on his bounty[, and] to be able to appreciate his relation to the members of his family.

⁶² See, e.g., *Taylor v. Kelly*, 31 Ala. 59, 65 (Ala. 1857); *In re Estate of Kumstar*, 487 N.E.2d 271, 272 (N.Y. 1985).

cases recite the relevant standard, few actually go through the standard in an ordered factor-by-factor way.⁶³ Indeed, many courts seem to make the capacity decision viscerally and then mention the standard to support the decision.⁶⁴ Moreover, capacity issues are so difficult, and gradations of sanity and insanity so subtle, that the precise terms of any test are of limited value.⁶⁵

The test for capacity does, however, provide some useful insight into capacity decisions. Generally, testamentary capacity requires, among other things, that the testator had the ability to “know the natural objects of her bounty.”⁶⁶ Although the phrase “natural object of the testator’s bounty” is used frequently in describing capacity, the phrase is much less frequently defined.⁶⁷ Generally, the natural objects of the testator’s bounty are his spouse and closest blood relatives.⁶⁸

⁶³ See Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 159–60 (1941); see also, e.g., *Teel v. Roberson (In re Estate of Teel)*, 483 P.2d 603 (Ariz. Ct. App. 1971); *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998).

⁶⁴ See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 275 (1944); see also Michael L. Perlin, “*Things Have Changed*”: *Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 536 (2002–2003).

⁶⁵ See *Slaughter v. Heath*, 57 S.E. 69, 71 (Ga. 1907) (“The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value.”); Green, *supra* note 63, at 159.

⁶⁶ E.g., *Bye*, 975 S.W.2d at 455 (“To validly execute a will, the testator must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose.”); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003). In California, the definition of capacity that has been codified into the probate code eschews the traditional “natural objects of the testator’s bounty” language. In its place, California law requires that the testator had the ability to “remember and understand the individual’s relations to living descendants, spouse, and parents, and those whose interests are affected by the will.” CAL. PROB. CODE § 6100.5 (West 1991).

⁶⁷ See, e.g., *Teel*, 483 P.2d 603. The phrase “natural objects of the testator’s bounty” was first used in the United States in 1823; however, the Court did not define the phrase. See *Daly’s Lessee v. James*, 21 U.S. 495, 504 (1823); see also Robert E. Mensel, *Right to Feeling and Knowing Right: Insanity in Testators and Criminals and Nineteenth Century American Law*, 58 OKLA L. REV. 397, 425 (2005).

⁶⁸ Frequently, the “natural objects of a testator’s bounty” are his heirs; that is, the individuals who would inherit the decedent’s estate if he died intestate. See *Daly’s Lessee*, 21 U.S. at 504; BLACK’S LAW DICTIONARY 741 (8th ed. 1990). In cases in which the heirs cannot reasonably be considered the natural objects of the testator’s bounty because of the testator’s frayed relations with his heirs, courts search for those individuals who provide a family-like support structure. See Mensel, *supra* note 67, at 426–29. Further, in cases in which the testator had both a traditional family and a nontraditional family, courts will

The testator does not, however, need an encyclopedic recall of the natural objects of his bounty.⁶⁹ Indeed, testamentary capacity requires a relatively low degree of mental ability.⁷⁰ Thus, although the testator must have the ability to “know the natural objects of her bounty” and “know the character and value of her estate,” she does not need to have perfect knowledge of either.⁷¹ For example, the testator may execute a valid will even though she does not know the value of her property with great precision⁷² or does not know all of her heirs.⁷³

Courts have frequently stated that an individual may execute a valid will even though his capacity is significantly impaired.⁷⁴ Thus, even an individual who is forgetful, eccentric, and fails to recognize old friends may have testamentary capacity.⁷⁵ Indeed, an Arizona court has held that a mentally retarded individual who had the mental function of a ten-to-

generally conclude that the traditional family is the “natural object of the testator’s bounty.” *See id.*; *see generally* Spitko, *supra* note 21, at 275–86.

⁶⁹ *See* Havens v. Mason, 62 A. 615, 616 (Conn. 1905); Mangan v. Mangan, 554 S.W.2d 418, 422 (Mo. Ct. App. 1977).

⁷⁰ *See* Turner v. Hand, 24 F. Cas. 355, 364–65 (D.N.J. 1855) (No. 14257) (noting that testamentary capacity requires that the testator had a “disposing memory” but that such memory may be “very imperfect”); *Bye*, 975 S.W.2d at 455. Capacity to contract requires a higher level of mental ability than testamentary capacity. *See* Norwest Bank Minn. N. v. Beckler, 663 N.W.2d 571, 579 (Minn. Ct. App. 2003); Owen v. Summers, 97 S.W.3d 114, 125 (Tenn. Ct. App. 2001). *But see In re* Estate of Romero, 126 P.3d 228, 233 (Colo. Ct. App. 2005).

Even individuals under guardianship may execute a valid will. *See Beckler*, 663 N.W.2d at 579; Allen v. Worrall (*In re* Worrall’s Estate), 127 P.2d 593, 595 (Cal. Dist. Ct. App. 1942). A ward under guardianship may be able to execute a valid will for two reasons. First, as mentioned, the level of capacity that allows for the appointment of a guardian (lack of capacity to contract) is higher than the level of capacity required to make a valid will. *See Beckler*, 663 N.W.2d at 579. Second, even an individual that has been adjudicated insane may enjoy a “lucid interval” during which he can execute a valid will. *See supra* text accompanying note 54.

⁷¹ *See Bye*, 975 S.W.2d at 455.

⁷² *See* Rich v. Rich, 615 S.W.2d 795, 797 (Tex. Civ. App. 1980); Fischbach v. Knutson (*In re* Estate of Von Ruden), 198 N.W.2d 583, 586 (Wis. 1972).

⁷³ *See supra* note 69 and accompanying text.

⁷⁴ *See, e.g.,* Firestine v. Atkinson, 218 N.W. 293, 294 (Iowa 1928) (stating that a testator may have capacity to execute a valid will even though his “mind may have been debilitated by age or disease, the memory enfeebled, the understanding weak, he may have even lacked the capacity to transact many of the ordinary business affairs of life” (quoting Perkins v. Perkins, 90 N.W. 55, 57 (Iowa 1902))); GA. CODE ANN. § 53-2-25 (1997).

⁷⁵ *See In re* Selb’s Estate, 190 P.2d 277 (Cal. Dist. Ct. App. 1948).

twelve year old child had testamentary capacity.⁷⁶ Similarly, individuals suffering from senile dementia may have testamentary capacity.⁷⁷

It is not necessary that the testator actually knew the “natural objects of his bounty” or the “character and value” of his estate. A testator’s mistaken belief will not vitiate testamentary capacity.⁷⁸ Instead, the testator merely needs to have the ability to understand these things.⁷⁹ Courts focus on the testator’s ability to know (rather than what the testator actually knew) because trying to determine what the testator was thinking when he executed his will requires delving too deeply into the mind of the deceased.⁸⁰ It creates an impossible issue of proof.

The role of the dispositive scheme in determining testamentary capacity is an issue that frequently confronts the courts. This is also the area in which the issue of capacity is most likely to conflict with testamentary freedom. A competent testator is free to dispose of his property in any manner he chooses.⁸¹ In some cases, however, the choices the testator

⁷⁶ See *Teel v. Roberson (In re Estate of Teel)*, 483 P.2d 603 (Ariz. Ct. App. 1971).

⁷⁷ See *Williams v. Gibson*, 249 P.2d 94, 98 (Okla. 1952).

⁷⁸ A factual mistake by the testator will not invalidate his will or any part of it, unless the mistake is apparent from the face of the will. See *In re Estate of Alberts*, 448 N.Y.S.2d 829, 830 (App. Div. 1982); *Jackson v. Austin*, No. CA99-34, 1999 WL 760974, at *3 (Ark. Ct. App. Sept. 22, 1999). Thus, for example, a testator who executed a will that left substantial property to Campbell College because of the testator’s gross underestimation of the size of his estate had testamentary capacity and the will (complete with mistake) was probated. See *Holmes v. Campbell College*, 125 P. 25, 26–27 (Kan. 1912). Although wills are not reformed to correct a mistake made by the testator, there is a statutory exception in cases in which the testator omitted a child solely because the testator erroneously thought that child was deceased. See, e.g., MO. ANN. STAT. § 474.240(2) (West 1992); MONT. CODE ANN. § 72-2-332(3) (2005); UNIF. PROBATE CODE § 2-302(c) (amended 1991), 8 U.L.A. 135–36 (1998).

⁷⁹ See *Holmes*, 125 P. at 26; *Edwards v. Vaught*, 681 S.W.2d 322, 325 (Ark. 1984) (“Capacity to understand the effect of making one’s will, and not actual understanding, is the test of mental capacity required of the testator.”); *Taylor v. McClintock*, 112 S.W. 405, 411 (Ark. 1908). In many states, the test for capacity is based explicitly on the testator’s “ability.” See, e.g., *Smith v. Smith*, 25 A. 11, 12 (N.J. Prerog. Ct. 1891); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003) Occasionally, courts will mention that capacity requires actual knowledge by the testator. See, e.g., *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998). It seems, however, that these courts simply did not focus on the difference between what the testator knew and what he had the ability to know. See *Edwards*, 681 S.W.2d at 325 (holding that the capacity to understand is the proper test).

⁸⁰ See Harry M. Sterling, *Mental Capacity and Freedom of Testation*, COLO. LAW., Mar. 1997, at 15, 18; see also Champine, *supra* note 25, at 553 (noting that the focus on the testator’s ability makes the test more objective).

⁸¹ See *Bye*, 975 S.W.2d at 454–55; see also *Lehman v. Lindenmeyer*, 109 P. 956, 959

makes show a lack of testamentary capacity, thereby rendering the will invalid.⁸²

Courts frequently claim that an arbitrary, unfair, unequal, or even mean-spirited estate plan is not evidence of incapacity.⁸³ Indeed, disinheriting a possible future heir may be a testator's primary purpose for executing a will.⁸⁴ Despite these broad pronouncements of judicial respect for testamentary freedom, courts do consider the terms of the estate plan in determining whether the testator had capacity.⁸⁵ Thus, an "unnatural" distribution is evidence of incapacity.⁸⁶ For example, in *Fletcher v. DeLoach*, the Alabama Supreme Court faced a will that left the testator's entire estate to one of his two children.⁸⁷ The court affirmed the jury's denial of probate. The court held that it was appropriate for the jury to consider the "character of the testamentary scheme."⁸⁸ An estate plan that was not "just and reasonable" or was not "consonant with the state of the testatrix's family relations" was evidence of a lack of capacity.⁸⁹ The court decided that the unequal distribution was sufficient evidence of incapacity to support the jury's verdict.⁹⁰ Similarly, in *Middleditch v. Williams*, the New Jersey Supreme Court held that it was unlikely that a testator "in the full possession of his senses" would execute a will that failed to provide for his descendants.⁹¹

(Colo. 1909); *Newkirk v. Knight (In re Estate of Newkirk)*, 456 P.2d 104, 106–07 (Okla. 1969); *supra* note 34 and accompanying text.

⁸² See, e.g., *Fletcher v. DeLoach*, 360 So. 2d 316, 318 (Ala. 1978); *Firestone v. Atkinson*, 218 N.W. 293, 297 (Iowa 1928).

⁸³ See, e.g., *M.I. Marshall & Isley Trust Co. of Ariz. v. McCannon (In re Estate of Killen)*, 937 P.2d 1368, 1372 (Ariz. Ct. App. 1996); *Taylor*, 112 S.W. at 411; *Bohler v. Hicks*, 48 S.E. 306, 307 (Ga. 1904); *Karris v. Frustaglio (In re Estate of Sarras)*, 384 N.W.2d 119, 121–22 (Mich. Ct. App. 1986).

⁸⁴ See *McGrail v. Rhoades*, 323 S.W.2d 815, 821 (Mo. 1959).

⁸⁵ See also *Leslie*, *supra* note 43, at 236 (noting that, in practice, courts have very little respect for testamentary freedom); *Spitko*, *supra* note 21, at 275 (same).

Arguably, courts' frequent protestations regarding their respect for testamentary freedom may, in fact, be evidence of their willingness to reject atypical estate plans. See WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2 ("The lady doth protest too much, methinks.").

⁸⁶ See *Fletcher*, 360 So. 2d at 318.

⁸⁷ See *id.* at 319.

⁸⁸ *Id.* at 318.

⁸⁹ *Id.* (quoting *Fountain v. Brown*, 38 Ala. 72, 74 (1861)).

⁹⁰ See *id.* at 319.

⁹¹ 17 A. 826, 828 (N.J. Prerog. Ct. 1889).

Despite the importance of the estate plan in determining testamentary capacity, numerous courts have held that the character of the estate plan cannot in and of itself establish incapacity.⁹² In some cases, this principle leaves contestants in a difficult situation. If the will makes an unnatural (or unfair or even merely unequal) distribution, but no other evidence of the severe incapacity required to invalidate the will exists, the contestant may be forced to accept the will's probate.⁹³ In these cases, the contestant still may successfully oppose probate of the will by arguing that the testator suffered from an insane delusion. As discussed below, such an insane delusion possibly could invalidate the will even though the testator had general testamentary capacity.⁹⁴ This represents a significant risk of undermining testamentary freedom.

⁹² See, e.g., *id.*; *Newkirk v. Knight (In re Estate of Newkirk)*, 456 P.2d 104, 106–07 (Okla. 1907). As mentioned, however, the bias in favor of traditional estate plans tempers the strength of this statement. See *supra* note 43 and accompanying text. Of course, in some situations the estate plan provides powerful evidence of incapacity. For example, in one case the testator left her entire estate to “John Gale Forbes,” who supposedly “resolved out of space” when the testator was playing with a Ouija board. See *In re Estate of Peck*, 144 A.2d 338, 340 (Conn. 1958).

⁹³ As discussed below, in this situation the will should be probated. See *infra* notes 230–82 and accompanying text.

⁹⁴ See *infra* notes 114–15 and accompanying text.

III. MONOMANIA

The first case⁹⁵ to address the issue of monomania in the context of testamentary capacity was the English case of *Dew v. Clark*.⁹⁶ In *Dew*, the court faced a truly dislikable testator. Throughout the testator's life he was cruel to his daughter. He was convinced that his daughter was "the special property of Satan,"⁹⁷ and his treatment of her was "harsh" and "severe."⁹⁸ The testator beat his daughter, treated her like a servant, and displayed no filial love for her. When his daughter was eleven years old, the testator (a doctor) forced the daughter to spend the evening with an insane female patient living in an asylum.⁹⁹

The testator's shameful treatment of his daughter continued after his death. In his will, he left only a small portion of his estate to her.¹⁰⁰ The daughter contested the will arguing that the testator lacked testamentary capacity because of an insane delusion regarding her. The testator's daughter did not contest the testator's general testamentary capacity; instead, she claimed only that he was insane on the subject of his relationship with her.¹⁰¹

⁹⁵ *Dew v. Clark*, (1826) 162 Eng. Rep. 410 (L.R.A. & E.), is generally cited as the first monomania case. See, e.g., Note, *Testamentary Capacity as Affected by Insane Delusions*, 26 IND. L.J. 291, 294 (1951). However, *Dew* cites the earlier case of *Greenwood v. Greenwood* that also involves an insane delusion. See *Dew*, 162 Eng. Rep. at 416 (citing *Greenwood v. Greenwood*, (1790) 163 Eng. Rep. 930 (K.B.)). The issue in *Greenwood*, however, was whether the testator had recovered from an insane delusion that, admittedly, had rendered the testator insane. See *id.* Thus, *Greenwood* is really more about lucid intervals than monomania.

Dew actually involves three related cases. The first case, decided by the Prerogative Court in 1822, determined that the contestant (the decedent's daughter) could admit proof regarding the testator's insane delusion. See *Dew v. Clark (Dew I)*, (1822) 162 Eng. Rep. 98 (L.R.A. & E.). The second case, decided by the Prerogative Court in 1824, also dealt with evidentiary issues. See *Dew v. Clark (Dew II)*, (1824) 162 Eng. Rep. 233 (L.R.A. & E.). In that case, the court decided that the daughter could introduce certain contested evidence. See *id.* at 238. The third case, decided by the Prerogative Court in 1826, finally resolved the issue. In that case, the court decided that the testator lacked testamentary capacity and, thus, the will was invalid. See *Dew v. Clark (Dew III)*, (1826) 162 Eng. Rep. 410, 455 (L.R.A. & E.) ("[T]hat the will here propounded, in my judgment, is null and void; and . . . the . . . deceased . . . is dead intestate.").

⁹⁶ *Dew III*, 162 Eng. Rep. 410.

⁹⁷ *Dew I*, 162 Eng. Rep. at 98.

⁹⁸ *Dew II*, 162 Eng. Rep. at 233.

⁹⁹ See *id.* at 235.

¹⁰⁰ The testator left his daughter merely a life interest in a small portion of the estate. See *Dew III*, 162 Eng. Rep. at 411.

¹⁰¹ See *id.* at 416.

The court held that the testator, as a general matter, had testamentary capacity.¹⁰² However, the court decided that the testator was insane on the subject of his daughter.¹⁰³ The court noted that the testator had some slight factual basis for his antipathy towards his daughter.¹⁰⁴ Indeed, the *Dew* court reasoned that most insane delusions have some factual basis.¹⁰⁵ The court concluded, however, that such overwhelming antipathy toward a child based on minor misdeeds had to be the result of an insane delusion.¹⁰⁶

Based on the terms of the will, the court decided that the testator's insane delusion must have affected how he devised his property.¹⁰⁷ Therefore, the will was the product of the insane delusion and, thus, invalid for want of testamentary capacity.¹⁰⁸

It is hard not to feel sympathy for the daughter in *Dew*. Indeed, the court spent a great deal of time discussing the daughter's fine moral character and vilifying the testator.¹⁰⁹ In fact, the court noted that a jury likely would be swayed by its sympathies and that the court had similar

¹⁰² *See id.* at 453. (“[T]he deceased is proved . . . to have been sui juris at all times, and sane upon all ordinary subjects, and in all ordinary respects . . .”).

¹⁰³ *See id.* at 454.

¹⁰⁴ It is not clear from the case exactly what misdeeds the daughter committed. The court notes that, at worst, the daughter is guilty of “some sullenness and perverseness of temper; of some unwillingness or inaptitude to profit by the pains bestowed upon her education [and] even of youthful indiscretion.” *See id.* at 444. However, at another point in the case, the court notes that the daughter would periodically leave the testator and try to live independently. *See id.* at 444. The court notes that these “revolts” greatly upset the testator. *Id.*

¹⁰⁵ *See id.* at 445 (“In most cases of delusion, the delusion finds itself, originally, on some slight circumstance, the magnifying of which, beyond all reasonable bounds, is . . . as good in proof of its being a delusion as the taking up some absurd prejudice, which is utterly unfounded, or that rests upon no basis.”).

¹⁰⁶ *See id.* at 446:

So, if the parent of a child really blamable to a certain extent . . . takes occasion from this to fancy her a “fiend” . . . if, moreover, he be found through his whole life acting under and upon that conception . . . such a parent is, I should say, as much in a state of morbid delusion, and so of insanity, in regard to that child, as if the child's conduct were wholly irreproachable.

¹⁰⁷ *See id.* at 454.

¹⁰⁸ *See id.* at 455.

¹⁰⁹ For example, the court describes radical instructions that the testator as a doctor gave his wife's nurses. *See Dew I*, 162 Eng. Rep. at 98. The court notes that these treatments likely led to the wife's death. *See id.*

feelings.¹¹⁰ The court, however, also repeatedly “protest[ed]” that sympathy for the daughter did not cloud its judgment.¹¹¹

Arguably, a testator should not have the power to disinherit heirs such as the daughter in *Dew*.¹¹² An explicit bias by a court in favor of a testator’s child, however, would run counter to the tradition of testamentary freedom. Moreover, even if it were wise for courts to prevent testators from disinheriting deserving heirs, courts should prevent such disinheritance explicitly rather than through misapplications of the test for testamentary capacity.¹¹³

Since *Dew*, courts have struggled to determine when a will should be invalidated based on the testator’s insane delusion. These courts have determined that a testator may have “sound mind” in terms of general testamentary capacity but may still lack capacity if suffering from an insane delusion.¹¹⁴ For the most part, the determination of whether the testator was suffering from an insane delusion is distinct from the test for general testamentary capacity.¹¹⁵

Although the phrasing and nuances of the test vary from state to state, some generalities can be made. A will is found invalid for lack of testamentary capacity because of monomania if: (1) the testator was suffering

¹¹⁰ See *Dew II*, 162 Eng. Rep. at 236:

[T]he [contestant] was actually anxious to submit her case . . . to a jury, that with such a case she had a much better prospect of succeeding with the jury through the medium of their feelings The Court . . . avow[s] that it participates to some extent in the feeling with which a British jury may be supposed to have looked at a case of this description.

¹¹¹ See *Dew III*, 162 Eng. Rep. at 455 (“[T]he Court has only again to protest that its feelings in this case have not been suffered to bias in its judgment.”); see also *supra* note 85.

¹¹² See *infra* notes 226–29 and accompanying text.

¹¹³ See *infra* notes 227–29 and accompanying text.

¹¹⁴ For example, in *Zielinski v. Moczulski* (*In re Estate of Zielinski*), 623 N.Y.S.2d 653 (App. Div. 1995), *vacated on other grounds*, 664 N.E.2d 891 (N.Y. 1996), the court held that even though the testator had general testamentary capacity and was able to handle the activities of day-to-day life, the will was invalid because of an insane delusion. See *id.* at 655.

¹¹⁵ See *In re Estate of Romero*, 126 P.3d 228, 230 (Colo. Ct. App. 2005); *English v. Shivers*, 133 S.E.2d 867, 868 (Ga. 1963).

In *Kottke v. Parker* (*In re Estate of Kottke*), 6 P.3d 243 (Alaska 2000), the Alaska Supreme Court noted that the test for an insane delusion was a facet of law regarding general testamentary capacity, rather than a separate and distinct test. See *id.* at 246. Despite the unusual characterization of the interaction between general testamentary capacity and monomania, the court’s description and analysis of the doctrine of monomania was relatively typical.

from an insane delusion, and (2) the will is a product of that delusion.¹¹⁶ Generally, the contestant bears the burden of proof.¹¹⁷

A. Requirement One: An Insane Delusion

First, the obvious requirement: for a court to invalidate a will based on an insane delusion, the testator must have been suffering from a delusion that is insane.¹¹⁸ The requirement that the delusion be an insane delusion is based on respect for the testator's testamentary freedom. If the purported delusion is merely a mistaken conclusion, then the delusion is not insane and the will is valid.¹¹⁹ For example, in *Jackson v. Austin*,¹²⁰ the Arkansas Supreme Court addressed a case in which a testator left nothing to her grandson or her daughter, the grandson's mother. The testator had cosigned a note for her grandson¹²¹ and later became consumed with fear that she would be required to pay off the grandson's note.¹²² The contestant argued that this fear was an insane delusion and was the reason that the testator disinherited her grandson and daughter.¹²³ The court noted that a belief founded on prejudice or mistake is not an insane delusion, "no matter how unreasonable."¹²⁴ A delusion is an insane delusion only if the delusion has absolutely no basis in fact.¹²⁵ Even a "glimmer" of a factual basis for the delusion renders the delusion not insane.¹²⁶

¹¹⁶ See, e.g., *Powell v. Thigpen*, 199 S.E.2d 251, 252 (Ga. 1973); *Athey v. Rask (In re Rask's Estate)*, 214 N.W.2d 525, 528 (N.D. 1974).

¹¹⁷ See *supra* notes 50–52.

¹¹⁸ See *Dibble v. Currier*, 83 S.E. 949, 950 (Ga. 1914); *Pyle v. Millar (In re Millar's Estate)*, 207 P.2d 483, 489 (Kan. 1949). This determination is made as of the time the testator executed the will. See *Nigro v. Fata (In re Estate of Nigro)*, 52 Cal. Rptr. 128, 131 (Dist. Ct. App. 1966).

¹¹⁹ See *Dibble*, 83 S.E. at 950; *Millar*, 207 P.2d at 489.

¹²⁰ No. CA99-34, 1999 WL 760974 (Ark. Ct. App. Sept. 22, 1999).

¹²¹ See *id.* at *1.

¹²² See *id.*

¹²³ See *id.* As discussed below, in order to prove that the will was invalid based on an insane delusion, the contestant (the daughter and grandson in this case) must show that the will was the product of the insane delusion. See *infra* notes 172–229 and accompanying text. Because the *Jackson* court decided that the testator was not suffering from an insane delusion, the court never reached the issue of whether the testator's will was a product of the purported delusion. See *id.* at *3.

¹²⁴ See *id.* at *4.

¹²⁵ See *id.*

¹²⁶ See *Kottke v. Parker (In re Estate of Kottke)*, 6 P.3d 243, 246 (Alaska 2000).

Like the *Jackson* court, most courts require that the delusion have no factual basis.¹²⁷ For example, the fact that the testator's children had a guardian appointed for him was sufficient to support the testator's belief that his children were trying to control his property and keep it for themselves.¹²⁸ Thus, the will disinheriting his children was probated even though the court noted that the children acted in the testator's best interests throughout the testator's life.¹²⁹

If there is going to be any respect for testamentary freedom, there needs to be a test that distinguishes between unusual (or even unreasonable) conclusions that do not negate testamentary capacity and insane delusions that do. However, if the requirement that the delusion have absolutely no basis in fact is strictly applied, few, if any, wills would be rejected based on monomania. The doctrine would be rendered vacuous.

Delusions almost always have some basis in fact.¹³⁰ Indeed, in one monomania case, the expert witness testified that insane delusions always have some basis in fact, even though it is not always possible to determine what that basis is.¹³¹ A review of the cases seems to support the expert's conclusion that some (perhaps trivial) factual basis can be found for any delusion. For example, in *Dew*, there were trivial reasons for the testator's antipathy toward his daughter.¹³² Despite this, the *Dew* court held that the testator was suffering from an insane delusion.¹³³

In the more extreme case of *Smith v. Tebbitt*,¹³⁴ the testator believed that she was the Holy Ghost referred to in the Trinity.¹³⁵ The court rejected her will for lack of testamentary capacity based on this insane

¹²⁷ See, e.g., *Alegria v. Alegria (In re Alegria's Estate)*, 197 P.2d 571 (Cal. Dist. Ct. App. 1948); *Baney v. Baney*, 462 S.E.2d 725, 726 (Ga. 1995); *Bain v. Cline*, 33 P. 542, 543 (Or. 1893).

¹²⁸ See *In re Estate of Raney*, 799 P.2d 986, 991 (Kan. 1990).

¹²⁹ See *id.* at 994, 996-97.

¹³⁰ See William Lubersky, Note & Comment, *Wills-Insane Delusion*, 18 OR. L. REV. 45, 47 (1938); *Dew v. Clark (Dew III)*, (1826) 162 Eng. Rep. 410, 445 (L.R.A. & E.). See also *Kottke*, 6 P.3d at 246. Presumably, it is possible for a testator to be suffering from a hallucination or some other form of delusion that is completely and entirely devoid of any factual basis. In these cases, however, it seems that a testator in such a weakened mental state would fail the general test for testamentary capacity. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003).

¹³¹ See *First Methodist Church of Ann Arbor v. Seegen (In re Doty's Estate)*, 180 N.W. 608, 616 (Mich. 1920).

¹³² See *Dew III*, 162 Eng. Rep. at 433.

¹³³ See *id.* at 454.

¹³⁴ (1867) 1 L.R.P. & D. 398.

¹³⁵ See *id.* at 405.

delusion.¹³⁶ One could argue, however, that the common belief that all persons are formed in God's image provides a factual basis (however slight) for the testator's delusion.¹³⁷

Other cases also show the presence of minor factual bases for the testator's purportedly insane delusion. For example, many monomania cases involve delusions of marital infidelity.¹³⁸ In these cases, if the facts are searched carefully, some basis for the testator's delusion can be found. This is especially true when a "trifle as light as air" is enough of a factual basis to render a jealous suspicion not an insane delusion.¹³⁹

For example, in *In re Kaven's Estate*,¹⁴⁰ the Michigan Supreme Court faced a will that largely disinherited the testator's husband. The testator was suffering from a delusion that her husband was having extramarital affairs, but the court noted that there was no evidence of marital infidelity. Therefore, the delusion was insane,¹⁴¹ and the will was denied probate.¹⁴² The court also stated, however, that the testator had sexual problems¹⁴³ and that the testator was jealous because her husband worked odd hours, worked predominantly with women, and frequently left in the middle of the night for emergencies.¹⁴⁴ These facts are easily explained. The testator's husband was a doctor (perhaps an obstetrician).¹⁴⁵ Although it is easy to understand why the court ruled as it did and refused to probate the will, the court's decision is clearly wrong. There was obviously some factual basis for the testator's belief that her husband was unfaithful. Her

¹³⁶ See *id.* at 436.

¹³⁷ See *Genesis* 1:26–27. Generally, religious beliefs cannot be insane delusions. See, e.g., *Conner v. Stanley*, 14 P. 306, 307 (Cal. 1887); *Owen v. Crumbaugh*, 81 N.E. 1044, 1052 (Ill. 1907). One possible explanation for this rule is that religious beliefs, by their nature, cannot be proved or disproved. Thus, it is not possible to determine if there is any factual basis for the testator's belief. See *Owen*, 81 N.E. at 1053. Uncommon religious beliefs, however, are sometimes determined to be insane delusions. For example, in *Irwin v. Lattin*, 135 N.W. 759 (S.D. 1912), the court held that the testator's belief in spiritualism was an insane delusion that rendered the will invalid. See *id.* at 763.

¹³⁸ See, e.g., *In re Scott's Estate*, 60 P. 527 (Cal. 1900); *Hammett v. Reynolds*, 256 S.E.2d 354, 355 (Ga. 1979); *In re Kaven's Estate*, 272 N.W. 696, 697 (Mich. 1937).

¹³⁹ See *Scott*, 60 P. at 530.

¹⁴⁰ 272 N.W. 696.

¹⁴¹ See *id.* at 698.

¹⁴² See *id.* at 699.

¹⁴³ See *id.* at 697.

¹⁴⁴ See *id.* at 697–98.

¹⁴⁵ The court never explicitly describes the type of medicine practiced by the husband. However, based on the facts described in the case (and noted in the main text), the guess that the husband was an obstetrician seems reasonable.

reasoning may have been flawed, her jealousy may have been unreasonable. However, because there was some foundation for her belief, the delusion should not be deemed insane. By overlooking trivial facts supporting a testator's belief in order to determine that a testator suffered from an insane delusion, courts risk rejecting wills based on a testator's merely unreasonable conclusion, as the *Kaven* court did.

Moreover, a "standardless" disregard of evidence leads to arbitrary results. For example, *Kaven* and *In re Scott's Estate*¹⁴⁶ both involved delusions of marital infidelity. In both cases, the testators suffered from physical ailments that may have affected their sexual performance.¹⁴⁷ Despite the similarities, in *Kaven*, the court held that there was no factual basis for the delusion of infidelity, and therefore, the delusion was insane and the will invalid.¹⁴⁸ In contrast, the *Scott* court held that the admittedly trivial factual basis for the testator's delusion was sufficient to make the delusion not insane.¹⁴⁹

In making the standardless determination of what evidence to ignore, fact-finders frequently rely on their own biases. For example, numerous monomania cases include a discussion that amounts to whether the excluded beneficiary was deserving of an inheritance.¹⁵⁰ Of course, this decision is supposed to be, and already has been, made by the testator. Thus, fact-finders are substituting their judgment for that of the testator and failing to respect the testator's testamentary freedom.¹⁵¹

In short, the requirement that an insane delusion have absolutely no basis in fact leads to one of two possible results. If followed precisely, this requirement renders the law of monomania superfluous. No

¹⁴⁶ 60 P.527 (Cal. 1900).

¹⁴⁷ See *Kaven*, 272 N.W. at 697; *Scott*, 60 P. at 530.

¹⁴⁸ See *Kaven*, 272 N.W. at 698–99. The factual differences between *Scott* and *Kaven* tend to show that the testator in *Kaven* had a greater factual basis for her belief in marital infidelity than the testator in *Scott*. For example, the spouse's odd hours in *Kaven* have no analog in *Scott*. See *id.* at 698. Despite this, the *Kaven* court decided that there were no facts to support the testator's belief, and the *Scott* court reached the opposite conclusion. See *id.* at 699; *Scott*, 60 P. at 535.

¹⁴⁹ See *Scott*, 60 P. at 535.

¹⁵⁰ See, e.g., *Kirkpatrick v. Union Bank of Benton*, 601 S.W.2d 607, 607–08 (Ark. Ct. App. 1980); *Zielinski v. Moczulski (In re Estate of Zielinski)*, 623 N.Y.S.2d 653, 655–56 (App. Div. 1995), *vacated on other grounds*, 664 N.E.2d 891 (N.Y. 1996) (noting that decedent and contestant had a "good relationship"); *Dew v. Clark (Dew III)*, (1826) 162 Eng. Rep. 410, 412–16 (L.R.A. & E.).

¹⁵¹ See *Brumelow v. Hopkins*, 29 S.E.2d 42, 48 (Ga. 1944); *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998).

testator—at least no testator who has general testamentary capacity—would be found to be suffering from an insane delusion. On the other hand, a standardless disregard of trivial factual bases for the testator’s belief leads to arbitrary results and fails to respect testamentary freedom.

Because the requirement that an insane delusion have no basis in fact, if followed precisely, renders the doctrine of monomania meaningless, a few courts have adopted a more flexible standard. For example, in *Benjamin v. Woodring*,¹⁵² the Maryland Court of Appeals held that an insane delusion is a belief in something that “no man of sound mind could give . . . credence.”¹⁵³ An exegesis of this definition, however, reveals that it is a tautology. Essentially, the quoted language is equivalent to a statement that an insane delusion is a belief in something no man of sound mind would believe or, more succinctly, an insane delusion is a belief that is not sane.

There are two closely related problems with the *Benjamin* court’s tautological definition. First, the tautological definition is tautological.¹⁵⁴ Thus, it provides no guidance for when a delusion is an insane delusion. It is important to remember that the fact-finder should not be trying to distinguish between a reasonable and an unreasonable conclusion—a distinction fact-finders are frequently called upon to make. There is no requirement that the testator’s conclusion be reasonable.¹⁵⁵ Instead, the fact-finder is trying to distinguish between an insane delusion and a conclusion that may be unreasonable, wrong, or mean-spirited.¹⁵⁶ This is a difficult task under the best of circumstances. Trying to draw the line of sanity between the subtle gradations of unreasonable conclusions without a meaningful standard is essentially impossible.

This impossibility leads to the second problem with the tautological definition of an insane delusion. When a fact-finder tries to determine if a

¹⁵² 303 A.2d 779 (Md. 1973) (“An insane delusion, in the legal sense, is ‘a belief in things impossible, or a belief in things possible, but so improbable under the surrounding circumstances that no man of sound mind could give them credence.’” (quoting *Johnson v. Johnson*, 65 A. 918, 919 (Md. 1907))).

¹⁵³ *Id.* at 784.

¹⁵⁴ Of course, this statement is also tautological.

¹⁵⁵ See *Alegria v. Alegria (In re Alegria’s Estate)*, 197 P.2d 571, 576 (Cal. Ct. App. 1948); *Dibble v. Currier*, 83 S.E. 949, 950 (Ga. 1914).

¹⁵⁶ An insane delusion obviates testamentary capacity. See *Pyle v. Millar (In re Millar’s Estate)*, 207 P.2d 483, 487 (Kan. 1949). A conclusion that is merely unreasonable, wrong, mean-spirited, prejudiced, and so forth, will not invalidate the will. See *id.* at 488; *infra* notes 254–58 and accompanying text.

belief is an insane delusion but has no meaningful standard for doing so, the fact-finder will use his personal biases to make the decision. This is true whether the fact-finder is a judge or a jury.¹⁵⁷

For example, in *Dew*, the court admitted there was some slight factual basis for the testator's antipathy towards his daughter.¹⁵⁸ The court concluded, however, that no sane man could have so much antipathy for his daughter based on such slight evidence.¹⁵⁹ Similarly, in *In re Klein's Estate*,¹⁶⁰ the testator, a woman of German heritage, became quite offended when her son-in-law (among other actions) made an anti-German remark.¹⁶¹ Her will left nothing to her daughter and son-in-law in favor of her church.¹⁶² The court held that the testator was suffering from an insane delusion and that the will was invalid.¹⁶³ The court was unwilling to consider the anti-German remark as possible grounds for the testator's action, even though the testator was "intensely loyal to her German heritage" and was a member of a then secret society of women of German extraction.¹⁶⁴ It seems that the court's decision was likely biased by the fact that *Klein* was decided just two years after the end of World War II.¹⁶⁵

*Firestine v. Atkinson*¹⁶⁶ is a marked contrast to *Dew* and *Klein*. In *Firestine*, the court probated a will that disinherited the decedent's sole heir—an illegitimate daughter. The daughter contested the will based on

¹⁵⁷ See Champine, *supra* note 25, at 553–54. For example, in *Dew v. Clark*, the court candidly mentioned that it shared the same sympathies as a jury would. See *Dew v. Clark (Dew II)*, (1824) 162 Eng. Rep. 233, 236 (L.R.A. & E.). Of course, the court also claimed that those sympathies had no effect on its decision. See *Dew III*, 162 Eng. Rep. at 455; see also *supra* note 85.

¹⁵⁸ See *Dew III*, 162 Eng. Rep. at 433.

¹⁵⁹ See *id.* at 446.

¹⁶⁰ *Redhead v. Lang (In re Klein's Estate)*, 183 P.2d 518 (Wash. 1947).

¹⁶¹ *Id.* at 519, 523. The testator was also quite upset that her son-in-law had, at another time, made a "jocular, though innocent" remark about a bit of glass the testator had found in her food. *Id.* at 522. Based on this incident, the testator began to believe that her daughter and son-in-law were trying to harm her.

¹⁶² See *id.* at 518.

¹⁶³ See *id.* at 526–27.

¹⁶⁴ See *id.* at 519.

¹⁶⁵ The Washington Supreme Court decided *Klein* on July 18, 1947. See *id.* at 518. World War II ended in 1945.

¹⁶⁶ 218 N.W. 293 (Iowa 1928). In *Firestine*, the court used the definition of monomania that required a complete lack of evidence for the testator's belief. See *id.* at 294–95. However, because the court disposed of the case by requiring the illegitimate daughter to prove the lack of evidence, the result would have been the same regardless of the test used by the court. See *id.* at 297.

the testator's purported insane delusion that the daughter was an immoral woman.¹⁶⁷ The record contained no evidence that could serve as the basis of such a conclusion.¹⁶⁸ The court noted, however, that the daughter could not prove the lack of evidence for the testator's belief.¹⁶⁹ Thus, the will was probated. In *Dew* and *Klein*, the courts found evidence in support of the testator's delusion but nonetheless concluded that the delusion was insane. In *Firestine*, the court had no evidence to support the testator's delusion, but still held that the delusion was not insane.¹⁷⁰

When a fact-finder relies on his biases to make determinations, the risk is not just the inconsistent results shown above. By relying on his own biases, the fact-finder substitutes his judgment for that of the testator. The fact-finder, in effect, rewrites the testator's will. For example, it may seem a bit capricious for the testator to disinherit her daughter based on a single anti-German remark made by her son-in-law. However, American law is quite clear that the decision is the testator's.¹⁷¹ The tautological definition of monomania leaves fact-finders with no guidance except their own biases. This leads to arbitrary results that fail to respect testamentary freedom.

B. Requirement Two: The Will Must Be a Product of the Insane Delusion

Once a contestant has shown that the testator is suffering from an insane delusion, the contestant also must show that the will is a product of that insane delusion.¹⁷² Because monomania is partial insanity, it is important to determine if the will is connected with the insanity. For

¹⁶⁷ See *id.* at 296.

¹⁶⁸ See *id.* at 297:

It does not appear that the testator made any explanation to the witness of his claimed basis for such belief [that his daughter was immoral] except the oft-repeated statement that "he knew." What it was that "he knew" or thought he "knew," upon what, if anything, his statement was based, nowhere appears in the record.

¹⁶⁹ See *id.*

¹⁷⁰ In *Dew*, the bias is in favor of the sympathetic and mistreated daughter. See *Dew v. Clark (Dew II)*, (1824) 162 Eng. Rep. 233, 239 (L.R.A. & E.). In *Klein*, decided shortly after World War II, the court dismissed as trivial the offense caused to a German woman by an anti-German statement. See *Klein*, 183 P.2d at 523. In *Firestine*, the bias runs against the contestant—an illegitimate daughter. See *Firestine*, 218 N.W. at 297.

¹⁷¹ See *supra* note 31 and accompanying text.

¹⁷² See *Kelley v. Reed*, 580 S.W.2d 682, 682–83 (Ark. 1979); *Pyle v. Millar (In re Millar's Estate)*, 207 P.2d 483, 487 (Kan. 1949).

example, suppose that the testator is suffering from an insane delusion that the moon is made of green cheese.¹⁷³ It is unlikely that this insane delusion would invalidate the testator's will because the delusion likely has nothing to do with the testator's estate plan.

Unfortunately, determining when a will is a product of an insane delusion requires the fact-finder to make difficult (if not impossible) factual determinations. To prove the will is a product of the insane delusion, the contestant must show that the insane delusion caused the testator to dispose of his property in a way that he would not have otherwise done.¹⁷⁴ Thus, the fact-finder must determine what the (now deceased) testator would have done if he were not suffering from an insane delusion. As a practical matter, it is nearly impossible for a fact-finder to make that determination.

Moreover, it is difficult to determine what the testator *would* have done without considering what the testator *should* have done. Indeed, it is unclear how a fact-finder could make this determination without considering what he would have done in the testator's situation—in other words, what the fact-finder believes the testator *should* have done. However, when the fact-finder considers what the testator *should* have done, he is substituting his judgment for that of the testator.¹⁷⁵ Once again, the law of monomania conflicts with respect for testamentary freedom.

This conflict is easily demonstrated in a common monomania situation. As mentioned, many monomania cases involve a testator's paranoid delusion that his spouse or children are trying to hurt him or take his property.¹⁷⁶ Even if the presence of an insane delusion is proved, causation is difficult to prove in these cases. Why did the testator disinherit his child or spouse? Was it because of the insane paranoid delusion, or was there some other non-insane reason? These determinations are difficult for many reasons. The testator is unavailable. In addition, the testator did not need a reason to make the disposition he did.¹⁷⁷ A testator who acts capriciously or arbitrarily still has capacity.¹⁷⁸

¹⁷³ See *Hartung v. Holmes (In re Chevallier's Estate)*, 113 P. 130, 133 (Cal. 1911). *But see supra* note 15.

¹⁷⁴ See *supra* note 15; see also *Steiner v. Dickmeyer (In re Estate of Koch)*, 259 N.W.2d 655, 662 (N.D. 1977).

¹⁷⁵ See *Brumbelow v. Hopkins*, 29 S.E.2d 42, 48 (Ga. 1944); *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998).

¹⁷⁶ See *supra* notes 17–20 and accompanying text.

¹⁷⁷ See *McGovern v. McGovern*, 65 N.E.2d 583, 583 (Ill. App. Ct. 1946); *Quathammer v. Schoon*, 19 N.E.2d 750, 751–52 (Ill. 1939); *In re Morgan's Estate*, 219 Pa. 355, 357–58

The will is invalid only if the insane delusion caused the testator to make the disposition he did.

*Taylor v. McClintock*¹⁷⁹ is a typical case. In *Taylor*, the testator was found to have suffered from an insane delusion that his daughter did not love him.¹⁸⁰ However, the record also showed that the testator strongly disapproved of his daughter's marriage.¹⁸¹ Indeed, the testator doted on his daughter prior to her marriage.¹⁸² Assuming that the testator's belief that his daughter did not love him was an insane delusion,¹⁸³ the court had to decide if the will was a product of that delusion. If the testator disinherited his daughter because of the insane delusion, then the will is invalid for want of testamentary capacity. In contrast, if the testator disinherited his daughter because he was upset that she married against his wishes, the will would be valid even if his anger with his daughter was unreasonable, capricious, or "stupid."¹⁸⁴ This is an impossible factual determination to make after the testator's death.

(1908).

¹⁷⁸ See *Taylor v. McClintock*, 112 S.W. 405, 412 (Ark. 1908); *Karris v. Frustaglio (In re Estate of Sarras)*, 384 N.W.2d 119, 121 (Mich. Ct. App. 1986).

¹⁷⁹ 112 S.W. 405.

¹⁸⁰ See *id.* at 411. The *Taylor* court noted that an insane delusion cannot be predicated on an abstract concept because abstract concepts cannot be proved false. See *id.* at 413. Thus, it would be impossible to show that the purported delusion had no basis in fact. The court ruled, however, that filial love is not an abstract concept. See *id.* Instead, the court noted that the presence of filial love is a concrete concept that is capable of being proved false. In contrast, the court noted that the amount of filial love is an abstract concept. See *id.* at 413–14. Thus, under the *Taylor* court's reasoning, the testator could (and did) have an insane delusion regarding whether his daughter loved him, but not regarding whether his daughter loved him enough. Similarly, in *In re Estate of Sarras*, a Michigan court faced a case in which a testator had disinherited his heirs because he felt that his heirs did not pay a sufficient amount of attention to him. See *Sarras*, 384 N.W.2d at 120. The court noted that this was a subjective determination that was completely up to the testator's discretion. See *id.* at 122–23. Thus, the testator's determinations probably were not the result of an insane delusion.

¹⁸¹ See *Taylor*, 112 S.W. at 416–17.

¹⁸² *Id.* at 405.

¹⁸³ Arguably, the court's conclusion was erroneous. Based on the facts of the case, the testator's conclusion that his daughter did not love him likely was based on her marrying against his wishes. See *id.* at 416. Thus, the testator's belief was (at worst) a mistaken conclusion based on facts as they actually existed. Such a mistaken conclusion is not an insane delusion. See *id.* at 414; see also *Dibble v. Currier*, 83 S.E. 949, 950 (Ga. 1914); *Pyle v. Millar (In re Millar's Estate)*, 207 P.2d 483, 489 (Kan. 1949). Of course, the court did not decide that the testator's belief was an insane delusion; rather, it referred the issue to the jury. See *Taylor*, 112 S.W. at 420.

¹⁸⁴ *Id.* at 411–12.

