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Testamentary Capacity--Standard for Mental Capacity

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writer submits that when an automobile is being driven in an ordin-
arily negligent manner, the dangerous potentialities to life and limb
show that the operator is manifesting a disregard for consequences.
And a disregard for consequences fits into our definition of the term
"reckless".

With any other dangerous instrumentality we would make the
same analogy. Be it poison, a gun, knife, or whatever else dangerous,
the very possibility of dire and harmful results would make even
ordinary negligence a manifestation that the actor is heedless of his
duty to refrain from harming others, or to endanger his or their lives.
This, too, fits perfectly into the category of recklessness.

And we have shown, in cases cited above, that many of the courts
have used the word "reckless" to define criminal negligence in man-
slaughter cases. All the other courts in cases cited above and those
which the writer has read have used words which are synonymous
with Webster's definition.

All of which has led us to the conclusion that the standard of care
for criminal negligence in manslaughter cases should be recklessness.
And we suggest as a statute to incorporate this idea, covering, we
believe, all situations, the following: "One shall be held criminally
liable for manslaughter who unintentionally causes the death of another
by negligent conduct which evidences that under all the circumstances,
the actor was reckless in causing the injury."

ALAN ROTH VOGELER

TESTAMENTARY CAPACITY—STANDARD FOR MENTAL
CAPACITY

Some qualifications as to mental capacity for making a will have
been required by courts from the earliest times. In the first Wills Act
of Henry VIII (1540) were used the words "all and every persons"
without any restrictions as to mental capacity, but the Statute of 34
and 35 Henry VIII two years later, provided that a will or testament
of lands, tenements, or hereditaments by an idiot or any person de non
sane memoria should not be taken as valid in law. The amendment
followed the original act so closely and has since been copied so gen-
erally that no courts have been called upon to decide the question but
it is quite likely that this exception would have been implied in the
language of the original act.

Under the ecclesiastical law neither a lunatic nor an idiot could
make a testament. In modern legislation it is generally required that

Schultze v. State, 89 Neb. 34, 130 N. W. 972 (1911); Texas: Harr v.
State, 265 S. W. 1055 (1924). But see also Illinois: People v. Adams,
289 Ill. 339, 124 N. E. 575 (1919); Michigan: People v. Barnes, 182
Mich. 179, 148 N. W. 400 (1914); Wyoming: State v. McComb, 33
Wyo. 346, 239 Pac. 526 (1925).

3 32 Henry VIII, c. 1.
4 34 & 35 Henry VIII, c. 5, sec. 14.
5 I Page on Wills, sec. 136.
6 Swinburn-on Testaments, P. II, secs. 3, 4.
the testator must have a sound mind,* or sound mind and memory, or sound and disposing mind and memory. These terms are very general and set up no standards by which one's mental capacity can be judged. The question of testamentary capacity under statute is not a question whether testator is sane or insane, but whether or not he is mentally competent.* The problem that confronts the courts is to determine when one possesses a "sound" mind or what constitutes a "sound and disposing" mind, or what degree of soundness is required. The terms, "sound" and "unsound" are purely relative. To determine the standard or measure by which the testator's mind is gauged one must look to the decisions of the courts and not to the statutes themselves.

**Tests for Determining Testamentary Capacity**

*Perfect Sanity.* The least used and least satisfactory of any test ever proposed for determining capacity to make a will is the one which requires the testator to be perfectly sane. If this test is adopted it is obvious that there is no need to determine the degree of insanity that obtains, or whether it had any effect upon the provisions of the will. But while this test sounds simple it is far from being simple in practice. It is doubtful if any such thing as perfect sanity exists. It would seem that all persons classed as being perfectly sane would necessarily possess exactly the same mental capacity. No such class exists. Mental capacity graduates upward from the helpless idiot to the towering genius, and it would be difficult if not impossible to designate any level of mental capacity as perfect sanity. While the early English courts held that testator need not be perfectly sane to make a will, there was a period when these courts seemed to accept the theory that perfect sanity was required.* The present view of the English courts, however, is in accord with their earlier opinion, that perfect sanity is not a requisite for testamentary capacity. The American courts have never held that a testator must possess perfect sanity.*

*Criminal Responsibility.* In a few instances it has been suggested by courts that criminal responsibility should be used as a measure for testamentary capacity. In a Pennsylvania case in 1850 it was said that a will may be set aside for a less degree of insanity in the testator than is necessary to be proved in order to acquit him of a crime or misdemeanor.*

However the great weight of authority holds that from the nature of the two no logical comparison between them is possible. Testa-

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* In re Cissell's Estate. — Mont. —, 66 P. (2d) 779 (1937).
* Dew v. Clark, 5 Russ. 163 (1828).
* Waring v. Waring, 6 Moore P. C. 341 (1848); Smith v. Tebbitt, L. R. 1 F. & D. 398 (1867).
* I Page on Wills, sec. 137.
mentary capacity requires the ability to know and understand one's property, those who have claims upon his bounty, etc., while criminal capacity requires the ability to distinguish between right and wrong. One may have criminal capacity and lack testamentary capacity or vice versa. Laboring under an insane delusion he may commit a crime for which he could not be held responsible, and yet he may have sufficient capacity to dispose of his property by will or testament. On the other hand he may lack capacity to know and understand his property and his relation to those having claims upon his bounty and yet be perfectly capable of distinguishing right from wrong under most circumstances.

Contractual or Business Capacity. Of greater importance than the comparison of criminal capacity with testamentary capacity is the question whether business or contractual capacity can be used in determining or measuring the capacity necessary for making a valid will. As in the case of criminal capacity, courts have varied widely on this matter. It was held in an Illinois case that "ability to transact ordinary business is a more stringent test of testamentary capacity than the law requires". And it has been said that a less degree of mental capacity is required for a will than for the execution of a contract, or the transaction of ordinary business, or to make a deed, or to transact business generally. Some opinions can be found to the effect that it requires a higher degree of mental capacity to execute a valid testament than to transact business. In Coleman v. Robertson's Exrs., an Alabama court held that the capacity to make a valid will or contract was precisely the same. This view has been held by the courts of other jurisdictions.

From this great divergence in the judicial opinions on the subject we are led to the view that testamentary capacity and contractual or business capacity cannot logically be compared: that they are so different in their nature that one cannot be used as a test for the other. By the great weight of authority this view obtains. It is quite possible that one may be able to make a simple disposition of his property by will and yet not be able to transact complicated, important, or even ordinary business and on the other hand one may be able to transact ordinary business and yet from an insane delusion or due to the complexity of his estate and relations to the objects of his bounty, not be

22 Converse v. Converse, 21 Vt. 163 (1849).
23 In re Weedman's Estate, 254 Ill. 504, 98 N. E. 956 (1912).
24 In re Winslow's Will, 122 N. W. 971 (Iowa, 1909).
26 Boughton v. Knight, L. R. 3 P. & D. 64 (1873).
27 Coleman v. Robertson's Exrs., 17 Ala. 84 (1849).
28 Berry, et al. v. Safe Deposit, Etc., 96 Md. 45, 63 Atl. 720 (1903); Lyon v. Townsend, 124 Md. 163, 91 Atl. 704 (1914).
29 Barnhill v. Miller, 114 Kan. 73, 217 Pac. 274 (1923).
31 McLean v. Barnes, 285 Ill. 203, 120 N. E. 628 (1918).
able to make a valid will. But generally it is held that in the absence of insane delusion, one who has capacity to contract, or transact ordinary business has capacity to make a will.\(^\text{2a}\) In refusing a charge that a less degree of mind is required to execute a will than a contract, a Montana court stated the view which prevails in the majority of the jurisdictions, viz.: "We think that in such matters comparisons are odious, and for the purposes of instructing the jury wholly unnecessary —neither is a test for the other and the presence or absence of one does not conclusively establish the presence or absence of the other".\(^\text{2b}\) But it has been held that where testamentary capacity was otherwise correctly defined and the court added that it required less mental capacity to execute a will than a contract it was not sufficiently prejudicial to be reversible error.\(^\text{2c}\)

But while the great weight of authority is against any comparison of business capacity and testamentary capacity, the decisions are not unanimous. One Missouri case held that to have testamentary capacity one need not be able to transact complicated business,\(^\text{2d}\) but there are later opinions from this jurisdiction which hold that the ability to understand the ordinary affairs of life\(^\text{2e}\) is the proper standard for the capacity to make a will. In several opinions Indiana courts seem to have adopted this same view.\(^\text{2f}\) In Maryland a statute definition of testamentary capacity adds, "and capable of making a valid deed or contract" to the usual "sound and disposing mind and memory" requirement.\(^\text{2g}\) In such case, of course, the statutory definition must prevail over the standard set up by the courts.

**Standard for Testamentary Capacity.** While it is not possible to have any specific and exact degree of intellectual ability required to execute a will and while courts yet vary widely in their setting out of the testamentary standard, by the great weight of authority there is an accepted standard which places upon the testator four requisites as to mental capacity. He must have sufficient mind and memory (1) to know the nature of the act about to be performed; (2) to know the nature and extent of the property of which he is about to dispose; (3) to know the names, number, etc., of those persons who are the objects of his bounty; (4) to know the relation he bears to those who are the objects of his bounty. Some courts set this standard out in an extended and elaborate manner while others lay it down in fewer and simpler terms. It is said that testator has testamentary capacity if he is able to retain in memory, without prompting, extent and condition of property to be disposed of,\(^\text{2h}\) has sufficient mental capacity to under-

\(^{2a}\) I Page on Wills, sec. 140.

\(^{2b}\) Murphy v. Nett, 47 Mont. 38, 130 Pac. 451 (1913).

\(^{2c}\) Goble v. Rauch, 50 S. C. 95, 27 S. E. 555 (1897).

\(^{2d}\) Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499 (1893).

\(^{2e}\) Rose v. Rose, 249 S. W. 605 (Mo., 1923); Rex v. Masonic Home of Mo., — Mo. —, 108 S. W. (2d) 897 (1937).

\(^{2f}\) See Bower v. Bower, 142 Ind. 194, 41 N. E. 523 (1895).

\(^{2g}\) Connelly v. Beall, 77 Md. 116, 26 Atl. 408 (1892).

\(^{2h}\) Puryear v. Puryear, 94 S. W. (2d) 695 (Ark. 1936).
stand the nature of the act,9 has sufficient mind and memory to under-
stand the nature of the instrument he is executing,10 or the business
in which he is engaged,10 and to recollect the property he means to
dispose of,10 recall property,10 to comprehend generally the nature and
extent of his property,10 to know the value and extent of his property,10 
to understand what property he has,10 and to recall the objects of his
bounty,10 to comprehend to whom he is giving his property,10 to remem-
ber and understand relations to persons who have claims upon his
bounty, and interests affected by provisions of the will,10 to compro-
hend to whom he is giving his property and to realize the deserts and
relations to him of those whom he excludes from his will.10

In these and many other terms do courts lay down the standard
for testamentary capacity. While they differ in the language, expres-
sions used, and in some technicalities, the fundamental requisites given
above are generally present. It is to be noted that in the definition set
out by the court often one or more of these four requisites is omitted.
This is not an indication that the requisite or requisites are not
recognized by the court but more likely the definition was formu-
lated in respect to the particular case in hand which did not necessitate
a decision on these points. More often, perhaps, it is the first of the
requisites (to understand the nature of the act he is about to perform)
and the fourth (to know his relations to the objects of his bounty)
that are omitted. This might be due to the fact that these can, to an
extent, be supplied by inferences from the other two. If one has suf-
ficient mental capacity to understand the nature, extent, and condition
of his property, and to know and understand who has claims upon his
bounty it is likely that he would know when he was making a will and
why the objects of his bounty had claims upon him, although this does
not necessarily follow.

Courts differ much on the amount of stress or emphasis they put
on the different requisites in the standard for testamentary capacity.
That a testator must know the nature of the act to be performed does
not require him to know all the technical legal terms embodied in the
will by his counsel. It is sufficient if he understands the legal effect
and intent of the instrument as a whole, and whether it is drawn to
express his intent.10 In a good many instances the simple charge, "to

9 In re Finkler's Estate, 3 Calif. (2d) 584, 46 P. (2d) 149 (1935).
10 Walters v. Heaton, — Iowa —, 271 N. W. 310 (1937).
12 Walters v. Heaton, — Iowa —, 271 N. W. 310 (1937).
13 In re Finkler's Estate, 3 Calif. (2d) 584, 46 P. (2d) 149 (1935).
15 Owen v. Crumbaugh, 228 Ill. 389, 81 N. E. 1084 (1907).
16 In re Cissell's Estate, — Mont. — , 66 P. (2d) 779 (1937).
17 In re Larson's Estate, — Wash. —, 71 P. (2d) 47 (1937).
18 Walters v. Heaton, — Iowa —, 271 N. W. 310 (1937).
19 In re Peterkin's Estate, — Calif. —, 73 P. (2d) 897 (1937).
21 Page on Wills, sec. 141.
know and understand the business in which he is engaged—that it is in making a will", is approved. While some courts require testator to remember property or beneficiaries only in a general way, or reasonable manner, others would seem to require testator to remember details as to his property or beneficiaries, or to comprehend perfectly conditions of his property, his relation to objects of his bounty, and scope of his will, that he must be capable of comprehending all the conditions which affect the act in which he is engaged. It is said that testator must have sufficiently active memory to collect in his mind, without prompting, elements of business to be transacted, and hold them in his mind long enough, at least, to perceive their obvious relations to each other and be able to form some rational judgment in relation to them. Nothwithstanding this variation among the courts in emphasizing the different requisites for testamentary capacity and the tendency of some to raise the standard above the general rule, it is to be noted that by far the greater number of courts in recent cases have tended to use the simpler statement of the standard for capacity to make a valid will or testament. It might be repeated here that no exact measure can be set, that it is a matter of degree which is to be determined in the particular case at hand from the circumstances of the case. "In whatever form the standard is stated, greater capacity is not necessary; less is sufficient; and in each case it is a question of fact, or of mixed law and fact, whether the testator possesses the requisite capacity."

Palmes L. Hall.

CRIMINAL NEGLIGENCE— IS IT SUBJECTIVE OR OBJECTIVE IN HOMICIDE CASES?

In a recent New York case, the proximate cause of the death of a pedestrian was defective brakes on a truck; the owner of the truck was held guilty of manslaughter though he was not an occupant of the truck at the time of the accident. This is another example of the increasing inclination of the courts to place emphasis upon societal harm rather than upon the evil intent and blameworthy mental attri-

4 In re Combs, 118 N. J. Eq. 119, 177 Atl. 849 (1935).
4 Ramseyer v. Dennis, 187 Ind. 420, 119 N. E. 716 (1918).
4 Appeal of Martin, 133 Me. 422, 179 Atl. 655 (1935).
4 I Page on Wills, Sec. 141.