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The Future of Testamentary Capacity

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The Future of Testamentary Capacity

Reid Kress Weisbord* & David Horton**

Abstract

Recently, the #FreeBritney saga cast a harsh spotlight on state guardianship systems. Yet despite their serious flaws, guardianship regimes have benefited from waves of reform. Indeed, since the 1970s, most jurisdictions have taken steps to protect the autonomy of people with cognitive, intellectual, or developmental disabilities (CIDD). Likewise, lawmakers are currently experimenting with supported decision-making (SDM): an alternative to guardianship designed to help individuals with CIDD make their own choices. These changes are no panacea, but they have modernized a field that once summarily denied "idiots" and "lunatics" power over their affairs.

However, in a related context, the legal system's treatment of individuals with CIDD remains rooted in the past. Since the sixteenth century, judges have voided wills executed by owners who lack testamentary capacity. This Article reveals that this notoriously problematic rule has resisted the progressive forces that have swept through guardianship law. The Article then offers fresh insight into how parties litigate testamentary capacity claims by reporting the results of a study of 3,449 estates from California. Finally, the Article analyzes several unsettled doctrinal issues, such as whether testators have due process rights to participate in adjudications of their own competence, the relationship between SDM and will-making, and the appropriate capacity test for nonprobate transfers.

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INTRODUCTION

Recently, Britney Spears became an unlikely spokesperson for an important cause. Spears was placed under a guardianship in 2008,[1] meaning that a third party—in her case, her father, James P. Spears—controlled her personal and financial choices.[2] Yet during a hearing on June 23, 2021, Britney delivered a passionate twenty-three-minute plea for a court to

1. California, where Britney lives, generally uses the term "conservatorship" for judicially supervised management of property for adults and married minor children and the term "guardianship" for such arrangements imposed upon minor children. *See* CAL. PROB. CODE §§ 1510, 1800.3(a) (West 2021). We will use the word "guardianship" as a general term to describe all arrangements in which a third party acquires the right to manage a person's property, but we will focus on the judicially supervised management of property belonging to adults.

2. *See* Joe Coscarelli, *Britney Spears: 'I Just Want My Life Back'*, N.Y. TIMES (June 23, 2021), https://perma.cc/HR5M-WWWV (last updated Sept. 22, 2021).

terminate this arrangement.[3] She described how she lost the freedom to make decisions ranging from the mundane (such as when to see her friends) to the intimate (like whether to remove her birth control device and attempt to conceive).[4] In addition, she highlighted the perverse fact that she earns millions of dollars every year and cannot spend a single penny.[5] "I just want my life back," she implored.[6]

Britney's speech rekindled debate over the American legal system's treatment of people with cognitive, intellectual, or developmental disabilities (CIDD).[7] Once, policymakers and judges dealt with individuals with CIDD as if they "suffered from a hereditary, incurable disease that led to criminality, immorality or depraved behavior, and pauperism."[8] The U.S. Supreme Court articulated this callous perspective in 1872 by declaring that "a person *non compos mentis*[] has nothing which the law recognizes as a mind."[9] Likewise, guardianship hearings made a mockery of due process[10] and tasked the trier of fact with

3. *See id.*

4. Julia Jacobs & Sarah Bahr, *The Britney Spears Transcript, Annotated: 'Hear What I Have to Say'*, N.Y. TIMES (June 24, 2021), https://perma.cc/CJ39-TAKS.

5. Madeline Berg, *How Much Has Britney Spears' Dad Earned Controlling Her Life?*, FORBES (June 24, 2021, 10:28 AM), https://perma.cc/C3BF-6PKT.

6. Coscarelli, *supra* note 2.

7. *See, e.g.*, Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 247 (2021); Anna-Drake Stephens, Student Article, *"Don't You Know That You're Toxic?" A Look at Conservatorships Through the #FreeBritney Movement*, 45 LAW & PSYCH. REV. 223, 223–24 (2021); Bianca Betancourt, *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney*, HARPER'S BAZAAR (Nov. 12, 2021, 5:39 PM), https://perma.cc/2AK9-9KNA; Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER (July 3, 2021), https://perma.cc/H295-R7NK.

8. Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 104 (2012).

9. Dexter v. Hall, 82 U.S. 9, 20 (1872).

10. *See, e.g.*, Dale v. Hahn, 440 F.2d 633, 635 (2d Cir. 1971) (featuring a plaintiff who alleged that "she did not receive personal notice of [a guardianship] petition, and also that she was not given an opportunity to retain counsel, to appear and be heard in opposition to the petition, and to have a jury trial").

deciding whether a respondent was an "idiot" or a "lunatic."[11] Finally, after a guardian was appointed, she engaged in surrogate decision-making, paternalistically choosing either what was in the person under guardianship's best interests or what the person under guardianship would have done.[12]

Since then, however, most jurisdictions have updated their guardianship regimes. The catalyst for these changes was the recognition that guardianships impose "lifelong constraints which result in substantial and often unnecessary forfeiture of rights."[13] For instance, lawmakers have taken steps to ensure that respondents can participate in guardianship proceedings[14] and revamped the black-letter test for incapacity.[15] Moreover, since 2015, eleven states have passed supported decision-making (SDM) laws.[16] SDM statutes replace the norm of surrogate decision-making with a cooperative model that "empower[s] persons with disabilities by providing them with help in making their own decisions, rather than simply providing someone to make decisions for them."[17] Of course, as Britney's story illustrates, guardianship law remains deeply flawed.[18] But at least on paper, the field has "undergone

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11. Cooper v. Summers, 33 Tenn. (1 Sneed) 453, 456 (1853).

12. *See, e.g.*, Rasmussen *ex rel.* Mitchell v. Fleming, 741 P.2d 674, 688 (Ariz. 1987) (describing these standards).

13. *In re* Guardianship of Hedin, 528 N.W.2d 567, 573 (Iowa 1995) (internal quotation omitted).

14. *See, e.g.*, *In re* Guardianship of Carpenter, 66 N.E.3d 272, 277 (Ohio Ct. App. 2016) ("[A] [person subject to guardianship] has the right to independent counsel of his or her choice to challenge a guardianship . . . .").

15. *See, e.g.*, *In re* Combs, 474 N.Y.S.2d 196, 197 (Surr. Ct. 1984) (explaining that guardianship statutes once applied to "idiot[s]" and "lunatic[s]" but now govern individuals who "from any cause whether by age, disease, affliction or intemperance [have] . . . become incapable of managing [their] own affairs" (quoting *In re* Perrine, 5 A. 579, 581 (N.J. Ch. 1886))).

16. *See infra* notes 98–99 and accompanying text.

17. Nina A. Kohn et al.*, Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN ST. L. REV. 1111, 1113 (2013).

18. *See, e.g.*, Rachel Mattingly Phillips, Note, *Model Language for Supported Decision-Making Statutes*, 98 WASH. U. L. REV. 615, 623 (2020) ("[R]eforms have also failed to end abuse, as [a] steady drumbeat of press reports from around the country has confirmed that these deficiencies persist." (internal quotation omitted)); Amanda Morris, *Britney Spears's Case Calls Attention to Wider Questions on Guardianship*, N.Y. TIMES (July 10, 2021), https://perma.cc/94S9-BCXS ("[A]dvocates for people with disabilities say guardianships have been used too broadly, including in cases of individuals

significant procedural and substantive revisions in an effort to more aptly protect an individual's rights, autonomy and self-determination."[19]

This Article explores a related issue that has received less attention. Under the ancient doctrine of testamentary capacity, courts strike down wills executed by testators who lack a "sound mind."[20] Capacity contests and guardianship proceedings are two sides of the same coin: both seek to determine whether "a state legitimately may intrude into an individual's affairs and take action to limit an individual's rights to make decisions about his or her own . . . property."[21] Yet the law of testamentary capacity has not kept pace with guardianship reforms.[22] For example, states have given respondents in guardianship proceedings robust due process protections, including the right to appear at the hearing.[23] Conversely, under the "worst evidence" tradition, judges must adjudicate a testator's capacity after she passes away.[24] Likewise, under

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with psychiatric disorders and developmental or intellectual disabilities who, the advocates say, do not require such intense or continuous oversight.").

19. Brief of Texas Advocates et al. as Amici Curiae Supporting Petitioner at 9, *In re* Tonner, 513 S.W.3d 496 (Tex. 2016) (No. 14-0940), 2015 WL 374580, at *9 (Tex. Jan. 26, 2015).

20. *See* Statute of Wills (1572 amendments), 34 and 35 Henry VIII, ch. 5, § 14 (voiding wills made by "idiot[s]" or "any person de non sane memory"). In addition, courts invalidate bequests that are the product of an "insane delusion": a persistent false belief. *See* Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 68 (2007). However, this Article only deals with the discrete issue of general testamentary capacity.

21. Charles P. Sabatino & Erica Wood, *The Conceptualization of Capacity of Older Persons in Western Law*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 35, 36 (2012).

22. *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 93 (2006) (observing that "[t]estamentary capacity law [has] stagnated for the entirety of the twentieth century").

23. Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 505 (2016) (noting that lawmakers and courts have "imported due process into guardianship proceedings and mandated that an individual's rights could not be taken away without a hearing").

24. *See* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344 (2013).

guardianship law's "least restrictive alternative" principle, courts try to preserve the freedom of a person under a guardianship to the greatest extent possible.[25] But in most jurisdictions, this norm does not extend to will-making. Indeed, under the nondelegation doctrine, guardians and agents acting under powers of attorney cannot make a proxy will for a testator.[26] Thus, wills law has resisted the progressive spirit that has swept through the field of guardianships.

To make these points concrete, the Article uses a hand-collected dataset of 3,449 probate administrations from two counties in California. It finds that an average of nearly four years passed between the execution of the will—the crucial date for assessing the testator's capacity[27]—and the filing of litigation. As a result, postponing trials until after the testator's death forces factfinders to rely on fading witness memories and exhibits that have been gathering dust. Moreover, despite this evidentiary haze, contestants fared well on the merits. Taking advantage of a California statute that requires probate courts to approve most settlement agreements, we find that litigants in capacity cases received a mean of 58 percent of the value of their claims.[28] Thus, testamentary capacity has the potential to reorder an estate plan.

The Article then examines open questions about testamentary capacity. For starters, it considers whether some of the constitutional principles that inspired guardianship reforms also require states to reconsider the worst evidence approach. Specifically, the Article explains that there is a

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25. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 301(b) (UNIF. L. COMM'N 2017) ("The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent."); Jamie L. Leary, Note, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves Against the Need to Guard Individual Autonomy*, 5 VA. J. SOC. POL'Y & L. 245, 263–65 (1997) (describing the origins of the principle).

26. *See* Ralph C. Brashier, *The Ghostwritten Will*, 93 B.U. L. REV. 1803, 1811 (2013) [hereinafter Brashier, *Ghostwritten*] ("No one can make, amend, or revoke the will of another person, and this is so even when that person becomes incapacitated and unable to act for herself.").

27. *See* Atchison v. Lewis, 38 A.2d 673, 673 (Conn. 1944) (applying the "test of testamentary capacity . . . at the very time he execute[d]" the will).

28. *See infra* notes 207–211 and accompanying text.

glimmer of an argument that the Due Process Clause entitles testators to litigate capacity claims during their lives. In addition, the Article analyzes what the SDM movement means for will-making. It concludes that the nondelegation doctrine should not bar supporters from assisting testators with drafting and signing wills. It also evaluates arguments both for and against treating the SDM process to be "capacity-boosting"—a method for testators who normally would lack capacity to execute valid wills. Finally, the Article suggests doctrinal changes that would modernize the black-letter testamentary capacity rule.

Three additional points deserve mention at the outset. First, testamentary capacity is worth revisiting because America is undergoing a massive demographic shift. Currently, about 50 million people are age 65 or older.[29] By 2060, that number will rise to roughly 95 million,[30] and members of that cohort will enjoy average life expectancies of an additional 19.5 years.[31] Because a third of seniors will suffer from Alzheimer's or dementia,[32] "the likelihood is increasing that, at some point, an attorney will be called upon to help a client or a client's family deal with the challenges posed by incapacity."[33]

Second, although we compare guardianship hearings and capacity contests, we acknowledge that they are not identical. For one, the stakes diverge. A guardianship can deprive a person of liberty interests, including the power to "choose where they live, how they spend their money, with whom they spend their time, and with whom they have relationships."[34] By contrast, a successful capacity claim merely voids a will. Likewise, courts assess the capacity of the living and the dead differently. Judges "require substantial proof of general incapacity before a

29. ADMIN. FOR CMTY. LIVING, 2018 PROFILE OF OLDER AMERICANS 1 (2018), https://perma.cc/J2YM-JP5L (PDF).

30. *Id.*

31. *Id.*

32. *See Facts and Figures*, ALZHEIMER'S ASS'N, https://perma.cc/H84L-73L7.

33. KATHLEEN A. KADYSZEWSKI, PLANNING FOR INCAPACITY AND DISABILITY, BASIC ESTATE PLANNING IN FLORIDA § 3.1 (10th ed. 2020).

34. Diller, *supra* note 23, at 501–02 (internal citations omitted).

guardianship is granted."[35] Conversely, the degree of acuity needed to create a valid will "is exceptionally low."[36] In fact, one "need not have sufficient mental capacity to enter into complex contracts or engage in intricate business in order to have sufficient capacity to make a will."[37] Lastly, the state's interest in imposing a guardianship is crystal clear: such an arrangement prevents people with CIDD from making unwise choices that jeopardize their own welfare.[38] But "few courts or scholars have ever explained why a testator's mental competency is an appropriate prerequisite to a validly executed will."[39] Indeed, "common sense tells us a living person will not

35. James Toomey, *How to End Our Stories: A Study of the Perspectives of Seniors on Dementia and Decision-Making*, 29 ELDER L.J. 1, 22 (2021). Admittedly, courts do not always obey this command in practice. *See id.* ("[T]he paternalistic view that guardianship principally benefits the ward, 'has made a judicial determination of incapacity relatively easy to obtain, particularly where the proposed ward has been an old person.'" (quoting 18 AM. JUR. 3d PROOF OF FACTS 185 § 5 (2020))).

36. *In re* Marriage of Greenway, 158 Cal. Rptr. 3d 364, 374 (Ct. App. 2013). Indeed, "[m]erely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable [of making a will]." Bye v. Mattingly, 975 S.W.2d 451, 456 (Ky. 1998); *cf.* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. d (AM. L. INST. 2003) ("Because an irrevocable gift depletes financial resources that the donor may yet need, the standard for mental capacity to make an irrevocable gift is higher than that for making a will.").

37. *In re* Chongas' Est., 202 P.2d 711, 713 (Utah 1949).

38. *See, e.g.*, *In re* S.P., 788 A.2d 10, 12 (Vt. 2001) ("The purpose of a guardianship, as its name suggests, is to lawfully invest a person with the authority and duty to protect and take care of another person.").

39. Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1109 (1980). This is not to say that commentators have ignored the doctrine's flaws. *See* Champine, *supra* note 22, at 93 (arguing that the doctrine should encourage potentially incapacitated testators to undergo forensic assessments during life); Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 306–07 (1944) (studying fact patterns in incapacity cases and concluding that "in determining the issue of mental incompetency, more frequently than otherwise, courts are passing upon the abnormality of the transaction rather than on the ability of the alleged incompetent to understand the transaction"); Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 165 (1941) [hereinafter Green, *Judicial Tests*] (contending that "[t]he standard by which mental incompetency is determined by the courts is a purely subjective one [that] . . . has no referent in the outside world"); James Toomey, *Narrative Capacity*, 100 N.C. L. REV. (forthcoming 2022) (manuscript at 43–52), https://perma.cc/AUN8-R87M (offering a thoughtful proposal that courts

be harmed by his or her own testamentary documents."[40] We will try to be sensitive to these distinctions.

Third, we should clarify our vocabulary. We intend "CIDD" to be a catchall category that includes any reason that a court might question a person's ability to make legally binding decisions, including diseases such as dementia, psycho-social conditions like schizophrenia, and acquired disabilities stemming from trauma. In addition, we will refer to "respondents" and "persons under a guardianship" rather than using the archaic phrases "protected persons" or "wards."[41] Finally, following the convention of many courts, we will use the words "competency" and "capacity" interchangeably even though these two concepts are not the same.[42] Competency is a legal determination made by a judge about whether to permit a person to make a particular decision or hold her accountable for her actions.[43] Competency is binary: it either exists or it does not.[44] Capacity, by contrast, is a medical decision "and is best understood as existing on a continuum—capacity can range from high to average to low."[45] Despite this distinction, discussions of mental fitness in the law usually employ "capacity" to mean "competency": a judicial decision about "the ability of an individual to make autonomous decisions that are sufficiently valid."[46] We will do the same.

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replace the testamentary capacity rule with a new standard that examines whether a will reflects a coherent narrative based on the testator's life).

40. *Greenway*, 158 Cal. Rptr. 3d at 376; *see* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 302 (2017) (noting that "once they have died, testators' wellbeing no longer merits concern by the state").

41. *See Third National Guardianship Summit: Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012) ("Where possible, the term *person under guardianship* should replace terms such as *incapacitated person*, *ward*, or *disabled person*.").

42. *See* Phillips, *supra* note 18, at 616 (noting that "in reality, the terms are often used interchangeably").

43. *See id.* at 616–17 (defining legal competency).

44. *See* Julie Blaskewicz Boron, *Cognitive Competence and Decision-Making Capacity*, 53 CREIGHTON L. REV. 659, 660 (2020).

45. Phillips, *supra* note 18, at 616.

46. Catherine S. Shaffer et. al., *A Conceptual Framework for Thinking About Physician-Assisted Death for Persons with a Mental Disorder*, 22 PSYCH. PUB. POL'Y & L. 141, 157 n.6 (2016).

The Article contains four Parts. Part I explores the revolution in guardianship law. It reveals that states once routinely violated the rights of people with CIDD but are now trying to repair their broken systems. Part II explores the history of testamentary capacity doctrine. It explains that the rule crystalized more than 200 years ago in a long-lost case in which a sitting U.S. Supreme Court Justice presided over a New Jersey will contest. Since then, however, it has divided courts and fallen out of step with the disability rights movement. Part III offers a ground-level view of testamentary incapacity claims by studying three years of court records from California. Among other things, it discovers that these allegations are typically litigated years after the execution of the will and generate generous settlements. Part IV looks to the future by considering the relationship between due process and the worst evidence tradition, the interplay of SDM and estate planning, and unsettled issues about the formulation and scope of the testamentary capacity standard.

I. CAPACITY DURING LIFE

This Part describes the guardianship system: the process by which courts decide whether a living person lacks the ability to make gifts, sign contracts, manage her finances, and make other important choices. It explains that after decades of neglect, most states have overhauled their guardianship regimes, and several are also now experimenting with the cutting-edge alternative of SDM.

Guardianships emanate from the ancient principle of "parens patriae": the idea that the state sometimes acts to "protect[] . . . those unable to care for themselves."[47] For example, in the 1200s, the British Parliament passed a statute called *De Praerogativa Regis*, which entrusted the Monarch with tending to the less fortunate:

> The King, as the political father and guardian of his kingdom, has the protection of all his subjects, and of their land and goods; and he is bound, in a more peculiar manner, to take care of those who, by reason of their imbecility or

47. Bd. of Comm'rs v. McGuinness, 80 N.E.3d 164, 170 (Ind. 2017) (quoting *Parens Patriae*, BLACK'S LAW DICTIONARY 1287 (10th ed. 2014)).

> want of understanding, are incapable of taking care of themselves.[48]

Juries determined whether a person was an "idiot," who was "born mentally deficient," or a "lunatic," who was "subject to fits of madness, with lucid intervals in between."[49] If someone fell into one of these categories, the court would appoint a committee to handle her property.[50]

In the 1800s, American jurisdictions codified these norms in guardianship laws. These statutes allowed third parties to petition probate courts to appoint someone to manage the assets of "persons who, by reason of their insanity, imbecility, or habitual drunkenness, are mentally incompetent."[51] They were backstopped by civil commitment mechanisms, which placed individuals with severe mental health disorders in specialized hospitals.[52]

At first, the legal system was ambivalent about guardianships. Some lawmakers and courts recognized that guardians "exercised virtually total control over the [person

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48. LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 6 (1833).

49. Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. CHI. L. REV. 361, 361–62 (1951); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *303 ("By the old common law there is a *writ de idiota inquierendo*, to inquire whether a man be an idiot or not . . . which must be tried by a jury of twelve men . . . .").

50. *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 475 (1923) (describing the process by which "the Chancellor appoints the committee for the lunatic, and is under the duty of seeing that the committee duly administers the lunatic's property"). Profits from managing real property owned by "idiots" flowed to the King, "while those from a lunatic's land had to be returned to him when he came 'to right mind.'" John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 570 (1972).

51. Kellogg v. Cochran, 25 P. 677, 678 (Cal. 1890); *see also* Thompson v. Hall, 77 Me. 160, 164 (1885) (involving a letter from a "friend" of a person under a guardianship seeking to name a new guardian after the existing one refused to serve); Margaret K. Krasik, *The Lights of Science and Experience: Historical Perspectives on Legal Attitudes Toward the Role of Medical Expertise in Guardianship of the Elderly*, 33 AM. J. LEGAL HIST. 201, 207 (1989) (describing an 1836 Pennsylvania statute).

52. *See* David L. Braddock & Susan L. Parish, *Social Policy Toward Intellectual Disabilities in the Nineteenth and Twentieth Centuries*, *in* THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES: DIFFERENT BUT EQUAL 83, 84–85 (2003) (describing the rise of asylums in the mid-1800s).

under guardianship's] life."[53] As a result, some early guardianship legislation gave allegedly impaired individuals "a right to a jury, adequate notice as necessary, and the opportunity to examine witnesses and be examined as in any other suit."[54] Likewise, even when a statute did not confer these entitlements, some judges implied them.[55] For example, in *North v. Washtenaw Circuit Judge*,[56] Eliza North was an eighty-four-year-old widow who "had always managed her own business[] and was abundantly capable of doing so."[57] A probate court placed her under a guardianship without giving her notice of the proceeding.[58] The Michigan Supreme Court reversed, remarking that "[i]t is difficult to imagine a more flagrant violation of the law."[59]

Yet there was also a countervailing intellectual current. Some judges thought that disempowering persons with CIDD also benefited them. For instance, in 1853, the New York Court of Appeals opined that a guardianship was in a respondent's best interest because it ensured that her property would not be "wasted [or] destroyed."[60] According to this logic, because guardianship hearings were benevolent attempts to *help*

53. Glen, *supra* note 8, at 105–06.

54. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 53 (1999).

55. *See, e.g.*, Chase v. Hathaway, 14 Mass. 222, 224 (1817) (reasoning that "every citizen shall be maintained in the enjoyment of his liberty and property, unless he has . . . had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them"); Holman v. Holman, 13 A. 576, 576 (Me. 1888) ("[I]t is a well-settled rule of the common law that, when an adjudication is to be made which will seriously affect the rights of a person, he should be notified, and have an opportunity to be heard."); Jones v. Learned, 66 P. 1071, 1072 (Colo. App. 1902) ("This section did not, in terms, require notice to be served upon the lunatic. The authorities, however, are at one that such notice is necessary irrespective of statute.").

56. 26 N.W. 810 (Mich. 1886).

57. *Id.* at 811.

58. *See id.* at 813.

59. *Id.* at 819.

60. Wadsworth v. Sharpsteen, 8 N.Y. 388, 391 (1853) (granting a petition for guardianship).

impaired individuals, robust due process protections were superfluous.[61]

Then, in the early twentieth century, social Darwinism came into vogue, and concern for the autonomy of people under a guardianship evaporated.[62] Despite advances in psychiatry,[63] jurisdictions clung to anachronistic statutes that imposed guardianships on "idiot[s]" and "imbecile[s]."[64] Likewise, in 1901, the Supreme Court significantly weakened respondents' due process rights in *Simon v. Craft*.[65] A friend of Jetta Simon, a forty-nine-year-old widow, filed a petition to place her under a guardianship.[66] Rather than serve Simon with notice, the sheriff arrested her on the advice of a local doctor who said that "it would not be consistent with her health or safety to have her present in court in any matter now pending."[67] In Simon's absence, the jury found her to be a "lunatic," and the guardian eventually sold her home over her objection.[68] The Court held that the guardianship hearing satisfied the requirements of procedural due process because Simon had received notice of the petition and a guardian ad litem had opposed it on her behalf.[69]

By the late twentieth century, the guardianship system had devolved into a kangaroo court. Thirteen percent of respondents never received notice that someone had filed a petition to subject

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61. *See* Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 59–60 (2004).

62. David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* DISABILITY STUDIES AS A FIELD 11, 38 (Gary L. Albrect et al. eds., 2001); *cf.* Buck v. Bell, 274 U.S. 200, 205, 207 (1927) (infamously upholding a Virginia law that permitted the "sterilization of mental defectives" because "[t]hree generations of imbeciles are enough").

63. *See* Krasik, *supra* note 51, at 210–12 (describing the birth of psychiatry in the 1800s).

64. Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L. REV. 485, 490 (1981); Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341, 342–44 (1964) (describing courts' early approaches to bases for guardianship).

65. 182 U.S. 427 (1901).

66. *See id.* at 428.

67. *Id.* at 428–29.

68. *See* Craft v. Simon, 24 So. 380, 383 (Ala. 1898) (affirming the guardianship and the sale of Simon's residence).

69. *Simon*, 182 U.S. at 436–47.

them to a guardianship.[70] Half of these individuals were not represented by counsel.[71] A quarter of cases were decided without a hearing,[72] 93 percent of respondents did not set foot in court,[73] and many proceedings lasted a mere fifteen minutes.[74] Finally, judges sometimes imposed guardianships based on nothing more than a declaration from a doctor who had neither treated the respondent nor was available to be cross-examined.[75] Thus, the process had become dehumanizing and mechanized.

But in the 1970s, the pendulum began to swing in the other direction. Activists succeeded in replacing the "medical" model of disability (which conceptualized disability as "a condition to be treated and cured")[76] with the "social model" (which recast disability as a kind of discrimination).[77] The social model sought

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70. Mark D. Andrews, Note, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L.J. 75, 81 (1997).

71. *Id.*

72. *Id.*

73. *See* George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003, 1010 (1979).

74. *See* PAMELA B. TEASTER ET AL., WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP 16 (2005) (summarizing research finding that "the majority of hearings lasted no more than fifteen minutes and 25% of hearings lasted less than five minutes").

75. *See* Dicker, *supra* note 64, at 492–93 (explaining that in Arkansas, the written statement of a doctor suffices as sole evidence to determine incompetence); Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 680 (1964) ("Psychiatrists rarely testify at guardianship [proceedings]."). For more on the dilution of due process, see Wright, *supra* note 61, at 59 (observing that states "failed to require adequate notice and opportunity for hearing to respondents, failed to apply uniformly the rules of evidence and civil procedure, failed to appoint counsel for respondents, [and] failed to provide for the right to confront and cross-examine adverse witnesses"); *In re* Link, 713 S.W.2d 487, 493 (Mo. 1986) (explaining that hearings took place "an atmosphere of procedural informality"); *In re* Evatt, 722 S.W.2d 851, 852 (Ark. 1987) (describing guardianship process that "does not contain a meaningful notice provision" and "does not provide the ward with the right to be present at a subsequent hearing where he can have counsel and cross-examine those who caused him to lose his freedom or control over his property, or both").

76. Karen Andreasian et al., *Revisiting S.C.P.A 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287, 296 (2015).

77. *See* Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 85 (2007) ("The social model of disability asserts that contingent social

to eradicate barriers that prevented people with disabilities from participating in everyday life—a goal that eventually inspired Congress to pass the Americans with Disabilities Act.[78] This shift made the guardianship system seem woefully inadequate. Commentators criticized states for providing "only limited due process safeguards[] and impos[ing] sweeping restrictions on [impaired] people without regard to less drastic alternatives."[79] In 1987, the Associated Press published a blockbuster exposé documenting how badly the system was broken.[80] A year later, Congress held hearings in which Claude Pepper, the Chairman of the House Select Committee on Aging, famously quipped that "[t]he typical [person under a guardianship] has fewer rights than the typical convicted felon."[81]

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conditions rather than inherent biological limitations constrain individuals' abilities and create a disability category."); David A. Weisbach, *Toward a New Approach to Disability Law,* 2009 U. CHI. LEGAL F. 47, 47–48 (2009) (explaining that under the social model, "disabilities are caused by the constructed environment . . . and that it is society's ethical or moral duty to change that environment to provide equal access and equal functioning to all its members"). Of course, this is not to say that disability scholars speak with a single voice. *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 7 (2004) (noting that "the disability rights movement . . . embraces people with a range of different disabilities, different life experiences, different material needs, and different ideological perspectives"); Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 926 (2019) (challenging the idea that integrating people with disabilities into society helps eliminate discrimination against them).

78. *See* 42 U.S.C. § 12101(a)(1) ("The Congress finds that . . . physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.").

79. Stanley S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553, 606 (1979); *see also* Comment, *An Assessment of the Pennsylvania Estate Guardianship Incompetency Standard*, 124 U. PA. L. REV. 1048, 1078 (1976) (emphasizing that "[a] declaration of civil incompetency resulting in a guardianship of the estate is a very serious matter, having drastic legal, social, and psychological effects for a person declared incompetent").

80. *See* Fred Bayles, *Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System*, AP (Sept. 19, 1987), https://perma.cc/U9VG-59K4 (noting, among many other things, that "[s]ome elderly people discover they are wards of the court only after the fact").

81. THE CHAIRMAN OF SUBCOMM. ON HEALTH AND LONG-TERM CARE, REPORT ON ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, 100th Cong., H.R. DOC. NO. 100-640, at 4 (1987).

States responded by revamping their guardianship statutes. For example, in 1988, about 100 guardianship bills were introduced into twenty-eight state legislatures.[82] Before long, nearly every state in the union had overhauled its guardianship regime.[83] For one, lawmakers replaced the vague nineteenth-century standards for determining incapacity with "functional assessment[s] of the person's ability to make decisions."[84] In addition, under the "least restrictive alternative" principle, courts tried to "allow[] incapacitated persons to retain as much autonomy as possible."[85] For example, plenary guardianships, which flatly deny people under guardianships the power to make decisions, were once the norm.[86] Increasingly, though, courts opted for limited guardianships, which only

82. *See* Johns, *supra* note 54, at 46.

83. *See, e.g.*, ABA, STATE ADULT GUARDIANSHIP LEGISLATION SUMMARY 26–31 (2019), https://perma.cc/KTU9-GLBD (PDF) (providing a table of guardianship reforms by jurisdiction).

84. Diller, *supra* note 23, at 505. These laws predicate incapacity on two findings: (1) that the person suffers from a "disabling condition"; and (2) that this ailment makes her unable "to adequately manage [her] personal or financial affairs." Sabatino & Wood, *supra* note 21, at 37; *cf.* UNIF. GUARDIANSHIP & PROTECTIVE PROCEED. ACT § 401(2)(a) (UNIF. L. COMM'N 1997) (defining incapacity to manage property as "an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance"); CAL. PROB. CODE § 1801(b) (West 2021) ("A guardian of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence . . . ."); N.Y. MENTAL HYG. LAW § 81.02 (McKinney 2021) (authorizing guardianship of the property for persons "unable to provide for personal needs and/or property management and [where] the person cannot adequately understand and appreciate the nature and consequences of such inability"). In a related development, courts held that "because a finding of incompetency involves deprivation of an individual's exercise of liberty and property rights, a determination of incompetency . . . must be established through clear and convincing evidence." State *ex rel.* Shamblin v. Collier, 445 S.E.2d 736, 741 (1994); *see also* UNIF. PROB. CODE § 5-311 (amended 2019) (adopting the clear and convincing evidence standard for the appointment of a guardian); *In re* Conservatorship of Edelman, 448 N.W.2d 542, 546 (Minn. Ct. App. 1989) (denying a petition to establish a conservatorship of estate because the petitioner did not establish that the person under a guardianship was incapacitated by clear and convincing evidence).

85. *In re* Conservatorship of Groves, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003).

86. *See* Kohn et al., *supra* note 17, at 1116 n.6.

restrict certain kinds of choices.[87] Finally, lawmakers gave respondents the rights to be represented by counsel, to confront adverse witnesses, to demand a jury, and to request an inquiry by a court-appointed investigator.[88]

When legislatures did not act, courts stepped in. After the Supreme Court held that draconian civil commitment rules were unconstitutional, plaintiffs filed a wave of challenges to guardianship practices.[89] These cases established that respondents have the right to participate in adjudications of their own competence. For example, in *In re Guardianship of Deere*,[90] Archie Deere received notice that a guardianship proceeding had been scheduled for the following week.[91] On the eve of the hearing, he found a lawyer who was willing to represent him.[92] Although neither Deere nor his attorney could appear on short notice, the court denied his request for a continuance and appointed a guardian for Deere.[93] The Supreme Court of Oklahoma reversed the order, reasoning that "minimal due process requires proper written notice and a hearing at

87. *See* UNIF. PROB. CODE § 5-401 cmt. (amended 2019) (encouraging courts "to appoint a limited conservator whenever possible"); Kohn et al., *supra* note 17, at 1116 n.6 (explaining how limited guardianships work).

88. *See* Glen, *supra* note 8, at 109, 113–14.

89. *See* Jackson v. Indiana, 406 U.S. 715, 730, 738 (1972) (finding that Indiana's approach to civil commitment for criminal defendants was unconstitutional); O'Connor v. Donaldson, 422 U.S. 563, 568 (1975) (holding that "a State cannot constitutionally confine . . . a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends"). Lower courts issued similar opinions. *See, e.g.*, McAuliffe v. Carlson, 377 F. Supp. 896, 903–04 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975) (striking down a Connecticut law that charged certain prisoners fees while they were patients at mental hospitals); Vecchione v. Wohlgemuth, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974) (invalidating a Pennsylvania statute that allowed "the Commonwealth . . . to summarily seize and appropriate assets of a patient not adjudged incompetent, while having to provide notice and opportunity for a hearing to a patient adjudged incompetent"). Courts were somewhat slow to find that guardianships deprived those persons under the guardianships of property interests because of the entrenched view that those proceedings "*preserv[ed]* the property" of the person subject to guardianship. Alexander, *supra* note 73, at 1012–13 (1979) (emphasis added).

90. 708 P.2d 1123 (Okla. 1985).

91. *Id*. at 1124.

92. *Id.*

93. *Id.*

which the alleged incompetent may appear to present evidence in his/her own behalf."[94] Accordingly, whether through statute or judicial decree, almost every state has now created due process protections for respondents.[95]

More recently, supported decision-making (SDM) has gained momentum in statehouses across the country. Traditionally, guardians made choices either by deciding what was in a person with CIDD's best interests or by applying a substituted judgment standard and asking what the individual would have done if she possessed capacity.[96] But in 2006, the

94. *Id.* at 1126; *see also In re* Evatt, 722 S.W.2d 851, 852–53 (Ark. 1987) (striking down a state statute that permitted courts to impose temporary guardianship without notice or "the right to be present at a subsequent hearing where he can have counsel and cross-examine those who caused him to lose his freedom or control over his property, or both"); *In re* Kloster, 526 So. 2d 196, 196 (Fla. Dist. Ct. App. 1988) (holding that trial court violated a person under a guardianship's due process rights by refusing to hear expert testimony about her "physical ability to take care of herself"); Guardianship of Doe, 463 N.E.2d 339, 341, 344 (Mass. 1984) (invalidating a guardianship when the person under the guardianship "was not notified of this proceeding either before or after her commitment"); *In re* Gamble, 394 A.2d 308, 310 (N.H. 1978) (determining that due process prohibits judges from both nominating a guardian and deciding whether that person is fit to serve); *In re* Weingarten, 405 N.Y.S.2d 605, 607 (Ct. Cl. 1978) (denying motion for appointment of guardian where "the Notice of Motion was not served personally upon [the ward]" because "due process requires that she be given an opportunity to be heard"). *But see* Rud v. Dahl, 578 F.2d 674, 679 (7th Cir. 1978) ("[N]otwithstanding the significant liberty interests implicated in an incompetency proceeding, we are unpersuaded that the presence of counsel is an essential element of due process at such a proceeding.").

95. *See* Desiree C. Hensley, *Due Process Is Not Optional: Mississippi Guardianship Proceedings Fall Short on Basic Due Process Protections for Elderly and Disabled Adults*, 86 MISS. L.J. 715, 719–20 (2017) ("[N]early every state ultimately adopted revisions to its guardian and conservatorship laws to enhance procedural protections . . . .").

96. *See, e.g.*, Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 32 n.170 (1990) (discussing the origins of the "best interests" standard); Dilip V. Jeste et al., *Supported Decision Making in Serious Mental Illness*, 81 PSYCHIATRY 28, 31 (2018) ("Most state laws [provide] that a substituted judgment standard should guide guardian decision making, and a best interest standard is allowable when guardians lack sufficient evidence to determine what decision the ward would have made if she or he had the capacity."); Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1495–96 (2012) (surveying states and finding wide variation in whether they use best interests, substituted judgment, or a combination of both).

United Nations Convention on the Rights of Persons with Disabilities assailed these forms of surrogate decision-making by declaring that countries needed to "provide access by persons with disabilities to the support they may require in exercising their legal capacity."[97] Nine years later, Texas became the first American jurisdiction to pass a SDM statute.[98] Since then, Alaska, Colorado, Delaware, the District of Columbia, Indiana, Louisiana, Nevada, North Dakota, Rhode Island, Washington, and Wisconsin have followed suit.[99]

The idea behind SDM "is as old as decision-making itself."[100] People often consult with their friends and family when facing important choices.[101] SDM laws harness this collaborative approach to encourage people with CIDD to control their own destinies. SDM statutes provide a framework for principals to enter into agreements with "supporters," who help the principal acquire information, process it, and communicate her choices.[102] In addition, they provide that third parties must respect decisions that arise from this process.[103] Although SDM legislation is embryonic and suffers from crucial ambiguities—a point to which we will return in Part IV—it nevertheless marks "a paradigm shift" that "upends the conventional wisdom that individuals with cognitive challenges need to be 'protected' from

97. Convention on the Rights of Persons with Disabilities §§ 2–3, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3. The United States has signed but not ratified the Convention. *See* Eliana J. Theodorou, Note, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973, 978 (2018).

98. *See* TEX. EST. CODE ANN. § 1357.001 (West 2021).

99. *See generally* ALASKA STAT. § 13.56.010 (2021); COLO. REV. STAT. § 15-14-801 (2022); DEL. CODE ANN. tit. 16, § 9401a (2021); D.C. CODE § 7-2131 (2021); IND. CODE § 29-3-14-1 (2021); LA. STAT. ANN. § 13:4261.101 (2021); NEV. REV. STAT. § 162c.010 (2021); N.D. CENT. CODE § 30.1-36-01 (2021); 42 R.I. GEN. LAWS § 42-66.13-5 (2021); WASH. REV. CODE § 11.130.001 (2021); WIS. STAT. § 52.01 (2021).

100. Phillips, *supra* note 18, at 616 n. 8.

101. *See* Diller, *supra* note 23, at 516 ("[W]e all turn to supporters to assist us in making decisions—whether we ask advice, seek explanations, or designate someone to interface with an agency on our behalf.").

102. *See* TEX. EST. CODE ANN. § 1357.002 (3)–(5) (West 2021).

103. *See, e.g.*, ALASKA STAT. § 13.56.130 (2021); DEL. CODE ANN. tit. 16 § 9407A (2021); NEV. REV. STAT. § 162C.310 (2021).

making poor decisions by having a surrogate decision-maker appointed to make decisions for them."[104]

To conclude, in the last half-century, states have begun to take the rights of people with CIDD more seriously. But as we discuss next, there has been less progress in the analogous context of testamentary capacity.

II. TESTAMENTARY CAPACITY

Guardianships are not the only proceedings in which courts evaluate a property owner's mental acuity. Judges also require testators to have sufficient capacity to execute a valid will.[105] This Part surveys the past and present of testamentary capacity. It reveals that the doctrine's policy basis and black-letter elements have long been hazy, and that the rule has largely been impervious to recent changes in disability law.

A. *The "Sound Mind" Standard*

English law formally adopted the doctrine of testamentary capacity in 1572, when Parliament amended the Statute of Wills to annul instruments executed "by any . . . idiot or, by any person de non sane memory."[106] Eventually, lawmakers replaced these phrases by requiring testators to be "of sound . . . mind."[107] Very roughly, this meant that testators needed to be able to identify their assets and beneficiaries when they executed the document.[108]

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104. Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 319 (2021).

105. *See infra* Part II.A–B.

106. *See* Statute of Wills (1572 amendments), 34 and 35 Henry VIII, ch. 5, § 14. Records from Ancient Greece also suggest that mental capacity has long been grounds to nullify a will. *See* Anton-Hermann Chroust, *Estate Planning in Hellenic Antiquity: Aristotle's Last Will and Testament*, 45 NOTRE DAME L. REV. 629, 637 (1970).

107. Greenwood v. Greenwood [1790] 163 Eng. Rep. 930, 931 (KB).

108. *Id.* at 943 (explaining that a testator must possess the "power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty"); *see also* Harwood v. Baker [1840] 13 Eng. Rep. 117 (PC) ("[The testator] must also have capacity to comprehend . . . the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property."); Marquess of Winchester's Case [1598] 3 Coke's Reps. 302, 302 (KB) (explaining that the testator "ought

However, the "sound mind" test proved easier to recite than to apply. For one, courts struggled to distinguish a disqualifying mental impairment from mere benign eccentricity. As one English chancellor explained:

> There is no difficulty in the case of a raving madman or of a drivelling [sic] idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.[109]

Similarly, judges disagreed about the significance of delusions that were not related to the will. For instance, in *Waring v. Waring*,[110] the testator harbored romantic fantasies about her servants and a chronic unfounded fear of assassination.[111] But at the same time, "in matters relating to the care of her property, [she] conducted herself with great prudence and discretion, and apparently as a person of sound mind."[112] The court admitted that "mere eccentricity is not enough to constitute mental unsoundness,"[113] but nevertheless held that the testator was "undoubtedly insane" and a "lunatic."[114] Conversely, in *Banks v. Goodfellow*,[115] the Court of Queen's Bench upheld a will executed by a testator who suffered from paranoid schizophrenia because his condition did not affect

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to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason").

109. Boyse v. Rossborough [1857] 10 Eng. Rep. 1192, 1210 (HL).

110. [1848] 13 Eng. Rep. 715 (PC).

111. *See id.* at 715–16, 722–23, 725. The court summarized the following evidence of the testator's behavior: "[S]he entertained (though without any rational foundation) a suspicion that her husband was endeavouring fraudulently to obtain her property and to poison her; that . . . her relations and friends, including her brother . . . appeared to her in disguise, [and] . . . she would frequently fire off pistols at night." *Id.* at 716–17.

112. *Id.* at 725.

113. *Id.* at 720.

114. *Id.* at 721 (explaining that it is "wholly immaterial that [the testator's delusions] do not appear in the Will itself").

115. LR 5 QB 549 (1870).

his ability to "understand the nature of the act" of will-making.[116]

Compounding this confusion, the policy basis for testamentary capacity was elusive. As noted above, courts justify guardianships on the grounds that they spare people with CIDD from unwise transactions that deplete their resources and therefore diminish their quality of life.[117] But because wills do not become effective until death, testamentary incapacity does not protect anyone from the burdens of their own bad choices. Also, unlike fraud, duress, and undue influence—which nullify wills that are obtained through the antisocial actions of a third party—incapacity applies in the absence of any wrongdoing.[118] Thus, some treatises explained testamentary capacity in circular terms, asserting that "Mad Folks . . . cannot make a Testament [because] . . . they know not what they do,"[119] and others acknowledged that it is "conceivable that the law should not make any particular requirement of mental capacity for testamentary purposes."[120]

Despite these flaws, American states borrowed English testamentary capacity law. For example, around the turn of the nineteenth century, New York and New Jersey enacted statutes that voided the wills of "person[s] of nonsane mind and memory."[121] Like their English counterparts, most American

116. *Id.* at 565.

117. Stannard v. Burns' Adm'r, 22 A. 460, 462 (Vt. 1891); *see In re* Est. of Lahr, 744 P.2d 1267, 1269 (Okla. 1987) ("[P]rohibitions regarding the ward's authority to deal with the ward's property were designed to protect the ward from those who would take advantage of the ward's decreased physical condition."); Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMP. L. REV. 1, 19 (2014) [hereinafter Brashier, *Conservatorships*] ("If a [person under guardianship] cannot understand the basic implications of contracts and gifts and is likely to impoverish herself by making foolish agreements or improvident gifts, the court may find it necessary to remove her power to enter contracts or make gifts.").

118. *See* Smith v. Cuddy, 56 N.W. 89, 93 (Mich. 1893) (Grant, J., dissenting) ("In order to establish a case of undue influence, there must be a wrongdoer to be resisted . . . .").

119. HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS § 3 (6th ed. 1743) (1590).

120. THOMAS E. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 51, at 233 (1953).

121. *See* An Act Concerning Wills, 1795, § III, 1800 N.J. Laws 189, 190, https://perma.cc/2C6D-7A4K (PDF) ("[W]ills or testaments made . . . by . . . any idiot, lunatic, or person of nonsane mind and memory,

judges interpreted these phrases to require testators to "know what [their] property was, and who those persons were that then were the objects of [their] bounty."[122]

Then, in 1820, in a long-forgotten will contest, a sitting Justice of the U.S. Supreme Court distilled the doctrine of testamentary capacity into an influential four-part test. In *Harrison v. Rowan*,[123] Bushrod Washington—the nephew of George Washington—gave a jury instruction that broke the "sound mind" requirement into specific elements:

> [The testator] ought to be capable of making his will, with [1] an understanding of the nature of the business in which he is engaged;—[2] a recollection of the property he means to dispose of;—[3] of the persons who are the objects of his bounty, and [4] the manner in which it is to be distributed between them.[124]

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shall not be held or taken to be good, or effectual, in law."); An Act to Reduce the Laws Concerning Wills into One Statute, § V, 1801 N.Y. Laws 178, 178, https://perma.cc/K6XE-UUGK (PDF) ("[N]o last will and testament aforesaid made by . . . any infant, idiot, or person of insane memory shall be valid in law."); John B. Rees Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613, 656 n.343 (1960) (collecting authorities). Maryland, however, imposed a higher capacity standard that required a testator to be "capable of executing a valid deed or contract." 1860 Md. Laws 685, https://perma.cc/899A-W5XJ (PDF).

122. Clarke v. Fisher, 1 Paige Ch. 171, 173 n.1 (N.Y. Ch. 1828); *see* Starrett v. Douglass, 2 Yeates 46, 49 (Pa. 1796) ("Disposing memory in a man is an ability to make disposition of his estate, with understanding and reason."); Spencer v. Moore, 8 Va. (4 Call) 423, 424 (1798) (requiring that the testator "be able to bestow his property with understanding and reason"); Den v. Vancleve, 5 N.J.L. 589, 661 (1819), *overruled in part by* Meeker v. Boylan, 28 N.J.L. 274 (Sup. Ct. 1860) ("[T]he objects of a man making his last will are—his property, its nature, its various parts and their relative value . . . .").

123. 11 F. Cas. 658 (C.C.D.N.J. 1820).

124. *Id.* at 661. Justice Washington presided over the matter with Judge William Pennington of the United States District Court for the District of New Jersey. *Id.* at 660. By contemporary standards, almost everything about this case must seem odd. Today, Supreme Court Justices typically do not preside over jury trials; judicial panels are typically comprised of an odd, not even, number of judges; a single judge, rather than a judicial panel, typically presides over trial court matters; federal circuit courts typically hear appeals rather than jury trials; and federal courts no longer have subject matter jurisdiction over state law probate matters because the probate exception to federal subject matter jurisdiction now requires that will contests be litigated exclusively in state court. *See* Marshall v. Marshall, 547 U.S. 293, 308 (2006). We suspect that *Harrison* may be the only will contest tried in a federal circuit court to a sitting member of the United States Supreme Court.

After *Harrison*, courts throughout the country adopted Justice Washington's granular formulation of the testamentary capacity doctrine, often crediting him by name.[125]

However, as the years passed, four aspects of the rule proved to be problematic. First, recall that the third prong of Justice Washington's rule mandated that a testator be capable of identifying "the persons who are the objects of his bounty."[126] In the mid-nineteenth century, judges started to add the adjective "natural" before "objects of his bounty," thus requiring that the testator be capable of identifying "the *natural* objects of his bounty."[127] This revised standard became "[t]he rule of almost universal application and acceptation to be applied in determining whether a testator has testamentary capacity."[128] Yet "[t]he phrase 'natural objects of bounty' has eluded crisp definition,"[129] and even today in some states, "[t]here is no . . . case that defines" this term.[130]

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125. *See* McMasters v. Blair, 29 Pa. 298, 299 (1857) (citing *Harrison*); Taylor v. Kelly, 31 Ala. 59, 72 (1857) (same); Delafield v. Parish, 25 N.Y. 9, 24 (1862) (same); McClintock v. Curd, 32 Mo. 411, 419 (1862) (same); Beaubien v. Cicotte, 12 Mich. 459, 490 (1864) (same); Nicholas v. Kershner, 20 W. Va. 251, 256 (1882) (same); Chrisman v. Chrisman, 18 P. 6, 6 (Or. 1888) (same); Craig v. Southard, 35 N.E. 361, 362 (Ill. 1893) (same); *see also* Hall v. Perry, 33 A. 160, 161 (Me. 1895) ("[A] disposing memory exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty.").

126. *Harrison*, 11 F. Cas. at 661.

127. *See* Roe v. Taylor, 45 Ill. 485, 490 (1867) ("An understanding of . . . the persons who were the natural objects of his bounty . . . [is] evidence of the possession of testamentary capacity . . . ."); Gay v. Gay, 209 S.W. 11, 12 (Ky. 1919) (providing that the testator must "know the natural objects of his bounty and his duty to them"); Lehman v. Lindenmeyer, 109 P. 956, 958 (Colo. 1909) (describing the factor as requiring the testator's ability to know "the number and names of the persons who are the natural objects of his bounty, [and] their deserts with reference to their conduct and treatment toward him").

128. *Gay*, 209 S.W. at 12; *see* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1(b) (AM. L. INST. 2003) ("If the donative transfer is in the form of a will, . . . the testator . . . must be capable of knowing and understanding in a general way . . . the natural objects of his or her . . . bounty . . . .").

129. Champine, *supra* note 22, at 77 n.248.

130. *In re* Est. of Hubbs, No. 102,875, 2011 WL 588493, at *5 (Kan. Ct. App. Feb. 11, 2011); *see In re* Est. of Berg, 783 N.W.2d 831, 842 (S.D. 2010) ("This Court has never been asked to define the natural objects of a testator's bounty.").

Second, jurisdictions disagree about the standard of proof in incapacity cases. The majority view tasks the contestant with "proving by a preponderance of the evidence that the testator lacked mental capacity."[131] However, other states raise the contestant's burden to clear and convincing evidence,[132] and still others require the *proponent* to prove that it was more likely than not that the testator possessed capacity.[133] For these reasons, one practitioner's guide calls this issue "a crazy quilt of apparently conflicting and confusing maxims and principles which vary from state to state in an astounding variety of verbal formulae."[134]

Third, states split over the scope of the doctrine. It is well-established that "[t]he minimum level of mental capacity required to make a will is less than that necessary to make a deed[] or a contract."[135] Indeed, unlike testamentary capacity,

131. Looney v. Est. of Wade, 839 S.W.2d 531, 533 (Ark. 1992); *see also In re* Est. of Killen, 937 P.2d 1368, 1371 (Ariz. Ct. App. 1996); Eyford v. Nord, 276 Cal. Rptr. 3d 309, 317 (Ct. App. 2021); *In re* Est. of Wiltfong, 148 P.3d 465, 467 (Colo. App. 2006); Hendershaw v. Est. of Hendershaw, 763 So. 2d 482, 483 (Fla. Dist. Ct. App. 2000); *In re* Est. of Herbert, 979 P.2d 39, 51 (Haw. 1999); Roller v. Kurtz, 129 N.E.2d 693, 697 (Ill. 1955); *In re* Est. of Todd, 585 N.W.2d 273, 276 (Iowa 1998); Est. of Washburn, 225 A.3d 761, 765 (Me. 2020); Slicer v. Griffith, 341 A.2d 838, 843 (Md. App. Ct. 1975); Alberts v. Est. of Gray, No. 196666, 1998 WL 1997642, at *1 (Mich. Ct. App. Feb. 27, 1998); *In re* Est. of Dion, 623 N.W.2d 720, 729 (N.D. 2001); *In re* Est. of Phillips, 795 S.E.2d 273, 281–82 (N.C. Ct. App. 2016); Stanek v. Stanek, No. 2018-CA-39, 2019 WL 3050523, at *6 (Ohio Ct. App. 2019); Amos v. Fish, 144 P.2d 967, 968 (Okla. 1944); Hairston v. McMillan, 692 S.E.2d 549, 552 (S.C. Ct. App. 2010); *In re* Est. of Boote, 265 S.W.3d 402, 416 n.24 (Tenn. Ct. App. 2007); *In re* Est. of Graham, 69 S.W.3d 598, 606 (Tex. App. 2001); *In re* Est. of Kesler, 702 P.2d 86, 88 (Utah 1985); *In re* Est. of Roosa, 753 P.2d 1028, 1032 (Wyo. 1988).

132. *See In re* Est. of Farr, 49 P.3d 415, 426 (Kan. 2002); *In re* Succession of Brown, 39,035 (La. App. 2 Cir. 10/27/04); 886 So. 2d 633, 635–36; Jeruzal's Est. v. Jeruzal, 130 N.W.2d 473, 482 (Minn. 1964); *In re* Est. of Fisher, 128 A.3d 203, 215 (N.J. Super. Ct. App. Div. 2015); *In re* Ziel's Est., 359 A.2d 728, 733 (Pa. 1976); *In re* Est. of Bussler, 247 P.3d 821, 828 (Wash. App. Ct. 2011); *In re* Est. of Persha, 649 N.W.2d 661, 673 (Wis. Ct. App. 2002).

133. *See In re* Est. of Edwards, 520 So.2d 1370, 1373 (Miss. 1988); *In re* Will of Buckten, 178 A.D.2d 981, 982 (N.Y. App. Div. 1991); Weedon v. Weedon, 720 S.E.2d 552, 558 (Va. 2012).

134. EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 6:13 (2d ed. 1999).

135. Bye v. Mattingly, 975 S.W.2d 451, 455 (Ky. 1998); *see* Weaver v. Mietkiewicz, No. 10-P-2260, 2012 WL 592849, at *1 (Mass. Ct. App. Feb. 24, 2012) ("[T]he standard for executing a will is different from and less stringent than the standard for the capacity to execute a contract.").

contractual capacity only exists if a person has the ability to understand the consequences of the transaction.[136] Yet contemporary estate planning often involves nonprobate mechanisms such as revocable inter vivos trusts, life insurance, and pay-on-death accounts.[137] Although these devices are either contract-like or full-fledged contracts, they are known as "will substitutes" because they are "functionally indistinguishable from a will."[138] As a result, authorities diverge on whether to resolve contests featuring these nonprobate devices under the test for contractual capacity or testamentary capacity.[139]

Fourth, capacity litigation unfolds in an awkward posture. Courts hold that "the validity of a will depends on the state of [the testator's] intellect at the time of its execution."[140] As a result, "execution would be the ideal time to determine capacity."[141] But because wills are "ambulatory"—testators can revoke or amend them until death[142]—the traditional rule is

136. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a) (AM. L. INST. 1979) (explaining that a contract is voidable if a party "is unable to understand in a reasonable manner the nature and consequences of the transaction").

137. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–09 (1984).

138. *Id.* at 1109.

139. *Compare* RESTATEMENT (SECOND) OF TRUSTS § 22 (AM. L. INST. 1959) (adopting the contractual capacity standard for inter vivos revocable trusts), *and* Fantin v. Fantin, No. FSTCV166027439S, 2017 WL 4872858, at *18 (Conn. Super. Ct. Sept. 6, 2017) (same), *and In re* Armster, No. M2000-00776-COA-R3CV, 2001 WL 1285904, at *7 (Tenn. Ct. App. Oct. 25, 2001) ("The mental capacity required to execute a general durable power of attorney, revocable living trust and warranty deed are essentially the same and equate to the mental capacity required to enter into a contract."), *and In re* Head's Est., 615 P.2d 271, 274 (N.M. 1980) (explaining that the same rule governs a person's capacity to "enter[] into a civil contract, [or] execute a trust or an amendment thereof"), *with* RESTATEMENT (THIRD) OF TRUSTS § 11(3) (AM. L. INST. 2003) ("A person has capacity to create a revocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to transfer the property inter vivos free of trust in similar circumstances."), *and* UNIF. TR. CODE § 601 (UNIF. L. COMM'N amended 2010) ("The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.").

140. Irish v. Smith, 8 Serg. & Rawle 573, 576 (Pa. 1822).

141. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978) [hereinafter Langbein, *Living Probate*].

142. *See* Cozzort v. Cunningham, 130 S.E.2d 171, 173 (Ga. Ct. App. 1963) ("It is fundamental that a person having the right to dispose of his property by

that "[j]udicial proceedings to probate a will while the testator is living[] are unheard of."[143] Accordingly, contests based on incapacity proceed under the "worst evidence" tradition: testators cannot take the witness stand to demonstrate their mental acuity or "authenticate or clarify [their] declarations, which may have been made years, even decades past."[144]

In sum, testamentary capacity has proven to be a challenging topic. Moreover, as we discuss next, it has fallen out of step with the disability rights movement.

B. *Testamentary Capacity and Disability Rights*

As noted, legislatures and courts have gradually expanded the rights of individuals who are subject to guardianships.[145] This section reveals that people with CIDD still face obstacles when they try to create wills.

The tension between testamentary capacity and disability rights surfaces in several ways. First, it was once "practically a universal rule that the mere fact one is under guardianship does not deprive him of the power to make a will."[146] Much like a criminal acquittal is not conclusive in a civil trial because of the different standards of proof, courts require less evidence of incapacity to appoint a guardian than to void a will:

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will may, during his lifetime while he retains testamentary capacity, change, modify or completely revoke a previously executed will and substitute therefor a new and completely different plan for the disposition of his property."); Alex M. Johnson, Jr., *Is It Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 393 (2016) ("By definition and in every jurisdiction, wills are ambulatory documents and can always be revoked prior to death." (internal citations omitted)).

143. Lloyd v. Wayne Cir. Judge, 23 N.W. 28, 29 (Mich. 1885) (Campbell, J., concurring).

144. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975).

145. *See supra* Part I.

146. Bd. of Trs. of Park Coll. v. Hall, 195 P.2d 612, 615 (Kan. 1948); *see* Hayes v. Est. of Reynolds, 925 So. 2d 994, 999 n.2 (Ala. Civ. App. 2005) ("A testator being assigned a guardian and/or guardian does not, by itself, preclude the testator from executing a valid will."); *In re* Est. of West, 887 P.2d 222, 229 (Mont. 1994) (same); Harrison v. Bishop, 30 N.E. 1069, 1071 (Ind. 1892) ("It is too plain for controversy that one might possess mental capacity quite up to or beyond the standard thus established, and yet fall far short of that necessary to enable him to transact business or manage his estate.").

> One's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, and to justify the appointment of a guardian for that purpose, and yet he may have such capacity as will enable him to direct a just and fair disposition of his property by will.[147]

In addition, because mental conditions wax and wane, even a severely impaired testator might execute a will during a "lucid interval."[148] Traditionally, then, "[e]ven the express finding in a guardianship proceeding of a mental defect inconsistent with testamentary capacity [gave] rise to only a presumption that the incapacitated person was or remained incapable of making a will."[149]

However, two states have overruled this principle. For example, in "a remarkable departure from . . . precedent,"[150] lawmakers in New Jersey passed a statute declaring that if a person under guardianship executes a will, her "property shall descend and be distributed as in the case of intestacy."[151] Similarly, an Oklahoma statute annuls testamentary instruments executed by persons under guardianships unless they are "subscribed and acknowledged in the presence of a judge of the district court."[152] As Ralph Brashier has observed, "[t]hese statutes appear to exist in blithe ignorance of, or blatant opposition to, the modern principles mandating that the state

147. Clement v. Rainey, 50 S.W.2d 359, 359 (Tex. Civ. App. 1932).

148. *In re* Est. of Alsup, 327 P.3d 1266, 1272 (Wash. 2014).

149. *Id.*

150. Brashier, *Conservatorships*, *supra* note 117, at 14.

151. N.J. STAT. ANN. § 3B:12-27 (West 2021). The law only applies to persons under a guardianship who have no other wills. *See id.* (governing "an incapacitated person [who] dies intestate or without any will except one which was executed after commencement of proceedings which ultimately resulted in adjudicating a person incapacitated").

152. OKLA. STAT. tit. 84, § 41(B) (2021). A few guardianship statutes once provided that a "ward shall be wholly incapable of making any contract or gift whatever, or *any instrument in writing*." Skelton v. Davis, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961) (emphasis added) (quoting FLA. STAT. § 747.11 (1961)). In turn, some courts held that "[t]he statutory phrase . . . —'any instrument in writing'—clearly includes a will," and invalidated wills made by people under guardianships. Barnes v. Willis, 497 So. 2d 90, 92 (Ala. 1986). However, these states have now deleted the phrase "instrument in writing" and thus likely restored persons under a guardianship's ability to engage in testation. *See* Brashier, *Conservatorships*, *supra* note 117, at 38–39.

impose upon [persons under guardianships] the least restrictive alternative and maximize autonomy consistent with ability."[153]

Second, under the nondelegation principle, a third party cannot make a proxy will for an impaired testator.[154] The nondelegation rule consists of two components. The first involves guardianships. A court supervising a guardianship enjoys "all the powers over the estate and business affairs . . . which the [person under a guardianship] could exercise if the person were . . . present[] and not under conservatorship."[155] For example, judges can authorize guardians to give gifts, create trusts, and change beneficiaries on pay-on-death accounts.[156] In fact, with court approval, guardians can even make fraught medical decisions, such as subjecting a person under a guardianship to experimental treatments or withholding life support or nutrition.[157] Yet many states do not permit guardians to obtain judicial approval to draft and execute a person under a guardianship's will.[158]

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153. Brashier, *Conservatorships*, *supra* note 117, at 41.

154. *See* Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1244 (2013) ("[C]ourts and legislatures have generally designated willmaking as nondelegable . . . ."); Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 63–64 (2009) [hereinafter Brashier, *Policy*] ("[F]or hundreds of years statutes of wills have assumed that only the testator himself can design and execute his plan of testamentary distribution.").

155. UNIF. PROB. CODE § 5-410(a)(2) (amended 2019).

156. *Id.*; *see* Brashier, *Policy*, *supra* note 154, at 87–89 (explaining that some courts "authorize distributions from the incapacitated individual's estate when they believe that the individual would make such distributions if capable" and others do if "a reasonably prudent person would make that gift under the circumstances").

157. *See, e.g.*, *In re* Moe, 432 N.E.2d 712, 716 (Mass. 1982) ("[P]rior judicial approval is required before a guardian may consent to administering or withholding of proposed extraordinary medical treatment"); *In re* Conservatorship of Torres, 357 N.W.2d 332, 337 (Minn. 1984) ("[I]f the [person subject to guardianship's] best interests are no longer served by the maintenance of life support[], the probate court may empower the conservator to order their removal"); *cf.* FLA. STAT. § 744.3215(b) (2021) (requiring a court to approve a guardian's request to subject a person subject to guardianship to "experimental biomedical or behavioral procedure[s]").

158. *See, e.g.*, UNIF. PROB. CODE § 5-408(3) (amended 2019); ALA. CODE § 26-2A-136 (2021); ALASKA STAT. § 13.26.435 (2021); ARIZ. REV. STAT. ANN. § 14-5408 (2021); IDAHO CODE § 15-5-408 (2021); MICH. COMP. LAWS § 700.5407 (2021); MONT. CODE ANN. § 72-5-421 (2021); NEB. REV. STAT. § 30-2637 (2021); N.M. STAT. ANN. § 45-5-402.1 (2021); UTAH CODE ANN. § 75-5-408 (LexisNexis 2021). Admittedly, a recent amendment to the UPC changes this principle and

The second strand of the nondelegation doctrine governs powers of attorney. People sometimes obviate the need for a guardianship by granting an agent the right to act on their behalf if they become incapacitated.[159] Like guardians operating pursuant to court approval, an agent under a power of attorney generally has broad dominion. For instance, in the estate planning context, principals can empower agents to execute or amend a variety of nonprobate instruments.[160] Nevertheless, "[i]t is not legally possible . . . to authorize the holder of the power to make a valid will for [a] mentally incompetent person."[161] Thus, under the double-barreled nondelegation

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permits a judge to authorize a guardian to "make, amend, or revoke the [person subject to guardianship's] will." UNIF. PROB. CODE § 5-411(a)(7) (amended 2019). However, only a handful of states have adopted this provision. *See, e.g.*, CAL. PROB. CODE § 2580(b)(13) (West 2021); COLO. REV. STAT. § 15-14-411(1)(a)(g) (2021); HAW. REV. STAT. § 560:5-411(a)(7) (2021); MASS. GEN. LAWS ch. 190B, § 5-407(d)(7) (2021); MINN. STAT. § 524.5-411(a)(9) (2021); NEV. REV. STAT. § 159.078(1)(a) (2021); N.H. REV. STAT. ANN. § 464-A:26-a (2021); S.D. CODIFIED LAWS § 29A-5-420(8) (2021).

159. *See, e.g.*, Scott v. Goldman, 917 P.2d 131, 134–35 (Wash. 1996) ("A guardian is appointed by the superior court and must abide by the [guardianship] laws . . . . An attorney-in-fact, on the other hand, is appointed by the principal and, with few exceptions, his authority is limited to the specific powers set forth in the power of attorney.").

160. *See, e.g.*, CAL. PROB. CODE § 4264(a), (c), (f) (West 2021) (allowing an agent to "[c]reate, modify, revoke, or terminate a trust"; "[m]ake or revoke a gift of the principal's property"; and "[d]esignate or change the designation of beneficiaries to receive any property . . . on the principal's death"). The power of attorney must expressly grant the principal the authority to take these actions. *See id.*; Schubert v. Reynolds, 115 Cal. Rptr. 2d 285, 288–89 (Ct. App. 2002) (holding that agent lacked power to create trust for principal when power of attorney did not explicitly confer this right). Other states follow the same general approach. *See* Stafford v. Crane, 382 F.3d 1175, 1184–85, 1184 n.2 (10th Cir. 2004) (collecting authority).

161. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 34.5 cmt. c (AM. L. INST. 1992); *see* CAL. PROB. CODE § 4265 (West 2021) ("A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will."); *In re* Est. of Garrett, 100 S.W.3d 72, 76 (Ark. Ct. Ap. 2003) ("A power of attorney . . . cannot bestow upon the attorney-in-fact the power to create a will on behalf of a principal."); Smith v. Snow, 106 S.W.3d 467, 470 (Ky. Ct. App. 2002) ("[D]esignating a power of attorney to make a will . . . is not permitted . . . ."); Perosi v. LiGreci, 948 N.Y.S.2d 629, 634 (App. Div. 2012) ("There are a few exceptions to the powers which can be granted to an attorney-in-fact. These exceptions include, but are not limited to[] the execution of a principal's will . . . .").

principle, "an individual without a will who permanently loses testamentary capacity is destined to die intestate."[162]

Third, most states continue to adjudicate incapacity claims after the testator dies. For more than a century, scholars have proposed creating "living" (or "antemortem") probate schemes that permit a "will [to] be probated *before* the death of the testator."[163] However, a mere handful of jurisdictions have heeded this call. Indeed, only Alaska, Arkansas, Delaware, Nevada, New Hampshire, North Carolina, North Dakota, and Ohio give testators the ability to initiate "an accelerated will contest"[164] and obtain a court order deciding the validity of a will during their lifetime.[165] In these states—and these states alone—the testator can take the witness stand and demonstrate her capacity "in direct view of the court or jury."[166] But in the other forty-two jurisdictions, "a court [lacks] power to determine the validity of a will prior to the death of the maker."[167]

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162. Brashier, *Ghostwritten*, *supra* note 26, at 1812.

163. Henry C. Lewis, Current Topics and Notes, *Ante-Mortem Probate of Wills and Testaments*, 50 AM. L. REV. 742, 742 (1916) (emphasis added); *see also* David Cavers, *Ante-Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 443 (1934) ("[T]he threat of the [will contest] is potent to exact settlements."). Michigan passed the first living probate statute in 1883. *See* 1883 Mich. Pub. Acts 1519. But two years later, the Michigan Supreme Court held that the statute was unconstitutional because it did not require that all interested parties receive notice of the proceeding. *See* Lloyd v. Wayne Cir. Judge, 23 N.W. 28, 29 (Mich. 1885). Ninety years later, an influential law review article rekindled interest in the topic. *See* Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 266 (1976) (proposing that states pass statutes "providing for a declaratory judgment as to the validity of a will and the capacity of its maker, to be brought by the testator himself, against all those who would, upon the testator's death, be able to challenge the will").

164. Langbein, *Living Probate*, *supra* note 141, at 73.

165. *See* ALASKA STAT. § 13.12.530 (2021); ARK. CODE ANN. § 28-40-202(a) (2021); DEL. CODE ANN. tit. 12, § 1311 (2021); NEV. REV. STAT. § 30.040(2) (2021); N.H. REV. STAT. ANN. § 552:18 (2021); N.C. GEN. STAT. § 28A-2B-1 (2021); N.D. CENT. CODE § 30.1-08.1-01 (2021); OHIO REV. CODE ANN. § 5817.02(A) (West 2021). Admittedly, several of these states have recently adopted living probate regimes, which suggests that the idea has begun to acquire fresh momentum. *See* David Horton & Reid K. Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. (forthcoming 2022) (manuscript at 23), https://perma.cc/WM8J-SQHT (PDF).

166. Fink, *supra* note 163, at 266.

167. Alexander v. Walden, 337 S.E.2d 241, 243 (S.C. Ct. App. 1985); *see* Hodge *ex rel.* Skiff v. Hodge, 78 F. Supp. 2d 29, 33 (N.D.N.Y. 1999) ("[I]t is

The worst evidence tradition creates a stark contrast in the procedures that apply to guardianships and those that govern testamentary incapacity claims. For instance, in 2019, the Iowa legislature gave respondents in guardianship proceedings the rights to be informed of the factual basis of their alleged incapacity[168] and to be present at the hearing.[169] But in 2021, with *In re Guardianship of Radda*,[170] the Iowa Supreme Court reiterated that "will contests must await the testator's death."[171] In that case, Vernon Radda, who suffers from schizoaffective disorder and autism, was placed under a guardianship.[172] Radda's sister, Barbara Kiene, then discovered that he had executed two wills.[173] Kiene filed a request for declaratory relief that Radda's wills were invalid because he lacked testamentary capacity when he signed them.[174] The state high court held that the probate code "does not allow a predeath will contest" and, further, that no judge could decide whether Radda had the *present* ability to create a will so long as Radda was still alive.[175]

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premature to interpret or invalidate a will that has not yet been admitted to probate because the testator is still alive."); Pond v. Faust, 155 P. 776, 778 (Wash. 1916) ("[C]ourts have no power to inquire into the validity of wills prior to the death of the maker, to determine the incompetency of the maker." (emphasis omitted)). One rationale for this rule is that testators can freely revoke wills during their life, which means that "a beneficiary has no legally protected interest in or entitlement to a decedent's estate while the testator is still alive." Fenstermaker v. PNC Bank, Nat'l Ass'n, No. 3:17-CV-00778, 2018 WL 1472521, at *6 (D. Conn. Mar. 26, 2018) (quotation omitted). In turn, "any ruling determining [a will's] validity would constitute an improper advisory opinion." Kellar v. Davis, 829 S.E.2d 466, 470 (Ga. Ct. App. 2019). For a thoughtful critique of the view that "no will speaks before death," see Katheleen Guzman, *Wills Speak*, 85 BROOK. L. REV. 647 (2020).

168. *See* IOWA CODE § 633.556(2) (2021) ("The petition shall contain a concise statement of the factual basis for the petition.").

169. *See id.* § 663.560(2) ("The respondent shall be entitled to attend the hearing on the petition and all other proceedings. The court shall make reasonable accommodations to enable the respondent to attend the hearing and all other proceedings.").

170. 955 N.W.2d 203 (Iowa 2021).

171. *Id.* at 208.

172. *Id.* at 206.

173. *Id.*

174. *See id.*

175. *See id.* at 213–14. The court cited two reasons for this rule. First, the court explained that "[p]redeath challenges to wills may be a waste of time—the testator might replace the will at issue with a new one, die without

Thus, while guardianship law entitles respondents to participate in decisions about their capacity, the conventional law of wills prohibits testators from doing the same.

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Testamentary capacity has divided courts and fallen behind the disability rights movement. In the next Part, we refine our understanding of the doctrine by reporting the results of an empirical study of incapacity claims in trial court.

III. TESTAMENTARY CAPACITY ON THE GROUND

There is little information about how testamentary capacity cases play out in practice.[176] To start to fill this gap, we analyzed incapacity claims in two datasets of probate matters. This Part describes our methodology and findings.

For a variety of previous projects, we collected 3,449 probate administrations from California. One batch consists of 2,100 cases that came on calendar in Alameda County between 2007 and 2010.[177] Another contains 1,349 estates that were heard in San Francisco County between 2014 and 2016.[178]

Admittedly, a study of two counties in a single state may not be nationally representative. For instance, San Francisco is one of the wealthiest cities in the United States,[179] which could warp the demographics of the decedents in our sample. Likewise, because California is a community property jurisdiction,[180] it allows surviving husbands or wives to collect

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property, or the challenger might die before the testator." *Id.* at 213. Second, the court observed that because wills are confidential, "a predeath challenge might invade the testator's privacy interest." *Id.*

176. *See, e.g.*, Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 607 (1987) ("Practitioners have written a great deal about how to protect against and defeat will contests. All of the analyses, however, have been undertaken in an empirical vacuum.").

177. For a richer description of this dataset, see David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447, 2477 (2018).

178. We used these files in David Horton & Reid K. Weisbord, *Heir Hunting*, 169 U. PA. L. REV. 383, 410–11 (2021).

179. *See* Kellie Hwang & Nami Sumida, *Here's Exactly How Much Money It Takes to Feel "Wealthy" in S.F. Versus L.A. and N.Y.*, S.F. CHRON. (May 13, 2021), https://perma.cc/ZEH5-BSW7 (last updated May 14, 2021, 10:56 AM).

180. *See In re* Landes, 627 B.R. 144, 156 (Bankr. E.D. Cal. 2021).

their share of a deceased spouse's property outside of probate.[181] In turn, because the first spouse to die rarely appears in the probate files, our sample contains a disproportionate number of single decedents. Finally, California's doctrine of testamentary capacity differs slightly from other states. Unlike most jurisdictions, the Golden State has codified the standard for mental fitness to execute a will:

> An individual is not mentally competent to make a will if, at the time of making the will . . . [t]he individual does not have sufficient mental capacity to be able to do any of the following: (A) Understand the nature of the testamentary act. (B) Understand and recollect the nature and situation of the individual's property. (C) Remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.[182]

This unique approach might cause litigants in California to behave differently than litigants in other states.[183]

With these caveats in mind, we discovered several points of interest. First, allegations of incapacity are a minor but visible part of probate. In Alameda County, they surfaced in 15 of the 1,055 testacies (1.4%). Likewise, in San Francisco County, there were 9 allegations of incapacity in the 676 estates with wills (1.3%). These figures are in the same ballpark as previous studies of probate litigation.[184]

Second, there were few standalone incapacity claims. Indeed, only two contestants rested their entire case on the

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181. *See* CAL. PROB. CODE § 13500 (West 2021) (authorizing the use of spousal property petitions).

182. *Id.* § 6100.5(a). However, the legislature intended the statute "to closely adhere to [existing] common law decisions." Goodman v. Zimmerman, 32 Cal. Rptr. 2d 419, 424 (Ct. App. 1994).

183. Likewise, as we mention *infra* notes 350–355, California applies the testamentary capacity rule to simple nonprobate transfers but contractual capacity to more complex devices.

184. *Cf.* MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 184 (1970) (determining that 1.3 percent of wills from Cuyahoga County, Ohio were contested on any grounds); Schoenblum, *supra* note 176, at 613–14 (reporting that less than 1 percent of testate administrations in Davidson County, Tennessee generated challenges to a will's validity); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 415–16 (1950) (finding that, on average from 1929 to 1944, 3.5 percent of estates from Dane County, Wisconsin involved will contests).

assertion that the testator was mentally unfit.[185] Instead, challenges almost always raised incapacity in conjunction with undue influence.[186] Undue influence occurs when "the volition of a testator is subjected to the coercion or domination of another person."[187] One element required to raise a presumption of undue influence is a kind of "incapacity light": proof that the testator suffered from a weakened intellect and thus was susceptible to manipulation.[188] Because incapacity and undue influence go hand-in-hand, 20 of the 24 contests (83.3%) in our data featured both claims.

Third, we unearthed a connection between incapacity claims and self-made wills. Some background can frame this discussion. Every jurisdiction validates "formal" wills that are signed by the testator and two witnesses.[189] To create a formal will under the supervision of an attorney, a testator must pass through two checkpoints that help ensure that she is not incapacitated. First, attorneys owe an ethical obligation not to prepare a will "for a client whom [she] reasonably believes lacks the requisite capacity."[190] Second, the witnesses must affirm

185. Twenty contestants alleged incapacity and undue influence. One contestant coupled an incapacity claim with allegations that the testator had revoked her will, and another's non-capacity legal theories were unclear.

186. *See, e.g.*, Schoenblum, *supra* note 176, at 649 (finding that litigants commonly pled both incapacity and undue influence in Davidson County, Tennessee).

187. *In re* Caffrey's Will, 159 N.Y.S. 99, 102 (Surr. Ct.), *aff'd*, 174 A.D. 398 (N.Y. App. Div. 1916), *aff'd*, 16 N.E. 1038 (N.Y. 1917).

188. *See In re* Est. of Smaling, 80 A.3d 485, 493 (Pa. Super. Ct. 2013) (explaining that a presumption of undue influence arises when "(1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the will; and (3) the proponent receives a substantial benefit from the will in question"); RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.3 cmt. h (AM. L. INST. 2003) (listing "the extent to which the donor was in a weakened condition, physically, mentally, or both" as a key factor for determining whether there is a presumption of undue influence).

189. *See, e.g.*, UNIF. PROB. CODE § 2-502(a) (amended 2019) (explaining that creating a notarized will requires the testator's and two witnesses' signatures); CAL. PROB. CODE § 6110(b) (West 2021) (same); *see also* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6–9 (1941) (describing the function of these formalities).

190. AM. COLL. OF TR. & EST. COUNS., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 162 (5th ed. 2016), https://perma.cc/97KR-MKA6 (PDF); *see* MODEL RULES OF PRO. CONDUCT r. 1.14(b) (AM. BAR ASS'N 2020) ("When the lawyer reasonably believes that the client has diminished capacity,

that the testator is mentally sound.[191] But not every will is subject to these safeguards. Some testators create formal wills without attorney input by either typing the document themselves or filling out premade forms.[192] And in some states, including California, testators can bypass both lawyer and witness participation by writing a holographic will.[193] Our San Francisco data, which is more detailed than its Alameda counterpart, suggests that these shortcuts may be linked to incapacity contests. Indeed, the proportion of incapacity allegations among self-made wills (5/141, or 3.5%) was higher by a statistically significant margin than the corresponding figure in lawyer-written wills (4/535, or less than 1%, p=0.01). Accordingly, the involvement of third parties during the will-creation process may deter capacity contests.

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is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ."); *cf.* Lovett v. Est. of Lovett, 593 A.2d 382, 386 (N.J. Super. Ct. Ch. Div. 1991) ("[A] lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent . . . ."); Norton v. Norton, 672 A.2d 53, 55 (Del. 1996) ("[W]e take the occasion to emphasize the importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator.").

191. *See In re* Mitchell's Est., 249 P.2d 385, 395 (Wash. 1952) ("[I]t is the duty of witnesses subscribing a will not only to attest the formal execution of the instrument but the testamentary capacity of the testator as well." (citation omitted)); Stevens v. Leonard, 56 N.E. 27, 30 (Ind. 1900) ("By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents."). For that reason, the UPC's statutory form self-proving affidavit includes the following statement to be sworn under oath by attesting witnesses: "to the best of our knowledge the testator is [18] years of age or older, *of sound mind*, and under no constraint or undue influence." UNIF. PROB. CODE § 2-504 (amended 2019) (emphasis added) (brackets in original).

192. *See, e.g.*, *How to Make a Will Without a Lawyer: A Step-by-Step Guide*, FREEWILL, https://perma.cc/MC5D-AZU9 (last updated Dec. 2, 2021) (providing instructions for writing a will without a lawyer, as well as the option to use linked forms).

193. *See, e.g.,* ARIZ. REV. STAT. ANN. § 14-2503 (2021); CAL. PROB. CODE § 6111 (West 2021); N.C. GEN. STAT. § 31-3.4 (2021); TEX. EST. CODE ANN. § 251.052 (West 2021); VA. CODE ANN. § 64.2-404 (2021); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1116 n.139 (2015) (collecting additional statutes).

Fourth, the worst evidence tradition casts a long shadow over capacity litigation. Recall that the critical issue in these disputes is the testator's mental ability on the date she signed the will.[194] In our twenty-four capacity contests, an average of about four years passed between the execution of the instrument and the lawsuit. In fact, two of these challenges were filed more than fourteen years after the testator put pen to paper. Resolving these claims required witnesses to dredge up memories from the distant past.

Table 1: Days Between Will and Incapacity Contest (Alameda and San Francisco Counties)				
N	Mean	Median	Minimum	Maximum
24	1,413	820	72	5,814

In addition, because the testator was not available to testify, the record in most cases was hazy. Parties rarely introduced facts that bore directly on the black-letter elements of the capacity doctrine. Of course, there were exceptions. One 104-year-old testator had been deemed competent by her doctor just before she signed her will.[195] In another matter, the drafting attorney ensured that the testator "knew who his family members were, what he owned, and what he wanted to happen to his assets."[196] But the vast majority of contests offered nothing more than generalized medical evidence: proof that the

194. *See supra* note 140 and accompanying text.

195. Reply and Objections to Contest and Grounds of Objection to Probate of Purported Will and Affirmative Defenses Thereon at ¶ 5, Est. of Carmel Anello, No. PES-16-299804 (Cal. Super. Ct. Oct. 11, 2016).

196. Declaration of Michael E. Sholtes in Support of Motion for Summary Judgment or Adjudication of Issues ¶¶ 3, 6, 9, Est. of Taylor, No. RP 07-332824 (Cal. Super. Ct. May 8, 2008) (on file with authors).

testator was suffering from cancer,[197] Alzheimer's disease,[198] substance abuse,[199] or a brain tumor.[200] For example, one testator, who had been diagnosed with dementia, happened to see his primary care physician about two weeks before he executed the instrument.[201] The doctor determined that the testator could not remember the date or solve relatively simple math questions.[202] Because the purpose of the visit was not to assess the testator's ability to make a will, the doctor did not ask whether he understood what he owned or who he loved.[203]

To some degree, this evidentiary mist insulated wills from lawsuits. For instance, in a dispute that progressed all the way to a bench trial, the court ruled in favor of the proponent, reasoning that "[t]o establish incapacity one must do more than

197. *See, e.g.*, Objection to Admission to Probate of the Last Will and Testament of Viktor Suslovsky at ¶ 8, Est. of Suslovsky, No. PES-14-297640 (Cal. Super. Ct. Oct. 8, 2014) (alleging that the testator was "suffering [from] advanced stage cancer, and was severely infirmed in mind and body as exemplified by the fact that shortly after the will was purportedly signed he could not even speak or communicate in any way"); Objection to Petition for Probate of Will and for Letters Testamentary at ¶ 6, Est. of Cole, No. PES-16-299880 (Cal. Super. Ct. July 22, 2016) (alleging "cognitive impairment due to hepatic failure from metastatic breast cancer"); Opposition to Petition for Probate of Will and Issuance of Letters Testamentary (Probate Code Section 8004) and Will Contest (Probate Code Sections 8250-8254) at ¶ 5I.A., Est. of Rosien, No. PES-15-299361 (Cal. Super. Ct. Feb. 8, 2016) (alleging severe headaches, disorientation, and memory loss associated with "chemo brain" syndrome).

198. *See, e.g.*, Objection to Barbara La Gioiakotlarz's Petition for Probate of Will and for Letters of Administration with Will Annexed; Contest of Will at ¶ 1, Est. of Oltranti, No. PES-16-299593 (Cal. Super. Ct. May 11, 2016) (alleging that the testator's Alzheimer's disease made him "incompetent to create any such will").

199. *See, e.g.*, Objections and Response of Paul A. Mapes to Petition for Probate Filed on February 26, 2015, by Bonnie Schindhelm at 6, Est. of O'Donnell, No. PES-15-298403 (Cal. Super. Ct. Mar. 24, 2015) (challenging the testator's will due to his alcohol and opiate consumption).

200. *See, e.g.*, Margret Dieberger's Trial Brief at 3, Est. of Dieberger, No. RP10545167 (Cal. Super. Ct. June 10, 2014).

201. *See* Declaration of Joel M. Klompus, M.D., in Support of Petition for Letters of Administration with Will Annexed at ¶ 12, Est. of Oltranti, No. PES-16-299593 (Cal. Super. Ct. May 11, 2016).

202. *Id.* ¶ 11.

203. *See id.* ¶¶ 11, 12 (opining that the decedent was not competent to engage in testation but not discussing any of the prongs of the legal test).

present a diagnosis."[204] Likewise, another challenger lost at the summary judgment stage.[205] The judge in this matter held that the challenger had only proven what the testator's "mental state at the time of the testamentary act . . . *may* have been."[206] Thus, without a smoking gun, some litigants struggled to demonstrate incapacity.

Nevertheless, other contestants fared well. As Table 2 reveals, 2 (8.3%) prevailed when the beneficiaries withdrew the will from probate and 15 (62.5%) settled.

204. Statement of Decision at 13, Est. of Diebeger, No. RP10-545167 (Cal. Super. Ct. Dec. 15, 2014) (on file with authors). The case was a bare-knuckle brawl between the testator's new wife and his mother. *See id.* at 1–3. In an interesting aside, the judge remarked that he was "left with the impression that the fundamental dispute here may be less about money than it is about the combatants' competing claims to the affection of the [d]ecedent." *Id.* at 4.

205. *See* Order Granting Motion of Petitioner Ottis Primus for Summary Adjudication of the First Cause of Action, Testamentary Capacity, Denying the Motion for Summary Adjudication of the Second Cause of Action, Undue Influence, and Denying Motion for Summary Judgment at 2, Est. of Taylor, No. RP 07-332824 (Cal. Super. Ct. Oct. 21, 2008) (on file with author).

206. *Id.* (internal quotation omitted).

Table 2: Outcome of Capacity Claims (Alameda and San Francisco Counties)		
Result	N	Percent
Proponent Won†	5	20.8%
Contestant Won††	2	8.3%
Case Settled	15	62.5%
Unclear	2	8.3%
Total	24	100%
Notes: † Proponent wins include contests that are voluntarily dismissed. †† Contestant wins include wills that are withdrawn from probate.		

Because settlements are private, this is where our research trail would normally go cold. But California requires parties to obtain judicial approval of settlements that either require a transfer of more than $25,000 of a decedent's assets[207] or involve real property.[208] Because every settlement of an incapacity contest satisfied at least one of these criteria, we were able to calculate each contestant's "success rate": the settlement amount divided by the sum the contestant would have received

207. CAL. PROB. CODE § 9833 (West 2021).

208. *Id.* § 9832(a)(1).

if she had invalidated the will.[209] Table 3 elucidates that the mean success rate was a healthy 58%, with a median of 66%.[210] In fact, in one of the only "pure" incapacity cases, the contestant took home more than $1.1 million, which was 90% of the value of his claim.[211] These results suggest that testamentary capacity remains a potent tool for parties seeking to set aside a will.

Table 3: Incapacity Settlements (Alameda and San Francisco Counties)		
	Median	Mean
Settlement Amount	$151,864	$313,444
Success Rate	66%	58%
Note: We were able to calculate the success rate for 12 of the 15 settlements.		

To conclude, our review of trial-level testamentary incapacity cases suggests that they are usually filed years after the testator executes her will, are often linked to self-made wills, hinge on nonspecific evidence about the testator's mental state, and often generate favorable outcomes for the contestant. In the next Parts, we tie the strands of the Article together by examining the doctrinal and policy implications of our analysis.

209. A simple example can illustrate the success rate. Suppose Testator had two children, Son and Daughter; owned $100,000 in property; and executed a will leaving everything to Daughter. Son filed a will contest and ultimately settled for $20,000. If Son had prevailed, he would have taken half of the estate ($50,000) in intestacy. Thus, Son's success rate would be $20,000/$50,000, or 40 percent.

210. Of course, because all but one of these contests featured other types of claims, we do not know whether beneficiaries were motivated to settle because of the strength of the incapacity allegations.

211. *See* Petition to Approve Settlement Agreement, Exhibit A, Mutual Release and Settlement Agreement at 3, Est. of Oltranti, No. PES-16-299593 (Cal. Super. Ct. Jun. 20, 2016).

IV. THE FUTURE OF TESTAMENTARY CAPACITY

This Part discusses three unresolved issues in capacity litigation. First, it considers whether the worst evidence tradition violates principles of procedural due process. Second, it examines how the use of SDM might impact will-making. Third, it suggests solutions to jurisdictional splits about the nuances of testamentary capacity.

A. *Living Probate and Procedural Due Process*

As mentioned, because persons under a guardianship forfeit liberty and property interests, states have tried to establish basic protections for procedural due process.[212] However, these changes create a dichotomy between guardianship law and wills law. Before a court can deny an owner the power to sign contracts or make gifts, it must give her notice, a hearing, and a chance to participate in the proceeding.[213] Conversely, under the worst evidence tradition, judges cannot evaluate that same individual's ability to execute a will until she has died.[214] Thus, a more consistent approach would apply the procedural due process principles now recognized in guardianship proceedings to the will-making process by creating a living probate option. This section explores this novel theory and concludes that it is worthy of serious consideration.

1. Property Interest

The first step in any procedural due process analysis is to determine whether state action deprives an owner of a property interest.[215] As this subsection explains, there is a colorable argument that the doctrine of testamentary capacity does so,

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212. *See, e.g.*, *In re* Mark C.H., 906 N.Y.S.2d 419, 426 (Surr. Ct. 2010); *see also supra* notes 78–84 and accompanying text.

213. *See* Hensley, *supra* note 95, at 719–20.

214. *See* Goldberg & Sitkoff, *supra* note 24, at 344 ("[C]ourts have long recognized that posthumous litigation over wrongful interference with a donor's freedom of disposition poses an obvious and serious difficulty given the inability of the donor [to confirm his intentions.] This 'worst evidence' problem is inherent to the derivative structure of such litigation." (internal citations omitted)).

215. *See* Mathews v. Elridge, 424 U.S. 319, 334–35 (1976).

but courts have not addressed the question directly and it is not clear how they would rule if presented with a live controversy.

For centuries, there was consensus that "the right to make a will is in no sense a property right" and thus is not "protected by any of the constitutional provisions whereby property is protected."[216] To be sure, state courts sometimes waxed poetic about testation, calling it "one of the most sacred rights attached to property."[217] However, according to the conventional wisdom, only "natural" rights—those that are "inherent, prepolitical, and prelegal"—were property rights.[218] And as a creature of the state, the power to convey assets after death did not fit this description:

> In feudal England, only the king owned real property, which represented the bulk of wealth, and only the king could decide who could exercise real property rights when a person died. During the decline of feudalism, Parliament enacted the Statute of Wills to grant citizens the lawful right to devise real property, qualified by regulations necessary to preserve order. Hence, devising property came to be regarded as a right created by statute, not a "property" right inherent in the common law of England.[219]

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216. 1 W. PAGE, THE LAW OF WILLS § 25, at 49 (3d ed. 1941); Hull v. Cartin, 105 P.2d 196, 205 (Idaho 1940); *see* Eyre v. Jakob, 55 Va. (1 Gratt.) 422, 430 (1858) ("The legislature . . . may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."). However, most cases dealt with the analytically distinct issue of whether *inheritance* is a constitutionally protected property right. *See* Jefferson v. Fink, 247 U.S. 288, 294 (1918) ("Not until the ancestor dies is there any vested right in the heir." (internal citation omitted)). Because heirs and beneficiaries enjoy a mere expectancy—not a vested right—in a living person's assets, courts hold that lawmakers have free rein to limit inheritance. *See id.*; Magoun v. Ill. Tr. & Sav. Bank, 170 U.S. 283, 288 (1898) ("[T]he right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege,—and therefore the authority which confers it may impose conditions upon it.").

217. *In re* Est. of Foss, 202 A.2d 554, 558 (Me. 1964); *cf. In re* Martinson's Est., 190 P.2d 96, 97 (Wash. 1948) ("The right of testamentary disposition of one's property as an incident of ownership, is by law made absolute.").

218. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568 (2003).

219. Shriners Hosps. for Crippled Child. v. Zrillic, 563 So. 2d 64, 67 (Fla. 1990) (internal citations omitted); *see* United States v. Perkins, 163 U.S. 625,

In 1942, the Court endorsed this view in *Irving Trust Co. v. Day*.[220] Two days before her wedding, Helena Snyder signed a document in which she surrendered her right to inherit from her husband-to-be, John McGlone.[221] Later, New York passed a statute that guaranteed surviving spouses a share of their deceased spouse's estate and invalidated waivers like Helena's.[222] Four years after that, John executed a codicil, which republished his will.[223] In turn, this triggered the new law, voiding the prenuptial agreement and entitling Helena to a statutory minimum inheritance from John's estate.[224] The beneficiaries of John's will argued that applying the statute violated due process by "retroactively destroy[ing]" the property rights they had acquired through the prenuptial agreement.[225] Similarly, John's executor contended that the state law infringed *John's* property rights in the contract.[226] The Court disagreed on both counts.[227] In a sweeping passage, it implied that states have total dominion over the field of inheritance:

> 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

627 (1896) ("[T]he right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control.").

220. 314 U.S. 556 (1942); *see id.* at 562 ("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.").

221. *Id.* at 558. The statute required prenuptial agreements to be signed by witnesses, and Helena's was not. *See id.* at 559.

222. *See id.* at 558.

223. *Id.* at 559–60.

224. *See id.* at 560.

225. Brief of Appellants Edward McGlone & Robert McGlone, Infants, by Ralph L. Kaskell, Jr., Special Guardian at 9, Irving Tr. Co. v. Day, 314 U.S. 556 (1942) (No. 51), 1941 WL 76708.

226. *See* Brief of Appellants Irving Trust Company and Thomas F. McGlone, Jr., as Executors of the Est. of John J. McGlone, Deceased, Thomas F. McGlone and Rose McGlone Meredith at 31, *Irving Tr. Co.*, 314 U.S. 556 (No. 51), 1941 WL 76707.

227. *See Irving Trust Co.*, 314 U.S. at 562.

> limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.[228]

But in 1987, the Court muddied the waters in *Hodel v. Irving*.[229] Land allotted by Congress in the nineteenth century to Native Americans had splintered over time into an ever-growing number of concurrently-owned shares managed in trust by the United States Department of the Interior.[230] To reverse this process, Congress passed the Indian Land Consolidation Act,[231] which declared that certain highly-fractionated interests in the reservation would escheat to the tribe and thus could not be transmitted by will or intestacy.[232] The Court held that the statute violated the Fifth Amendment's Takings Clause because it denied owners a cherished property right without providing just compensation:

> [T]he character of the Government regulation here is extraordinary [because it] . . . destroy[s] "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.[233]

Then, in a confusing maneuver, the Court cited *Irving Trust* and "reaffirm[ed] the continuing vitality of the long line of cases recognizing the States' . . . broad authority to adjust the rules governing the descent and devise of property."[234]

Courts and scholars have resolved this conflict by construing *Hodel* narrowly. The most common understanding is that *Hodel* only deems the *wholesale elimination* of the ability

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228. *Id.* The Court also held that John's executor could not complain about the impact of the statute because John had set its wheels in motion by signing the codicil. *See id.* at 562–63. As the Court explained, if John had forfeited any rights, "it was only because he exercised further testamentary privileges with a condition attached, and thereby brought those consequences unwittingly or intentionally upon himself and his estate." *Id.* at 563.

229. 481 U.S. 704 (1987).

230. *Id.* at 708.

231. 25 U.S.C. §§ 2201–2221.

232. *Hodel*, 481 U.S. at 709.

233. *Id.* at 716 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

234. *Id.* at 717.

to convey an asset after death to be a deprivation of "property."[235] Indeed, the Indian Land Consolidation Act did not merely invalidate bequests of interests in land; instead, it also prohibited owners from transmitting these parcels through intestacy.[236] Thus, a federal judge in Wisconsin has read *Hodel* "as an attempt to preserve the holding in *Irving Trust*, while making clear that total and 'extraordinary' restrictions will not pass muster."[237] Likewise, Ronald Chester has argued that although *Hodel* appears to be "revolutionary," its impact "may, upon further reflection, be minor."[238]

At first blush, this interpretation of *Hodel* would seem to doom any attempt to impose procedural due process principles on capacity contests. Striking down a will made by an impaired testator does not prevent her from conveying her possessions after death. Indeed, even if the rule invalidates a person's most recent will, it permits her to pass her estate under a previous instrument or through the laws of intestate succession.[239] Because it leaves open other avenues for the posthumous transmission of assets, it does not affect a constitutionally protected property right.[240]

Nevertheless, this conclusion is hardly airtight. For starters, *Hodel* is a takings case, and courts have generally defined "property" more narrowly for takings purposes than

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235. *See* Ronald Chester, Essay, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of* Hodel v. Irving, 24 SW. U. L. REV. 1195, 1209 (1995)

236. *See Hodel*, 481 U.S. at 709. Moreover, the Court observed that the relatively low value of the interests meant that owners were extremely unlikely to use "will substitutes" such as trusts. *See id.* at 716. Thus, the statute effectively "total[l]y abrogat[ed]" the right to pass the asset after death. *Id.* at 717.

237. Klauser *ex rel.* Whitehorse v. Babbitt, 918 F. Supp. 274, 280 (W.D. Wis. 1996).

238. Chester, *supra* note 235, at 1199, 1209 (1995); *cf.* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1288 (1999) (criticizing *Hodel* and noting that the decision offers "no direct discussion of why the right to bequeath is a constitutionally protected right").

239. *See Chester*, *supra* note 235, at 1208 (discussing will substitutes).

240. *See id.* at 1209 (noting that the Court in *Hodel* did not say that complete abrogation of descent and devise rights were unconstitutional, but that complete abolition of certain property *may* constitute a taking).

when evaluating due process.[241] Thus, it is possible that state regulations of testation would not trigger the Takings Clause but *would* constitute the deprivation of a property right under the Due Process Clause.

Moreover, *Irving Trust* coexists uneasily with the Court's more recent due process jurisprudence. Shortly after deciding *Irving Trust*, the Justices expanded the definition of constitutional "property," announcing that it included all "legitimate claim[s] of entitlement."[242] Having embraced this broader concept, the Court later held that the government could not deny a person public employment,[243] welfare benefits,[244] social security payments,[245] and a driver's license[246] without offering proper procedures. Likewise, lower courts have recognized property rights in a motley assortment of things, such as mineral rights[247] and pawnshop goods.[248] According to the modern doctrine, even a single stick in the proverbial bundle of rights associated with property ownership, such as the power to use or exclude, could constitute a property interest entitled to the protections of procedural due process.[249] To give but one example, the Sixth Circuit held that a spouse's possessory rights

241. *See* Burns v. Pa. Dep't of Corr., 544 F.3d 279, 285 n.3 (3d Cir. 2008) ("[W]hile certain property interests may not be taken without due process, they may be taken without just compensation." (quoting JOHN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWER § 9.04 (Supp. 2001))).

242. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); *see* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 956 (2000) (explaining that "procedural due process protection cannot be confined to property in the common law sense").

243. *See* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 556 (1956).

244. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

245. *See* Richardson v. Perales, 402 U.S. 389, 401 (1971).

246. *See* Bell v. Burson, 402 U.S. 535, 539 (1971).

247. *See* Wilson v. Bishop, 412 N.E.2d 522, 525 (Ill. 1980).

248. *See* Fla. Pawnbrokers & Secondhand Dealers Ass'n v. City of Fort Lauderdale, 699 F. Supp. 888, 890 (S.D. Fla. 1988); Landers v. Jameson, 132 S.W.3d 741, 751 (Ark. 2003).

249. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673, (1999) ("The hallmark of a protected property interest is the right to exclude others."); Connecticut v. Doehr, 501 U.S. 1, 12 (1991) ("[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.").

in the corneas of her deceased husband rose "to the level of a 'legitimate claim of entitlement' protected by the due process clause."[250] If these abstract and ephemeral rights qualify for procedural due process protection, it is hard to see why the power to execute a will would not.

Finally, even if *Irving Trust* remains good law, it does not speak to whether testation is a property right under state constitutions. At least two states, Florida and Wisconsin, recognize a constitutional "right to devise property."[251] Both state constitutions also contain due process clauses that mirror their federal counterpart.[252] Thus, in these jurisdictions, the government must offer testators sufficient process before striking down a will.

In sum, will-making may be a property right that deserves due process protection. As we discuss next, this raises the question of whether the worst evidence tradition passes constitutional muster.

2. Process

If a property interest rises to the level of constitutional concern, courts need to define what type of process is due before the government can strip an owner of it. In most cases, people are entitled to notice and a hearing before the deprivation.[253] These procedures must be "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action

250. Brotherton v. Cleveland, 923 F.2d 477, 480, 482 (6th Cir. 1991).

251. *See* Shriners Hosps. for Crippled Child. v. Zrillic, 563 So. 2d 64, 67 (Fla. 1990); *In re* Beale's Est., 113 N.W.2d 380, 383 (Wis. 1962) ("[T]he right to make a will is a sacred and constitutional right, which right includes a right of equal dignity to have the will carried out.").

252. *See* McRae v. Douglas, 644 So. 2d 1368, 1372 (Fla. Dist. Ct. App. 1994) ("An individual may, in a public employment context, establish entitlement to procedural due process under the United States and Florida Constitutions . . . ."); State v. Laxton, 647 N.W.2d 784, 789 n.8 (Wis. 2002) ("The Due Process Clauses of the United States and Wisconsin Constitutions protect both substantive and procedural due process rights.").

253. *See* Leger v. Adams, No. 932589A, 1994 WL 879587, at *3 (Mass. Super. Ct. July 15, 1994), *aff'd sub nom.* Leger v. Comm'r of Revenue, 654 N.E.2d 927, 930 (Mass. 1995) (emphasizing that due process requires that an individual receive notice and a hearing before governmental deprivation of property).

and afford them an opportunity to present their objections."[254] This section plunges into the murky waters of what steps the state must take before allowing courts to invoke the doctrine of testamentary capacity to set aside a will.

The analysis here begins with the Court's seminal opinion in *Mathews v. Eldridge*.[255] The Social Security Administration informed George Eldridge that his disability benefits were ending.[256] Eldridge sued, arguing that these payments were property and that terminating them without an evidentiary hearing violated his due process rights.[257] The Court explained that claims of deficient process revolved around three questions:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[258]

Applying these factors, the Court found that Eldridge's right to benefits was "significant," reasoning that if he was disabled, it would be hard for him to find an alternative source of income.[259] But the Court also concluded that a hearing would add little value.[260] As the Court saw it, benefits assessments could easily be decided on the papers, because they hinged on "'routine, standard, and unbiased medical reports by physician specialists,' concerning a subject whom they have personally examined."[261] Finally, the Court observed that it would be expensive and burdensome for the government to offer

254. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

255. 424 U.S. 319 (1976).

256. *Id.* at 323–24.

257. *Id.* at 324–25. Because Eldridge sued the federal government, he invoked the Due Process Clause of the Fifth Amendment. *Id.* at 323.

258. *Id.* at 335.

259. *Id.* at 342–43.

260. *Id.* at 343–47.

261. *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).

full-fledged hearings every time it cut off disability benefits.[262] For these reasons, the Court rejected Eldridge's claim.[263]

Under *Mathews*, there is a plausible argument that the worst evidence tradition is procedurally defective when compared to a regime that offers testators the option of living probate. The first prong—the private interest at stake—favors testators. In general, "[t]he deprivation of real or personal property involves substantial due process interests."[264] Of course, as noted, invalidating a will only strips a person of a single arrow in the quiver of property rights. Yet for the purposes of *Mathews*, courts hold that people have strong interests in discrete aspects of ownership, such as "the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents."[265] Moreover, there is no shortage of flowery judicial rhetoric about the importance of testation. Indeed, the Wyoming Supreme Court has gone so far as to declare that executing "a last will and testament is the most solemn and sacred act of a man's life."[266] For these reasons, the scale tips against posthumous capacity litigation.

The second *Mathews* factor, which focuses on value of additional procedures, also militates against the worst evidence tradition. *Mathews* itself is instructive. As noted, the Court held that a hearing was not necessary because decisionmakers were privy to reports from doctors who had seen the claimant for the purpose of evaluating her eligibility for disability benefits.[267] But our California study suggests that disputes over testamentary capacity almost never feature such rich factual records.[268] Instead, litigants and judges usually must piece together the testator's mental status from secondhand accounts

262. *Id.* at 347.

263. *Id.* at 349.

264. Krimstock v. Kelly, 306 F.3d 40, 61 (2d Cir. 2002).

265. United States v. James Daniel Good Real Prop., 510 U.S. 43, 54 (1993); *see* Serrano v. Customs & Border Patrol, 975 F.3d 488, 497 (5th Cir. 2020) ("An individual has an important interest in the possession of his or her motor vehicle . . . .").

266. Brimmer v. Hartt (*In re* Est. of Hartt), 295 P.2d 985, 1002 (Wyo. 1956).

267. Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

268. *See supra* notes 186–194 and accompanying text.

and proof from before or after the execution of the will.[269] By contrast, living probate would permit the factfinder to assess the testator in person and in real time. Arguably, then, waiting until a testator dies "creates an unacceptable risk of error."[270]

Finally, the third *Mathews* inquiry, which looks at the cost to the government of supplying the extra procedures, is indeterminate. On the one hand, state courts are underfunded,[271] and living probate would expose them to additional salvos of contests. Making matters worse, living probate has the potential to increase the consumption of judicial resources. A ruling upholding the will of a living testator may only be temporary because the testator remains free to revoke or amend the instrument.[272] In turn, this creates a risk that probate courts would need to decide multiple cases involving the same individual. On the other hand, there is anecdotal evidence that living probate petitions are rarely filed in jurisdictions that permit them,[273] which raises the possibility that the burden on courts would be low and possibly offset by a corresponding reduction in the number of posthumous will contests. Without better data, it is hard to predict the outcome of the *Mathews* balancing.

There are also three wild cards at play. First, precedent from the guardianship context might foreclose a procedural due process challenge to the worst evidence tradition. Recall that the Court held in *Craft v. Simon* that a guardianship proceeding can occur in the person under guardianship's absence so long as a guardian ad litem represents the person under guardianship's

269. *See supra* notes 186–194 and accompanying text.

270. *James Daniel Good Real Prop.*, 510 U.S. at 55.

271. *See* Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. RICH. L. REV. 277, 277–78 (2020) (noting that state officials warn that "inadequate funding has led to undue court delays, case backlogs, and poorly decided cases").

272. *See* Kristen A. Sluyter, *Probate Law*, 28 U. ARK. LITTLE ROCK L. REV. 399, 406 (2006) ("Unless a trust expressly states that it is irrevocable, the settlor may revoke or amend the trust.").

273. *See* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 171–75 (1990) (noting that practitioners in states that allow living probate report that parties virtually never invoke the procedure).

interests.[274] Probate litigation also features litigation by surrogate.[275] The beneficiaries—who inherit if the will is valid—have strong incentives to defend the testator's capacity. Arguably, then, even if the testator is not in the courtroom, third parties can vindicate her opportunity to be heard.

Second, it is not clear that deceased testators *have* due process rights. The relationship between the Constitution and the dead is ridiculously confusing. Several federal courts have broadly declared that the constitutional rights "of a person cannot be violated once that person has died."[276] These cases tend to involve personal representatives of deceased victims of police violence alleging that officials covered up the killing.[277] Judges reject these claims on the grounds that "[a]fter death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived."[278] In turn, this logic suggests that the worst evidence tradition is immune from a constitutional attack. After all, the state does not decide whether to enforce a will until the testator is in the grave.

There is also authority that cuts the other way. For starters, *Hodel* recognized a posthumous constitutional violation by holding that the federal government impermissibly took

274. Craft v. Simon, 182 U.S. 427, 436–37 (1901); *see supra* notes 65–69 and accompanying text.

275. *See* Kohn, *supra* note 104, at 321–22.

276. Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980).

277. *See, e.g.*, Judge v. City of Lowell, 160 F.3d 67, 76 (1st Cir. 1998), *overruled on other grounds by* Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004); Ford v. Moore, 237 F.3d 156, 165 (2d Cir. 2001); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979); Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); *Silkwood*, 637 F.2d at 749.

278. Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979); *see* Judge v. City of Lowell, 160 F.3d 67, 76 n.15 (1st Cir. 1998) ("[W]e note that all of the actions that form the basis of Judge's claims occurred subsequent to Weems's death. At that time, Weems had no rights of which he could be deprived."); Ford v. Moore, 237 F.3d 156, 165 (2d Cir. 2001) ("Even if there were a viable claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's."); Est. of Conner by Conner v. Ambrose, 990 F. Supp. 606, 618 (N.D. Ind. 1997) ("It is clear that § 1983 does not provide a cause of action on behalf of a deceased based upon alleged violations of the deceased's civil rights which occurred after his death."). *But see* Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1479–86 (2020) (criticizing these decisions).

decedents' property without just compensation.[279] Similarly, courts in the District of Columbia, Florida, Montana, Ohio, and Pennsylvania have held that mortmain statutes violated the Equal Protection Clause.[280] Mortmain legislation invalidates charitable bequests made within a set time—often about a month—before the testator's death.[281] These laws "were intended to require gifts to charity to be made with proper deliberation and at a time when the testator was in at least reasonably good physical and mental condition."[282] But as judges recognized, they spawn such arbitrary results that they lack a rational basis:

> The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days.[283]

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279. *See supra* notes 229–233 and accompanying text. There is a way to square *Hodel* with the police cover-up cases. The latter involve claims under 42 U.S.C. § 1983, which only applies to "persons." Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979). As the Ninth Circuit has opined, "the term 'person', as used in a legal context, defines a living human being and excludes a corpse or a human being who has died." Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979). Conversely, "[t]he Fifth Amendment's Takings Clause is self-executing," which means that "[a] takings plaintiff is not required to invoke § 1983." Devillier v. Texas, No. 3:20-CV-00223, 2021 WL 1200893, at *4–5 (S.D. Tex. Feb. 22, 2021), *report and recommendation adopted*, No. 3:20-CV-00223, 2021 WL 1199369 (S.D. Tex. Mar. 30, 2021). Because there is no requirement that a takings plaintiff be a "person," a decedent's estate can pursue such a claim.

280. *See In re* Cavill's Est., 329 A.2d 503, 505–06 (Pa. 1974); Est. of French, 365 A.2d 621, 623–24 (D.C. 1976); Shriners Hosps. for Crippled Child. v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990); *In re* Kinyon's Est., 615 P.2d 174, 175 (Mont. 1980); Shriners' Hosp. for Crippled Child. v. Hester, 492 N.E.2d 153, 156 (Ohio 1986).

281. *See* Decker v. Vreeland, 115 N.E. 989, 990 (N.Y. 1917) (applying New York's mortmain statute); G. Stanley Joslin, *Florida's Charitable Mortmain Act*, 7 MIA. L.Q. 488, 488–89 (1953) (describing mortmain statutes in California, the District of Columbia, Georgia, Idaho, Iowa, Maryland, Mississippi, Montana, New York, Ohio, and Pennsylvania).

282. GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326, at 566–67 (2d ed. 1977).

283. *In re* Cavill's Est., 329 A.2d 503, 505–06 (Pa. 1974).

Even though mortmain legislation does not apply until the court carries out the will, some of these opinions held that the statutes deprived *testators* of equal protection.[284] Thus, these cases create further uncertainty by implying that constitutional rights can survive death.

Third, conceptualizing testation as a property right would create mind-bending logistical problems. As noted, courts would need to give testators notice and a hearing before refusing to enforce their last wishes. Arguably, this mandate would apply not only to incapacity contests, but to the entire sprawling universe of rules that can nullify a will, including fraud, duress, undue influence, and violation of the execution formalities.[285] Fulfilling this duty would be close to impossible. Judges could not give individualized notice: during someone's life, they have no way of knowing that she *has* made a will—let alone that a disappointed heir is going to try to overturn it. Thus, the government would need to fall back on the theory that testators who do not take advantage of living probate waive their due process rights.[286] But because "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts," this assertion is a stretch.[287] A testator's failure to invoke an arcane procedural option hardly seems like an informed choice. Accordingly, rather than open this Pandora's Box, a court would likely hold that testators lack procedural due process rights.

To conclude, a procedural due process challenge to the worst evidence tradition would face major barriers. Yet it is also worth observing that the worst evidence tradition is a far cry from the procedures courts generally offer before depriving an owner of a property right. In the next section, we pivot from this thought

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284. *See In re* Kinyon's Est., 615 P.2d 174, 176 (Mont. 1980). *But cf.* Est. of French, 365 A.2d 621, 624 (D.C. 1976) (concluding that a mortmain statute violated the equal protection rights of the will's beneficiaries).

285. *See, e.g.*, *In re* Saenger's Est., 335 A.2d 601, 602 (N.J. Prob. Div. 1975) (describing the formalities required to execute a valid will); Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 244 (2019) ("[F]raud, duress, and undue influence all involve a wrongdoer undermining the testator's freedom of disposition, so that the estate plan described in a will reflects the wrongdoer's intent rather than the testator's intent . . . .").

286. Due process rights are indeed "subject to waiver." D.H. Overmyer Co. of Ohio v. Frick Co., 405 U.S. 174, 185 (1972).

287. Brady v. United States, 397 U.S. 742, 748 (1970).

experiment to the more practical topic of will-making through SDM.

B. *Supported Decision-Making (SDM)*

As SDM continues to spread, questions are likely to arise about how it intersects with the doctrine of testamentary capacity. This section evaluates three such issues. First, it contends that SDM statutes allow supporters to assist principals with estate planning. Second, it claims that the nondelegation rule does not bar this species of third party will-making. And third, it briefly explores whether SMD should serve as a substitute for the traditional requirement of capacity.

Although SDM statutes do not expressly address testation, they seem to include it as a permissible activity. Most provisions contain expansive language that allows supporters to "[h]elp the principal access, obtain, and understand any information that is relevant to any given life decision, including . . . financial[] . . . decisions."[288] Some even authorize support with "managing income and assets"[289] and "[l]egal affairs."[290] Thus, if the parties want, they can work together on estate planning.

However, there is friction between the nondelegation rule and the use of SDM for will-making. As noted, the nondelegation principle prohibits both guardians and agents acting under powers of attorney from making proxy wills for impaired testators.[291] Because the rule reflects the view that "the power to make a will is personal,"[292] it might also prevent supporters from aiding testators. There is a thin line between a guardian or agent dictating a will for a person with CIDD and a supporter shepherding the person through the estate planning process.

But for several reasons, courts should not extend the nondelegation rule to SDM. For one, nondelegation laws are context specific. In the estate planning setting, the

288. DEL. CODE ANN. tit. 16, § 9406A (2021).

289. ALASKA STAT. § 13.56.160(2) (2021); WASH. REV. CODE § 11.130.010(38) (2021) ("personal and financial decisions").

290. N.D. CENT. CODE § 30.1-36-01(e) (2021); 42 R.I. GEN. LAWS § 42-66.13-3(vi) (2021) ("[l]egal assessments and advisement").

291. *See* Brashier, *Ghostwritten*, *supra* note 26, at 1811.

292. *In re* Est. of Garrett, 100 S.W.3d 72, 76 (Ark. Ct. App. 2003).

nondelegation rule applies specifically to proxy will-making by guardians and agents acting under a power of attorney.[293] But because SDM is an *alternative* to both guardianships and powers of attorney, supporters do not fall within the scope of these rules.[294] Similarly, the nondelegation doctrine only precludes guardians and agents from making wills *for* individuals with CIDD.[295] Indeed, the rule stops third parties from substituting their judgment for the testator's or determining what is in the testator's best interest.[296] But in SDM, principals make their *own* choices.[297] Thus, wills made with support violate neither the letter nor the spirit of the nondelegation rule.

There are other compelling reasons to limit the nondelegation principle. The doctrine is notoriously "odd"[298] and "illogical."[299] For starters, because guardians and agents generally enjoy the power to make crucial decisions for wards and principals—including giving away property or placing it into trust—prohibiting them from helping people with CIDD give away property in a will or a testamentary trust created by a will is anomalous.[300] In fact, this suspicion of proxy wills is exactly backwards. Lifetime transfers are more perilous for people with CIDD than testamentary instruments. An unwise inter vivos conveyance can deplete an owner's bank account and leave her destitute, but a will cannot impoverish anyone. Thus, because the nondelegation rule lacks a solid policy foundation, it should not govern new settings like SDM.

A final area of uncertainty is whether support confers capacity on a testator who would otherwise lack it. Only three

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293. *See supra* notes 154–161 and accompanying text.

294. *See* Guardianship of A.E., 552 S.W.3d 873, 887 (Tex. App. 2018) (discussing the purpose of SDM statutes).

295. *See supra* notes 154–161 and accompanying text.

296. *See supra* notes 154–161 and accompanying text.

297. SDM is thus analogous to decisions that refuse to apply the nondelegation doctrine when an agent "merely acted as a conduit or messenger between the decedent and [the estate planner] concerning the decedent's wishes." *Est. of Garrett*, 100 S.W.3d at 76. In both situations, the testator remains the ultimate decisionmaker.

298. Boni-Saenz, *supra* note 154, at 1246.

299. Brashier, *Ghostwritten*, *supra* note 26, at 1836.

300. *See supra* notes 156, 160 and accompanying text.

SDM statutes seem to address whether the process is "capacity boosting." Alaska answers that question in the affirmative by declaring that "a principal is considered to have capacity even if the capacity is achieved by the principal receiving decision-making assistance."[301] At the opposite pole, statutes in Delaware and Nevada authorize SDM if the principal "does not harm others and *is capable of making decisions about such matters*."[302] The italicized language suggests that SDM does not lift principals above the capacity threshold; rather, it can only help those who already possess capacity to make better decisions. Unfortunately, the remaining SDM laws do not say whether "an individual using a supporter is considered to be competent."[303]

Both approaches are defensible. On the one hand, deeming support to be capacity enhancing would expand access to an important ritual. Testation is valuable for financial and emotional reasons.[304] Indeed, it permits decedents to provide for their loved ones and serves as a form of self-expression.[305] Thus, the law should do everything in its power to open this door for people with CIDD. Similarly, a kind of informal SDM is already baked into estate planning. In a typical estate planning consultation, attorneys help testators plan for contingencies, such as the possible death or birth of named beneficiaries and the potential acquisition or disposition of property by the testator after the will's execution. By providing legal advice regarding those critical aspects of estate planning, attorneys support the decision-making of testators who, in turn, are better

301. ALASKA STAT. § 13.56.150(d) (2021).

302. DEL. CODE ANN. tit. 16, § 9402A(b)(1) (2021) (emphasis added); NEV. REV. STAT. § 162C.100(2)(a) (2021) (emphasis added).

303. Phillips, *supra* note 18, at 637.

304. *See, e.g.*, Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 147 (2012) (describing the therapeutic aspects of the estate planning process).

305. *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992) (describing the benefits of testation); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012) (cataloguing the downsides of intestacy); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 66 (2012) (arguing that testation is a final form of commentary about the world and loved ones); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 395 (2011) (describing benefits of including expressive language in wills).

able to understand the ramifications of their choices. In addition, when a client is impaired, it is common for her "family members or other persons [to] participate in discussions with the[ir] lawyer."[306] Thus, validating wills made via SDM would merely acknowledge what is often the case: that third parties provide scaffolding for testators.

On the other hand, treating support as a substitute for capacity could have serious downsides. For one, even proponents of SDM acknowledge that it "could be used as a means of financial exploitation."[307] Indeed, creating incentives for SDM will-making might permit malicious supporters to hijack a testator's dispositive choices.[308] At bare minimum, courts would need to perform the thankless task of distinguishing between legitimate assistance and rank undue influence. Moreover, even well-intentioned third parties may not be able to help principals grasp the fundamentals of will-making. Although research on SDM has only just begun, there is some evidence that it can be more effective for routine choices than for complex ones.[309] Thus, in some cases, deeming support to "cure" testamentary incapacity would be a fiction.

Accordingly, wills made through SDM may be on the horizon. Properly understood, the nondelegation rule should not prevent supporters from helping testators. Only time will tell whether SDM does (or should) displace the conventional test for capacity and, if it does, whether wrongdoers will be able to exploit SDM to unduly influence a principal's estate plan. Next, we discuss two additional areas of doctrinal uncertainty.

C. *Jurisdictional Splits*

As mentioned, states disagree about who are the natural objects of the testator's bounty and which capacity test to apply

306. MODEL RULES OF PRO. CONDUCT r. 1.14 & cmt. 3 (AM. BAR ASS'N 2016).

307. Megan S. Wright, *Dementia, Autonomy, and Supported Healthcare Decisionmaking*, 79 MD. L. REV. 257, 307 (2020).

308. *See id.* at 307–08.

309. *See* Terry Carney et al., *Paternalism to Empowerment: All in the Eye of the Beholder?*, DISABILITY & SOC'Y., July 12, 2021, at 14–17, https://perma.cc/LQS4-WV6Q (PDF) (reviewing data from interviews with people in Australia and raising questions about whether SDM facilitated informed decision-making when applied to complex choices such as whether to undergo a medical procedure).

to nonprobate transfers.[310] This section tries to clarify these issues.

1. Natural Objects

One perennial problem in capacity litigation is the meaning of the phrase "natural objects of the testator's bounty."[311] This section argues that courts should only find a will to be "unnatural" when there is clear and convincing proof that it divides property in an irrational fashion.

There are two main definitions of "natural objects." The dominant view is what we call the "intestacy" theory. Courts in this camp hold that the phrase "is a euphemistic way of defining 'next of kin,' or those who would take in absence of a will."[312] Seen through this prism, a testator's exclusion of blood relatives is "strong evidence[] of a derangement in one department in his mind."[313] However, other judges follow what we refer to as the "relationship" theory and hold that "natural objects" are "those people related to [the testator] by ties of blood *or affection*."[314] As the Indiana Supreme Court explained:

> By natural object is not meant the legal object recognized by the law of descent, for the power and purpose to disregard some canon of descent is necessarily implied in the making of any will . . . . The jury is to determine, not what the

310. *See supra* Part II.A.

311. *See supra* notes 126–130 and accompanying text.

312. *In re* Est. of Hubbs, No. 102,875, 2011 WL 588493, at *5 (Kan. Ct. App. Feb. 11, 2011); Page v. Phelps, 143 A. 890, 894 (Conn. 1928); *In re* Est. of Strozzi, 903 P.2d 852, 857 (N.M. Ct. App. 1995).

313. Johnson v. Moore's Heirs, 11 Ky. 371, 374 (1822) (setting aside a will that devised property to decedent's girlfriend, an enslaved person, because disinheritance of siblings was proof of incapacity).

314. *In re* Est. of Roeseler, 679 N.E.2d 393, 401 (Ill. App. Ct. 1997) (emphasis added); *see In re* Sheldon's Will, 16 N.Y.S. 454, 460 (Surr. Ct. 1891), *aff'd*, 21 N.Y.S. 477 (Sup. Ct. 1892) (mem.), *aff'd*, 36 N.E. 343 (N.Y. 1894) (mem.) ("The natural objects of a testator's bounty are not always those whom the statute declares shall take the property of an intestate, but may depend upon the life they have lived . . . ."); Goddard v. Dupree, 76 N.E.2d 643, 645 (Mass. 1948); *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1 (AM. L. INST. 2003) ("Relatives by affinity do not take by intestacy but could be counted as natural objects of a testator's bounty in the case in which the testator was close to them . . . . The natural objects of the testator's bounty might include nontraditional as well as traditional family members.").

> testator would probably have done if governed by fixed canons of descent or any law of human contrivance, but what he might, under all the evidence.[315]

In general, the relationship theory is superior to the intestacy theory. For starters, the intestacy theory is anachronistic. Decades ago, in the heyday of the nuclear family, a testator's choice to disinherit her heirs might have raised a red flag about her cognition.[316] Indeed, failing to provide for blood relatives—the people whom a testator presumably loved—could betray confusion about the testamentary act.[317] But today, intestacy statutes are badly outdated. Although so-called "non-traditional" families are fast becoming the norm,[318] intestacy laws generally exclude "stepchildren, unmarried partners, nonbiological children, and multigenerational households."[319] Thus, leaving assets to non-heirs is not necessarily probative of anything—let alone incapacity.[320]

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315. Breadheft v. Cleveland, 110 N.E. 662, 663 (Ind. 1915).

316. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3 (AM. L. INST. 2003) (describing the decision to "abruptly and without apparent reason disinherit[] a faithful and deserving family member" as one "that a reasonable person would regard . . . as unnatural, unjust, or unfair").

317. *See* M.C. Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1, 20 (1957) ("When a testator passes over the natural objects of his bounty in favor of an outsider, it is not uncommon for courts to characterize his action as harsh or unnatural or irrational, treating it as corroborative evidence of lack of testimentary [sic] capacity.").

318. For instance, in 1950, more than three-quarters of American families consisted of married, opposite-sex spouses with genetic children, but by 2010, that figure fell to less than half. *See* Katherine M. Arango, Note, *Trial and Heirs: Antemortem Probate for the Changing American Family*, 81 BROOK. L. REV. 779, 782 (2016); *see also* Megan Doherty Bea & Emily S. Taylor Poppe, *Marginalized Legal Categories: Social Inequality, Family Structure, and the Laws of Intestacy*, 55 L. & SOC'Y REV. 252, 256 (2021) (explaining why "the kinds of family structures deprioritized by the laws of intestacy are quite prevalent").

319. Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 350 (2019).

320. *See* Goble v. Grant, 3 N.J. Eq. 629, 636 (N.J. Prerog. Ct. 1835) ("Very often, the object of making a will is to discriminate, or to exclude and give preferences; and not unfrequently, the reasons for so doing are known only to the testator . . . .").

The intestacy theory also penalizes "cultural minorities."[321] A related critique of the doctrine of undue influence is instructive. A hallmark of undue influence is that a testator makes an "unnatural disposition."[322] As with testamentary capacity, "unnaturalness" for the purposes of undue influence generally means a bequest "to one who is not related by blood or marriage."[323] But a parade of scholars has persuasively argued that this rubric tends to cloud the legitimacy of wills that defy societal norms.[324] Likewise, using intestacy as the yardstick for "natural objects" singles out testators who lack families, seek to reward caregivers, or are involved in intimate partnerships.[325]

The relationship theory, in contrast, is more consistent with the phrase "natural objects." As noted, in the early nineteenth century, the law asked whether the testator knew the "objects" of her bounty,[326] a concept that most courts understood to mean

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321. *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, 275 n.1 (1999). Indeed, as one probate judge admitted, if "he and his colleagues . . . consider[] the provisions in the instrument offensive, it is denied probate." Edwin Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMP. L.Q. 231, 240, 242 (1962).

322. *In re* Est. of Moretti, 871 N.E.2d 493, 502 (Mass. Ct. App. 2007).

323. *In re* Ingersoll Tr., 950 A.2d 672, 698 (D.C. 2008).

324. *See* Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 201 (1989) (observing that the undue influence doctrine "often functions . . . as a barometer of society's mores"); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997) (arguing that "the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms"). Admittedly, other commentators have also linked the pernicious impact of the "unnatural disposition" element of undue influence to the "natural objects" prong of incapacity. *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210–11 (2001) ("Bequests to individuals other than 'natural objects of the decedent's bounty'—essentially family members—raise judicial red flags, even when the beneficiary was the decedent's dependent or primary caregiver."); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243 (1996) (noting that courts apply an "implicit presumption of invalidity where a will benefits non-relatives").

325. *See supra* notes 318–319.

326. *See* Den v. Vancleve, 5 N.J.L. 589, 654 (1819), *overruled in part by* Meeker v. Boylan, 28 N.J.L. 274 (1860) ("A man enfeebled by age or disease must always be under the care, protection and government of somebody; this somebody must generally be one of his children who lives with him . . . and who will, almost necessarily, be one of the objects of his bounty . . . ."); Clarke

her "immediate family."[327] Yet some courts struggled with fact patterns where the testator had snubbed heirs who seemed undeserving of an inheritance.[328] The testator's decision to exclude estranged heirs may have been entirely rational and yet, under the intestacy theory, the disinheritance of any heir could be considered evidence of the testator's incapacity.[329] To uphold these sensible-seeming wills, judges made a subtle change to the test by inserting the word "natural" before "objects" and therefore expanded the relevant class to "persons who formed, for the testator, the emotional equivalent of a family."[330] Accordingly, the "natural objects" rule was initially designed to reject the intestacy theory and examine whether the testator and the beneficiary "had developed a close and affectionate relationship."[331] But while most jurisdictions later included the language of "natural objects" in their test for testamentary capacity, they did so without adopting the

v. Fisher, 1 Paige Ch. 171, 173 (N.Y. Ch. 1828) ("He must be of sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to . . . the relative claims of the different persons who are or might be the objects of his bounty.").

327. Turner v. Cheesman, 15 N.J. Eq. 243, 243 (Prerog. Ct. 1857); Robert E. Mensel, *Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397, 424 (2005) ("Derangement in this context was defined in counterpoint to the idealization of the family underlying the cult of domesticity . . . .").

328. *See* Mensel, *supra* note 327, at 426 ("Where members of the conjugal family, or the nearest relatives, had behaved 'unnaturally' the courts plumbed the record for a 'family' that served the emotional role of a conjugal family, and identified the natural objects of bounty accordingly."); *cf.* Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 1032–33 (2006) (explaining how judges during this time were torn between respecting individual autonomy and striking down wills that "deviated from the norms of 'natural justice'").

329. *See* Blumenthal, *supra* note 328, at 971 ("[T]hose deemed competent to make a will remained subject to various restraints on their power to dispose of their property. . . . [A] few [states] refused to give effect to 'inofficious' wills absent clear proof of the testator's intent to disinherit his offspring . . . .").

330. Mensel, *supra* note 327, at 424.

331. Reddoch v. Blair, 688 S.W.2d 286, 290 (Ark. 1985) ("A will cannot be said to be unnatural because a testator preferred one for whom she had developed a close and affectionate relationship . . . ." (quoting Abel v. Dickinson, 467 S.W.2d 154, 156 (Ark. 1971))).

relationship theory on which that language is predicated.[332] Thus, in most jurisdictions today, the "natural objects" prong of testamentary capacity refers—illogically, in our view—to the testator's intestate heirs rather than to persons with whom the testator actually maintained close relationships during life regardless of familial status.

This is not to say that the relationship theory is perfect. One of its most glaring deficiencies is its amorphousness.[333] Indeed, it requires a posthumously assembled jury to decide what a rational testator *should have* done with her estate. As such, it indulges in the heroic assumption that strangers can peer back through time and analyze "the respective relative standings of the beneficiary and the contestant to the decedent."[334] As a result, critics argue that it is "infinitely more vague than the standard of the hypothetical 'reasonably prudent man' in negligence cases."[335]

To address this concern, courts should follow the relationship theory but impose a heightened burden of proof. The "unnaturalness" of a will should only matter when there is

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332. *See supra* notes 312–313 and accompanying text.

333. *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 41 (2000) ("[T]he court must determine actual family ties—rather than make a distribution based simply on blood or other legal ties.").

334. *In re* Est. of Sarabia, 270 Cal. Rptr. 560, 564, 609 (Ct. App. 1990) (adopting this standard to define "undu[e] profit[]" in undue influence cases). In addition, giving courts discretion to decide who the testator should have preferred may also "create problems for persons whose behavior and family structure do not fit the prevailing social norms." Gary, *supra* note 333, at 70. Yet this danger may be less acute given recent societal changes that are more accepting of diverse family structures and romantic relationships. *See* June Carbone, *A Consumer Guide to Empirical Family Law*, 95 NOTRE DAME L. REV. 1593, 1597 (2020).

335. Green, *Judicial Tests*, *supra* note 39, at 165. At the same time, though, the intestacy theory suffers from a similar flaw. Some jurisdictions that subscribe to the intestacy theory define natural objects as the "descendants, surviving spouse, and parents of the testator." *In re* Nolan's Est., 78 P.2d 456, 458 (Cal. Ct. App. 1938). Under this interpretation, natural objects do not include "[n]ephews, nieces, brothers, sisters, and other collateral heirs." Stormon v. Weiss, 65 N.W.2d 475, 505 (N.D. 1954) (quotation omitted). Yet other judges include cousins as natural objects, although they admit that their status is "not as formidable" as other relatives. *In re* McCarty's Will, 126 N.Y.S. 699, 702–03 (App. Div. 1910). Thus, in its own way, the intestacy theory is ill-defined and open-ended.

clear and convincing evidence that the testator was not capable of identifying her closest relationships or loved ones at the time of will execution. To prevail, a contestant should have to prove the existence of a close relationship to the testator and the testator's inability to recognize the existence of that relationship when she executed the will.

To illustrate this standard more concretely, suppose that a testator had instructed her lawyer to draft a will that left everything to her then-current boyfriend and nothing to her children from a prior marriage. Suppose further that, when asked by the attorney why she wanted to disinherit her children, the testator stated that she had not seen her children in years and they had all but abandoned her. If the testator's stated reasons for disinheriting her children were factually true, then the boyfriend would, in fact, be the natural object of the testator's bounty and the will would not be set aside for lack of testamentary capacity. If, however, the testator's stated reasons were not true such that the testator's children could prove by clear and convincing evidence that, contrary to the testator's representation to her attorney, they had continued to visit and communicate with the testator, then such evidence would rightly call into question the testator's capacity to understand the legal consequences of the estate plan memorialized in her will. The will could then be set aside on grounds of incapacity. Contestants would not prevail under the relationship theory merely by proving that the boyfriend was not an intestate heir or that an objectively rational testator would not have disinherited her children. Rather, contestants would prevail by proving clearly and convincingly (1) the existence of a close relationship and (2) the testator's inability to cognize the existence of that relationship at the time of will execution.

Thus, the relationship theory would abolish the formalism of the intestacy theory while minimizing the risk of judges second-guessing a testator's dispositive choices by subjecting proof of incapacity to the clear and convincing evidence standard. The relationship theory would also reinforce the value of independent legal advice in the estate planning process and underscore the need for attorneys to thoroughly discuss the testator's reasons for selecting each will beneficiary or, as relevant, the reasons for excluding individuals who might expect to inherit from the testator.

Finally, states could easily implement this proposal. As we mentioned above, some jurisdictions already require the contestant to demonstrate incapacity by clear and convincing evidence.[336] Thus, lawmakers or courts in these regions would only need to adopt the relationship theory. Alternatively, other states could either switch to a clear and convincing standard for each element of the incapacity test—a change that would align testamentary capacity with the standard of proof in guardianship cases[337]—or simply raise the bar for the "natural objects" component.

2. Capacity and Nonprobate Transfers

Lawmakers and courts are also divided over which capacity test governs nonprobate instruments.[338] This section contends that will substitutes should trigger the rule for testamentary capacity.

The confusion about capacity and nonprobate transfers exists on two levels. At the most basic level, jurisdictions disagree about which capacity rule applies to certain types of transfers. For example, the Restatement (Second) of Trusts and some courts use contractual capacity to assess all trusts.[339] However, the Restatement (Third) of Trusts, the Uniform Trust Code, and many states relax the standard to testamentary capacity for revocable trusts.[340]

But this divergence also goes deeper. Traditionally, courts calibrated the capacity yardstick by focusing on the type of

336. *See supra* notes 131–134 and accompanying text.

337. *See supra* note 86.

338. *See supra* notes 135–139 and accompanying text.

339. *See* RESTATEMENT (SECOND) OF TRUSTS § 22 (AM. L. INST. 1959) ("A person has capacity to create a trust by making a promise to another person whose rights against the promisor are to be held in trust for a third person, to the extent that he has capacity to make a contract."); *see also supra* note 139 and accompanying text.

340. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(3) (AM. L. INST. 2003); UNIF. TRUST CODE § 601 (UNIF. L. COMM'N 2000) (amended 2010) ("The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."); *Trust Code*, UNIF. L. COMM'N (2022), https://perma.cc/FVX2-N7DC (showing that the UTC has been widely enacted).

transfer (the "formalist" approach).[341] A good illustration is *Ivie v. Smith*,[342] a Missouri Supreme Court decision. Patricia Watson, who suffered from Alzheimer's dementia, amended her revocable trust and the beneficiary designations on her pay-on-death accounts.[343] The state high court analyzed each of these acts differently.[344] On the one hand, the court explained that "[t]he capacity required to make or amend a revocable trust is the same as that required to make a will—'testamentary capacity.'"[345] On the other hand, the court held that "changes to beneficiary designations are matters of contract" and therefore trigger "the standard for contractual capacity, not the standard for testamentary capacity."[346] Accordingly, under the formalist approach, the species of the conveyance dictates the appropriate test.

Lately, though, some jurisdictions have started considering the substantive complexity of the contested transaction rather than the form (the "transactional complexity" approach).[347] For example, in *Andersen v. Hunt*,[348] Wayne Andersen suffered a stroke and then amended his revocable trust to leave his partner, Pauline Hunt, 60 percent of his assets.[349] A California trial court invalidated the revision under the rule for contractual capacity.[350] An appellate panel reversed, reasoning that capacity "must be evaluated by a person's ability to appreciate the consequences of the particular act he or she

341. *See* Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L. ATT'YS J. 303, 304 (2006) ("Different actions require different levels of mental capacity.").

342. 439 S.W.3d 189 (Mo. 2014).

343. *Id.* at 195–97.

344. *Id.* at 200–05.

345. *Id.* at 200.

346. *Id.* at 205.

347. *See* Ware v. Ware, 161 P.3d 1188, 1193 (Alaska 2007) (applying the testamentary capacity standard to a gift); Maimonides Sch. v. Coles, 881 N.E.2d 778, 788 (Mass. Ct. App. 2008) (affirming the trial court for using "the standard for testamentary capacity and not the more demanding test for contractual capacity" when the decedent's "trust instruments were not complex, even though they disposed of property worth millions of dollars").

348. 126 Cal. Rptr. 3d 736 (Ct. App. 2011).

349. *Id.* at 738.

350. *Id.*

wishes to take."[351] Because Andersen's amendment was simple—indeed, it merely changed Hunt's share of the estate—the court held that it was "indistinguishable from a will or codicil," and enforced it under the lower threshold for testamentary capacity.[352] Conversely, in *Lintz v. Lintz*,[353] another California appellate court analyzed an amendment to a revocable trust under contract law.[354] Robert Lintz executed two revocable trusts and more than ten amendments to them.[355] The court of appeals reasoned that these instruments, despite being revocable will substitutes, addressed community property and estate tax issues that "were unquestionably more complex than a will or codicil."[356] Therefore, the transactional complexity approach goes beyond labels by linking the capacity rule to the sophistication of a particular device. A downside of this approach is that the transferor cannot ascertain with certainty which capacity standard will apply to a prospective transaction because the determination of complexity is not made by a court until after the transferor's death.[357]

Ideally, states would find middle ground by applying testamentary capacity to all will substitutes (the "hybrid" approach).[358] Doing so would combine the benefits of the formalist and the transactional complexity approaches. For starters, borrowing the bright lines of the formalist approach would promote clarity and, in turn, cure the transactional complexity approach's biggest flaw.[359] In a setting like estate planning, a categorical rule is superior to a muddy standard that forces the parties to guess what the law is. The hybrid approach

351. *Id.* at 742 (emphasis omitted).

352. *Id.*

353. 167 Cal. Rptr. 3d 50 (Ct. App. 2014).

354. *Id.* at 54–55.

355. *Id.* at 53–54.

356. *Id.* at 55.

357. *See id.*

358. By "will substitutes," we mean "revocable inter vivos trusts, life insurance, pension and employee-benefit accounts, multiple-party accounts with banks and other financial intermediaries, payable- or transfer-on-death arrangements, joint ownership with right of survivorship, and annuities with death benefits." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.1 cmt. a (AM. L. INST. 2003).

359. *See supra* note 357 and accompanying text.

would then expand the application of the testamentary capacity standard to all transfers that fall into the category of revocable will substitutes. Unfortunately, even though the Restatement endorses the categorical application of testamentary capacity to all revocable will substitutes,[360] many formalist jurisdictions still subject some types of will substitutes to contractual capacity.[361] Like transactional complexity states, the hybrid approach would recognize the folly in this perspective. As noted, the rationale for demanding a higher degree of mental acuity for contracts is that transferors can harm themselves by making poor decisions.[362] Yet when a person executes a will substitute, she retains "substantial lifetime rights of dominion, control,

360. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1(b) (AM. L. INST. 2003)

> If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must 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.

361. *See supra* note 139 and accompanying text (collecting authority that uses contractual capacity for revocable trusts); SunTrust Bank, Middle Ga. N.A. v. Harper, 551 S.E.2d 419, 425 (Ga. Ct. App. 2001) ("Because [the decedent] no longer had the power to contract, we find that he no longer had the power to modify the contractual terms of the IRA by changing the beneficiary."); *In re* Est. of Marquis, 822 A.2d 1153, 1157 (Me. 2003) ("[A] party to an annuity contract must possess the mental capacity necessary for executing a valid contract—and not that required to execute or amend a will—when changing the beneficiary designation on an annuity policy."); Netherton v. Netherton, 593 S.W.3d 654, 665 (Mo. Ct. App. 2019) ("The capacity required to make a beneficiary designation is contractual capacity, which is a higher standard than testamentary capacity."); Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 296 n.1 (Tenn. Ct. App. 2001) ("[C]hanging a beneficiary requires the same mental capacity as executing a valid contract."); Hilbert v. Benson, 917 P.2d 1152, 1156 (Wyo. 1996) ("[A] higher degree of mental capacity is required to execute an inter vivos conveyance or contract or to transact business generally, than is required in executing a will."). *But see* Prudential Ins. Co. of Am. v. Huizenga, No. CV-18-08320, 2020 WL 6891415, at *3 (D. Ariz. Nov. 24, 2020) (employing the rule for testamentary capacity when analyzing a change to life insurance benefits).

362. *See supra* note 117 and accompanying text.

possession, or enjoyment."[363] Accordingly, there is less risk that a revocable trust or change in beneficiary designations will cause hardship to the property owner during life. Thus, applying the contractual capacity rule to revocable will substitutes imposes an unnecessarily stringent standard of mental acuity for transactions that are, in practice, aspects of estate planning rather than lifetime contracts.

Finally, the hybrid approach would pay practical dividends. Individuals often execute an "integrated" estate plan that consists of a revocable inter vivos trust (the centerpiece of their estate plan) and a "pour-over" will (which "pours" any remaining property in the probate estate into the trust).[364] Yet recall that in some formalist states and all transactional complexity jurisdictions, contractual capacity might govern the trust.[365] In turn, if a decedent possessed testamentary capacity but not contractual capacity, a court would uphold the will but invalidate the trust. This would nullify the decedent's testamentary scheme: indeed, the will would transmit assets to a trust that does not exist.[366] The hybrid approach would avoid this perverse outcome by ensuring that each element of the integrated estate plan rises or falls together.

CONCLUSION

This Article has explored an anomaly in the regulation of people with CIDD. Courts often must decide whether an owner possesses the mental fitness to control her property. When the question is whether to impose a guardianship, states try to ensure that the respondent participates in the hearing and

363. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.1(a) (AM. L. INST. 1979).

364. *See* Maimonides Sch. v. Coles, 881 N.E.2d 778, 788 (Mass. Ct. App. 2008)

365. *See supra* notes 139, 353–357 and accompanying text.

366. *See Maimonides Sch.*, 881 N.E.2d at 788 (assessing an amendment to a trust under the testamentary capacity doctrine because "[t]he use of one standard for mental capacity to execute a pour-over will and another standard to execute a simultaneous revocable inter vivos trust would unnecessarily and impractically risk inconsistent results"); Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 PENN ST. L. REV. 1061, 1078 (2013) (suggesting that the law "consider[s] adopting a new unitary standard for mental capacity").

forfeits as few rights as possible. But if the issue is the validity of a will, this rubric inverts. Testators must overcome bright-line rules against persons under guardianship executing wills or delegating the task to a guardian or agent. Moreover, in almost every American jurisdiction, testators have no opportunity to personally respond to allegations of mental incapacitation. By abolishing these hurdles, enacting living probate regimes, and clarifying the testamentary capacity standard, the legal system would embrace the modern SDM trend of disability rights law and empower individuals who were once dismissed as "lunatics" and "idiots" to wield "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[367]

367. Hodel v. Irving, 481 U.S. 704, 716 (1987) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).