TESTAMENTARY CAPACITY IN IOWA

Testamentary power to execute a will is conditioned upon two requirements, full age and sound mind.[1] The ascertaining of a testator's age at the time of execution of the will is not usually difficult. The determination of his soundness of mind may not be as easy. Testamentary capacity is frequently difficult to ascertain. Like undue influence,[2] testamentary capacity is not susceptible of a formula to determine when it is present and when it is not. Broad general statements concerning the degree of mental competence required for testamentary capacity are readily available. However, the critical area of inquiry is what guidelines or factors are important in the determination of testamentary capacity.

In simple terms, testamentary capacity is that degree of mental competence which a person must possess in order to make a will. A perfect mind is not required.[3] This degree of competence is less than that which is required to carry on business affairs or to make contracts.[4] Indeed, the ability to conduct *some* business is not required.[5] Testamentary capacity is a mixed question of law and fact.[6] The law sets forth the definition of what testamentary capacity is, and the standard which must be met.[7] Facts must then be adduced and applied against this standard to determine whether or not there was testamentary capacity.[8] The standard is fourfold. A testator must: (1) understand the nature of the instrument he is executing; (2) know and understand the nature and extent of his bounty; (3) remember the natural objects of his bounty; and (4) know the distribution of his property he desires to make.[9] Against this fourfold standard a myriad of factual patterns can be, and have been, presented. The real difficulty lies in these factual patterns. Facts may be adduced in one case to the effect that the testator appears to be an "idiot", yet he is found to have testamentary capacity. On the other hand, the testator's competence may not be nearly as questionable in another case, yet testamentary capacity is found lacking. For example, a young, healthy, successful businessman may be found under careful examination to lack the necessary capacity, while an adjudged incompetent may possess it. The results are due to certain factors and subtleties in the law of testamentary capacity itself. Testamentary capacity is more than an easy definition and much more than a "gut" feeling. Its presence or ab-

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1 Iowa Probate Code § 264 (1964); IOWA CODE § 633.264 (1966).
2 Note, *Testamentary Undue Influence in Iowa*, 18 DRAKE L. REV. 255 (1969).
3 In re Bresler's Estate, 188 Iowa 458, 176 N.W. 249 (1920); In re Estate of Heller, 233 Iowa 1356, 11 N.W.2d 586 (1943).
4 In re Estate of Faris, 159 N.W.2d 417 (Iowa 1968); In re Winslow's Will, 146 Iowa 67, 124 N.W. 895 (1910); Waters v. Waters, 201 Iowa 586, 207 N.W. 598 (1926).
5 In re Grange's Estate, 231 Iowa 964, 2 N.W.2d 635 (1942).
6 Ipsen v. Ruess, 241 Iowa 730, 41 N.W.2d 658 (1950).
7 *Id.*
8 *Id.*
9 In re Estate of Cory, 169 N.W.2d 837 (Iowa 1969).

sence is directly related to the presence or absence of certain factors and criteria possessed by the testator at the time of the execution of the will.

It is the purpose of this Note to examine these factors and criteria in an attempt to ascertain why two sets of apparently similar facts sometimes yield different results. This analysis hopefully will provide a concise and clear statement of the nature of testamentary capacity in Iowa, as well as provide a useful guideline for the determination of when testamentary capacity may or may not be present in a particular case. Questions of evidence—particularly the weight, sufficiency, and admissibility of medical and lay opinion as to a testator's capacity—are not included.

I. Monomania—Insane Delusion

It is frequently alleged in will contests that the testator entertained an erroneous belief which affected the distribution of property in his will. An example would be where a son or daughter was either left out of a will entirely or was discriminated against in it because the father or mother unjustifiably believed them to be of bad character. Such erroneous beliefs are termed insane delusions, or it is said that the testator was afflicted with monomania. Insane delusion and monomania appear to be snynonymous as far as testamentary capacity is concerned.[10] Both refer to a particular mental aberration. In *Mastain v. Butschy*, the Iowa supreme court defined monomania "as a derangement of the mind in regard to a single subject, an insanity upon a particular subject only."[11] The basis for holding that a belief is an insane delusion is that it is harbored without any evidence to support it.[12] The belief must be established as completely false.[13] However, proof of a mere mistake is not, of itself, proof of an insane delusion.[14] In *Riley v. Casey*,[15] the court stated that a testator of sound mind may make a mistake and act upon it while making his will to the detriment of a proper object of his bounty, and such mistake will neither invalidate the will nor subject it to reformation. Nor is it enough to show an erroneous belief on the part of the testator in order to establish an insane delusion.[16] In *In re Estate of Henry*,[17] the testator had discriminated against his son in his will. It was proved that the testator believed his son to be a bastard.[17] The son had been born in wedlock and was thus legally presumed to be the testator's son.[18] The court held that an insane delusion had not been established because no evidence had been presented as to *why* the testator believed his son to be a bastard. The court stated that whether the evidence which satisfied the testator's belief was such that a rational man would believe, or was such that no person could believe, and still be rational, was beyond the possibility of

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10 Firestine v. Athinson, 206 Iowa 151, 218 N.W. 293 (1928).
11 224 Iowa 68, 81, 276 N.W. 79, 86 (1937).
12 Firestine v. Athinson, 206 Iowa 151, 218 N.W. 293 (1928).
13 *Id.*
14 Riley v. Casey, 185 Iowa 461, 170 N.W. 742 (1919).
15 185 Iowa 461, 170 N.W. 742 (1919).
16 In re Estate of Henry, 167 Iowa 557, 149 N.W. 605 (1914).
17 *Id.*
18 *Id.*

proof. Thus, one should be concerned not only with the fact that the belief is false, but also with whether the grounds upon which the belief is based could possibly support such a belief.

Mere establishment of an insane delusion does not render one incapable of making a will.[19] The existence of an insane delusion shows a diseased condition of the mind, but a person thus afflicted may be entirely sane on all other subjects. Thus, it cannot be said that he is generally insane or does not have the capacity to make a will.[20] In *Zinkula v. Zinkula,*[21] the court stated:

> [W]here it is shown that the delusion is unfounded, and without it, in all probability, a different course of conduct would have been pursued, or where it is shown that the act of the testator was influenced by the delusion, and that, without such influence operating on his mind, he would have done other than he did, then his act is said to be the result of the delusion and not a deliberate act of a mind possessing testamentary capacity.[22]

Zinkula is a clear example of a decision holding the testamentary disposition not to be the offspring of an insane delusion.[23] The testator therein possessed an insane delusion regarding his wife, in that among other things he believed she hated their daughters. The testator's will discriminated against the daughters. An attempt was made to set the will aside because of the testator's insane delusion. The court stated that "it would require a very strange and unnatural process of reasoning to reach the conclusion" that the testator was influenced by his feeling toward the mother to discriminate against his daughters. Conversely, in *Hardenburgh v. Hardenburgh,*[24] a testator discriminated against his daughters because he believed them unchaste and generally immoral. It was proven that the daughters had high standing in the community and that testator had held his daughters in high regard in previous years. The court held the discrimination to be a direct result of the testator's delusion, and thus invalidated the will.[25]

The court in *Lockie v. Estate of Baker*[26] set out the elements which must be established in order to invalidate a will on the grounds of monomania or insane delusion. It must be shown that:

(1) there is no evidence whatever upon which to base such a belief;

(2) the belief was false and was adhered to after its falsity had been shown by reasonable evidence;

(3) the thing believed was such that no person of sound mind would believe it;

(4) the testator failed to give up the belief, in the face of such reasonable evidence as would convince an ordinary, sound, and healthy mind; and

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19 Zinkula v. Zinkula, 171 Iowa 287, 154 N.W. 158 (1915).
20 Hardenburgh v. Hardenburgh, 133 Iowa 1, 109 N.W. 1014 (1906).
21 171 Iowa 287, 154 N.W. 158 (1915).
22 *Id.* at 306, 154 N.W. at 165.
23 *Id.*
24 133 Iowa 1, 109 N.W. 1014 (1906).
25 *Id.*
26 208 Iowa 1293, 227 N.W. 160 (1929).

(5) the existence of such delusion was present in the mind of the testator and exercised controlling influence at the time the will was executed.

Care should be taken to gather all the facts in examining a possible question of monomania. These facts should be evaluated in light of the foregoing cases to determine whether or not such a belief was in fact a delusion and whether or not this delusion affected the testamentary disposition. Not every strange belief is a delusion, nor is every delusion one which will cause a will to be invalidated on the grounds of the testator's lack of capacity.

II. Guardianship and Insanity

The fact that a testator has been placed under guardianship because of having been adjudged insane carries greater weight than any other single factor when dealing with the question of testamentary capacity. Although a voluntary guardianship raises no presumption of incompetency,[27] a testator who has been placed under guardianship because of insanity is considered *prima facie* incapable of making a will.[28] However, the person is not incapable of making a will.[29] A presumption of fact, not of law, is involved.[30] A presumption of fact is not evidence of anything, but merely determines which party shall first go forward with the burden of proof.[31] Thus, in *Olson v. Olson*,[32] although not a will contest, but an action to set aside a guardianship, the court upon proof of the plaintiff's capacity to manage and care for his property granted the relief prayed. The court commented that the plaintiff was seventy-seven years old and if his cause failed before the court, he would be burdened with a *prima facie* incapacity to make a will. The court in *Olson* concluded that no one "can read [the] record and not be convinced that [the plaintiff] has testamentary capacity."[33]

The critical question to ask when a testator has been placed under guardianship is *why*. "The conditions of mind that would show a person incompetent to care for and preserve property, so as to authorize a guardian, might, in no sensible degree, show a condition of mind to incapacitate one for making a will."[34] In *Cahill v. Cahill*,[35] it was held that when the appointment of a guardian is not based upon any specific grounds, and might have been made upon any one of several grounds, parol testimony is admissible to explain the appointment, though it cannot contradict it. The court went on to note that a guardian may be appointed for many purposes, such as the testator being a ha-

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27 In re Guardianship of Property of Stark, 254 Iowa 598, 118 N.W.2d 537 (1962).
28 Cahill v. Cahill, 155 Iowa 340, 136 N.W. 214 (1912); In re Will of Fenton, 97 Iowa 192, 66 N.W. 99 (1896).
29 In re Estate of Willer, 225 Iowa 606, 281 N.W. 155 (1938). *See also*, 23 Marq. L. Rev. 45 (1938).
30 Brogen v. Lynch, 204 Iowa 260, 214 N.W. 514 (1927).
31 *Id.*
32 242 Iowa 192, 46 N.W.2d 1 (1951).
33 *Id.* at 212, 46 N.W.2d at 12.
34 In re Will of Fenton, 97 Iowa 192, 196, 66 N.W. 99, 100 (1896).
35 155 Iowa 340, 136 N.W. 214 (1912).

bitual drunk or a spendthrift. Thus, in *In re Estate of Willer,*[36] a testator's guardianship was shown to have been the result of excessive drinking and not incompetency.

The Iowa supreme court in *Waters v. Waters* discussed the importance of ascertaining *why* a person was placed under guardianship, stating:

> In considering the effect of a prior adjudication of insanity or unsoundness of mind as proof of incapacity to contract or make a will, the distinction between an adjudication that a person is insane and requires care and treatment, and that he is mentally incompetent to manage his property and requires a guardian, has not always been observed. Yet it is a substantial one, and demonstrates that an adjudication of insanity such as to require treatment is of even less probative force upon the question of testamentary capacity than an adjudication that the person is incapable of caring for his property and requires a guardian. Both proceedings are statutory. The first is to determine only if the person is insane and a fit subject for treatment in a hospital for the insane . . . . The term "insane" as there used, is defined by statute to include every species of insanity or mental derangement . . . . The other proceeding has for its object the appointment of a guardian of the estate of a person of unsound mind . . . and the question is whether the person is capable of transacting the ordinary business involved in caring for his property.[37]

In attempting to defeat the presumption of incompetency two avenues are open. A showing, as in *Olson,*[38] that the testator did have the capacity and competency to manage, control, or otherwise dispose of his property is one method. This method merely goes forward to overcome the presumption. The presumption can also be negated by showing the circumstances surrounding the appointment of a guardian, that is, proof to the effect that the appointment of a guardian, that is, proof to the effect that the appointment of a guardian or the adjudication of insanity was not the result of general mental incompetency concerning proprietary matters. Thus, circumstances such as a voluntary appointment, appointment because of drunkenness, or because the person was a spendthrift, would defeat the presumption. This is not to say that certain adjudications of insanity would be of little probative value when the question of testamentary capacity is involved. They would, but they would not carry presumptive weight unless the appointment of the guardian or adjudication of insanity was brought about by testator's general incompetency.

Of final importance in this area is the question of *when* the adjudication was made. An adjudication of unsoundness subsequent to the execution of a will does not, of itself, create a presumption of unsoundness previous to the date of the adjudication;[39] nor does the appointment of a guardian after the will is drawn justify an inference of mental incompetence at the time the will was

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36 225 Iowa 606, 281 N.W. 155 (1938).
37 Waters v. Waters, 201 Iowa 586, 588, 207 N.W. at 600.
38 242 Iowa 192, 46 N.W.2d 1 (1951).
39 In re Estate of Howe, 172 Iowa 723, 154 N.W. 1001 (1915).

drawn.[40] It is apparent that in situations concerning a subsequent appointment or adjudication the *nature* of the testator's incapacity or incompetency is important. If the disease is such as to manifest itself in a short period of time then this would be of less weight than if the disease was one which gradually worsened to the point where incompetency would occur. In the latter instance, the time factor between the drawing of the will and the adjudication would be extremely important. The shorter the period, the more likely the condition existing at the time of judicial determination also existed at the time the will was drawn.

Iowa follows the general principle that insanity once established is presumed to continue until the contrary is shown.[41] The court in *Bever v. Spangler and Blake*[42] makes clear the importance of ascertaining the nature of the insanity involved:

> "There must be kept in view the distinction between inferences to be drawn from proof of habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former, once established, would require proof from the other party to show a restoration or recovery, and, in the absence of such evidence, insanity would be presumed to continue. But, if the proof shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself with proof of insanity at an earlier period."[43]

The court in *Kirsher v. Kirsher*[44] stated that proof of insanity at a stated period, without reference to the particular circumstances connected with the insanity, is not sufficient to authorize the inference of insanity at a remote subsequent period. In *Jones v. Schaffner*,[45] the court held that the strength of the presumption is lessened in proportion to the remoteness of the adjudication. In *Waters v. Waters*,[46] the testator had been adjudged insane twenty-five years before the execution of the will. The testator was placed in a hospital and subsequently released into another's care. The court held in *Waters* that the presumption of continued insanity was overcome, in view of the absence of testimony showing that the testator's condition was of general and settled unsoundness when he was released from the hospital and in view of the fact that during the long interval between such release and the execution of the will the testator carried on normal business affairs.[47] The importance of the problem of reoccurence is illustrated aptly in *Mileham v. Montagne*,[48] wherein the court held that a discharge from a mental hospital was *prima facie, but not conclusive,*

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40 In re Meyer's Estate, 240 Iowa 1226, 37 N.W.2d 265 (1949).
41 In re Knox's Will, 123 Iowa 24, 98 N.W. 468 (1904).
42 98 Iowa 576, 61 N.W. 1072 (1895).
43 *Id.* at 601, 61 N.W. at 1079.
44 120 Iowa 337, 94 N.W. 846 (1903).
45 193 Iowa 1262, 188 N.W. 787 (1922).
46 201 Iowa 586, 207 N.W. 598 (1926).
47 *Id.*
48 148 Iowa 476, 125 N.W. 664 (1910).

evidence of recovery from insanity. This court also recognized that mental diseases often reoccur and that release does not necessarily connote a complete cure.

In dealing with the problem of insanity and a resulting guardianship, one must first examine the reasons why such a determination was had or made. Next the nature of the illness should be ascertained. Is it generally disabling or is the illness one which does not generally affect competency? Finally, a determination of when the illness first occurred and whether it manifests itself quickly or is long-term and progressive in nature is essential. The answers to these questions should provide a sound basis for evaluating the effect of a guardianship or an adjudication of insanity on testamentary capacity.

III. Testamentary Discrimination

Will contests arise, almost without exception, because of disappointed heirs or unhappy beneficiaries. The provisions of the will provide for, what in the eyes of the contestants is, an unequal or unfair disposition of property. The argument is raised that the testator must have been incompetent, because a normal person would not have executed a will which provided for such an inequitable distribution of property. The Iowa supreme court in *In re Estate of Heller*[49] commented upon this situation:

> The right of an individual to dispose of his property as he sees fit, even though he make what others might think was an unequal or unjust disposition or give nothing to some or all of those who are regarded as naturally entitled to his bounty, is nevertheless a sacred right with which the courts must not interfere when it appears that he knew what he was doing. There is no such thing as a legal right in any relative, other than the surviving spouse of a testator, to the latter's bounty. Standing alone, the deprivation of that bounty cannot destroy a will.[50]

The court commented further in *Johnson v. Johnson*[51] that "the infirmities of human nature are likely to be evidenced in the last testament voicing dictates of affection and enmity, the partialities and dislikes of the testator while living. But he has the right to feel this way and if he chooses might be unjust in disposition of property."[52]

Neither inequality nor inequity will *alone* warrant a presumption of incapacity.[53] There are many factors bearing upon the question of testamentary discrimination.[54] Even though testamentary discrimination is but one factor bearing upon testamentary capacity, it is important to understand its nature and effect. An unjust, unreasonable, or unnatural provision in a will is one which

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49 233 Iowa 1356, 11 N.W.2d 586 (1943).
50 *Id.* at 1365, 11 N.W.2d at 591.
51 134 Iowa 33, 111 N.W. 430 (1907).
52 *Id.* at 34, 111 N.W. at 431.
53 Manatt v. Scott, 106 Iowa 203, 76 N.W. 717 (1898).
54 *Id.*

"a person in a like situation and similar relationship" would not make.[55] Thus the court felt in *Manatt v. Scott*[56] that leaving property to well-to-do beneficiaries while leaving nothing to those who were poor did "not commend itself as reasonable or natural." Although a testator may disinherit his children,[57] it appears the Iowa courts attach significant weight to this fact. In *Hardenburgh v. Hardenburgh,*[58] the court stated that "[t]he children of a testator are the natural objects of bounty and when they are entirely ignored in the disposition of his property, it is *prima facie* an unnatural and unreasonable act." Thus, in *Ranne v. Hodges,*[59] the testator's will favored his second wife and her children over the testator's own children. The testator's second wife predeceased the testator, but her children still received more than the testator's own children. The court pointed out that had she survived him her children would indirectly be inheriting from the testator. The court in *Ranne,* while recognizing a testator's freedom of disposition, nevertheless held that the preference shown to the children of another, as opposed to favoring his own children, was so contrary to the ordinary "that a suspicion arises that something is wrong."[60]

Although testamentary discrimination is present, it can be explained by a showing of such factors as ill-will or dislike toward the disappointed party.[61] In *In re Estate of Shields,*[62] the testator left a will which was unfavorable to his son, but the apparent unfairness was explained by evidence showing that the testator was disappointed in his son because of the son's drinking, gambling, and irresponsibility. Of particular note is *In re Estate of Fousek,*[63] wherein the testator left a considerably greater amount to his seven sons than to his three daughters. The father appeared to have equal affection toward all of his children. The record revealed that the daughters had received something equivalent to a dower upon their marriage and that their husbands were apparently prosperous. The sons had contributed valuable labor and services to the father without remuneration. The court stated that the "unnaturalness or want of equity of the will is not . . . a matter of mathematics."[64] When the question of inequality arises, "the history of the family is to be considered, and the moral equities and obligations appearing therefrom."[65] The court in *Fousek* thus looked to: (1) the relative amount which each child had contributed to the testator's property, (2) payments to pretermitted children, and (3) the relative financial condition of each child. It would seem that these criteria could, in modified form, be used not only when judging discrimination which affects the testator's children, but

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55 *Id.* at 217, 76 N.W. at 722.
56 106 Iowa 203, 76 N.W. 717 (1898).
57 Zinkula v. Zinkula, 171 Iowa 287, 154 N.W. 158 (1915); Goldthorp v. Goldthorp, 115 Iowa 430, 88 N.W. 944 (1902).
58 133 Iowa 1, 109 N.W. 1014 (1906).
59 181 Iowa 162, 162 N.W. 803 (1917).
60 *Id.* at 174, 162 N.W. at 807.
61 Ross v. Ross, 140 Iowa 51, 117 N.W. 1105 (1908).
62 198 Iowa 686, 200 N.W. 219 (1924).
63 188 Iowa 700, 175 N.W. 29 (1920).
64 *Id.* at 702, 175 N.W. at 30.
65 *Id.*

also discrimination affecting other relatives as well.

Three other cases in the area of testamentary discrimination bear mention. In *Collins v. Brazill*,[66] the testatrix devised her property to a stranger to the detriment of her brother and sister. This seemingly unjust disposition was explained by the fact that the testatrix was unhappy over the disposition of her father's estate, and she believed that she had not received a fair share of the estate as compared to her brother's and sister's shares. In *In re Estate of Heller*,[67] the testator devised all of his property to unrelated beneficiaries. The testator's brother and nephews (sons of a deceased brother) were excluded. This apparent injustice was explained by the record which revealed that the beneficiaries had cared for the testator for a number of years. Furthermore, the testator's brother was not in financial distress. A final insight into what effect discrimination may have upon a will is provided in *Bever v. Spangler and Blake*.[68] In *Bever*, there was conflicting evidence as to the testator's capacity. Evidence of senile dementia was offset by other evidence showing the testator's apparent competency to make a will. The disposition under the will gave considerably more to the testator's sons, both of whom were wealthy. On the other hand, his two daughters, who had children, were poor. The court refused to disturb the jury verdict which invalidated the will. However, the court stated that a contrary verdict would not have been disturbed either, and that some of the members of the court would have preferred such a result. The court, as individuals, appeared to feel that the evidence was insufficient but nevertheless deferred to the jury's finding of fact. One wonders what effect the unequal disposition of property had in tipping the scales of testamentary capacity from a question of law to a question of fact, upon which the court must follow the findings of the jury.

Testamentary discrimination, no matter how unjust, unfair, or unreasonable can never, by itself, establish lack of testamentary capacity. The discrimination must first be shown to be unnatural or inequitable. To determine this, the parties' relationship, feelings, duties, and obligations (both moral and otherwise) must be examined. Only after such an examination can it be said that the disposition was fair or unfair, reasonable or unreasonable. If the disposition was unfair or unreasonable, only then will it bear upon testamentary capacity. Nevertheless, the discrimination still must be linked with elements of senile dementia, delusions, insanity, or other factors before either a jury or a court can find that the testator lacked sufficient capacity to make a will.

IV. Old Age—Senile Dementia

More than any other factor bearing upon testamentary capacity, old age (with its attendant conditions and manifestations) is the most difficult to ex-

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66 63 Iowa 432, 19 N.W. 338 (1884).
67 233 Iowa 1356, 11 N.W.2d 586 (1943).
68 93 Iowa 576, 61 N.W. 1072 (1895).

amine. This is because the condition known as senile dementia arises with old age.[69] This condition cannot "be described by any positive characters . . . [for] in its gradual advance to incompetency, it embraces a wide range of infirmity, varying from simple lapse of memory to complete inability to recognize persons or things. . . ."[70] To constitute senile dementia there must be such a failure of the mind as to deprive the testator of intelligent action.[71] Even so, senile dementia does not necessarily render a party incapable of making a will if he understands the nature of his bounty and so forth.[72] Although senile dementia is difficult to speak of in positive terms, it is not so difficult to discuss in negative terms. First, old age in and of itself does not deprive one of testamentary capacity.[73] A showing of the attributes of old age does not even necessarily present a jury question.[74] A failure of memory does not necessarily deprive one of testamentary capacity.[75] Deterioration of mental powers, peevishness, childishness and eccentricities are not alone sufficient to get to the jury.[76] The court in *Leonard v. Shane*[77] not only provides an excellent summation of the effect of the foregoing conditions, but also sheds light on the effect of senile dementia in will contests:

> That there is such a thing as senile dementia must be conceded. That, as the average person advances in old age, he manifests in some degree a progressive weakening in some or all of his physical and mental powers, is likewise a fact of common observation, and that his deterioration or decay sometimes culminates in a state of complete and unquestionable incompetence, is not to be denied. These obvious truths have made the allegation of senile dementia the favorite and almost universal resort of those who seek to set aside . . . devises . . . by persons who have entered that vaguely defined period of life which we call old age . . . . In proof of such claim, it is never difficult to find witnesses who remember that he (the testator) was forgetful, or was absentminded or childish; that he would repeat old stories; had become careless in matters of dress; that he sometimes failed to recognize a friend or acquaintances; that his eyesight and hearing had become impaired; and so on through the whole category of infirmities which usually and normally appear in those who had passed the zenith of life . . . . [However] it is no less true, as a matter of law and of common observation and common sense, that the existence of

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[69] Old age manifests itself in numerous ways, and effects various parts of the body. The nervous system suffers perhaps more than any other system of the body. It is this degeneration in the nervous system because of old age which is known as senile dementia. The process is simply the wearing out of the nervous system due to age. The degenerative changes are evident by both gross and microscopic observation. The symptomology of senile dementia is evidenced by such manifestations as deficiency of recent memory, failing of the power of attention, inability to grasp the significance of problems as a whole, irritability, egotism, and paranoia. There is no specific treatment. R. GRINKER & A. SAHS, NEUROLOGY (6th ed. 1966).

[70] Gates v. Cole, 137 Iowa 613, 617, 115 N.W. 236, 237 (1908).

[71] *Id.*

[72] In re Estate of Stryker, 191 Iowa 64, 181 N.W. 810 (1921).

[73] Ranne v. Hodges, 181 Iowa 162, 162 N.W. 803 (1917).

[74] In re Estate of Sinift, 233 Iowa 800, 10 N.W.2d 550 (1943).

[75] Speer v. Speer, 146 Iowa 6, 123 N.W. 176 (1909).

[76] Bailey v. Cherokee State Bank, 208 Iowa 1265, 227 N.W. 129 (1929).

[77] Leonard v. Shane, 182 Iowa 1134, 166 N.W. 373 (1918).

> these normal and usual accompaniments of age do not imply any lack of capacity to . . . make an intelligent disposition of property . . . by devise.[78]

The *Leonard* case emphasizes the possible effect of old age and the misunderstanding which one can give to it. Certainly old age—senile dementia—can, and in most instances does, have a bearing on testamentary capacity, but this by itself does not explain when and how it will affect testamentary capacity. It is important then to discover when and how the attributes of old age can and will affect capacity to execute a will. When are childishness, peevishness, lapse of memory and other senility traits relevant to the question? This can only be done by surveying and analyzing cases dealing with senile dementia in an attempt to extract from them relevant signposts.

In *Sevening v. Smith*,[79] evidence showed that the testator was forgetful and suffered from lapse of memory. However, evidence also showed that the testator conducted his business up to the time of his death. In addition, it was shown that the testator had discussed the extent of his property as well as the relatives who might have claim upon his bounty, and had given the reasons for the provisions he had made in his will. The court found that the testator had the requisite capacity. *In re Estate of Fitzgerald*[80] gave weight to the testator's collection of rent for his property up to the time of his death, and the court found testamentary capacity present. *In re Will of Kester*[81] presents the typical case where traits of senility were attempted to be used to show lack of capacity. The testatrix was forgetful, irritable, and evidenced signs of senile dementia. The testatrix did, however, discuss the execution and provisions of her will with her attorney. The will provided funds for church work, something which the testatrix had been actively interested in for a number of years. The court reversed the jury findings of incompetency, thus holding as a matter of law that the facts adduced were insufficient to generate jury question.

Gates v. Cole,[82] *In re Estate of Shields*,[83] and *In re Estate of Ransom*[84] are other cases where the frailities of age were raised in an attempt to defeat capacity. In *Cole*, evidence was adduced as to testatrix's forgetfulness and her "dull" eyes. In the other two cases, evidence as to poor memory, unclean habits, occasional incoherent speech, and loss of train of thought was presented. Yet, testamentary capacity was found present in all three of the cases. In these cases, the contestants' evidence did not significantly bring into question the testators' inability to meet the standard of the law. In each case the proponents presented direct evidence as to the testator's ability to conduct his affairs. The testator's awareness of his property, relatives, and so forth was shown in each

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78 *Id.* at 1140, 166 N.W. at 375.
79 153 Iowa 639, 133 N.W. 1081 (1912).
80 219 Iowa 988, 259 N.W. 455 (1935).
81 183 Iowa 1336, 167 N.W. 614 (1918).
82 137 Iowa 613, 115 N.W. 236 (1908).
83 198 Iowa 686, 200 N.W. 219 (1924).
84 244 Iowa 343, 57 N.W.2d 89 (1953).

case. These cases exemplify the message of the *Leonard* case, in that the compilation of numerous incidences of old age is not enough to establish lack of capacity.[85] These peculiarities must be connected directly to one of four criteria set forth by the law. Of further interest are *Albright v. Moeckly*[86] and *In re Estate of Koll.*[87] In *Albright*, a showing of inability to transact business, loss of memory, and senile dementia was made. Yet the court's sustaining of the will might have been due in part to the fact that the testatrix made and executed the will in a judge's office and under his guidance.[88] The testatrix also later made some changes in her will during which time it appeared that she was aware of the will's effect and what effect the change would bring. *In re Estate of Koll* re-emphasizes the fact that examination as to capacity is to be done at the time when the will is executed. In *Koll* there was no question that the testatrix suffered from senile dementia, manifestations, and other senility traits.[89] However, the evidence was clear that at the time of the making of the will she clearly understood what her property consisted of, who the objects of her bounty were, what she wanted to do with her property, and the nature of the instrument she was executing. She had told her attorney exactly what she desired.

The foregoing cases illustrate that the failings of old age are not necessarily dispositive of the question of capacity. Furthermore, to be significant, these conditions or characteristics must be connected to one of the four criteria set forth by the law. The next group of cases demonstrates when old age is critical to testamentary capacity and why it is critical. These cases are in many instances readily distinguishable from the foregoing cases.

In *Galt v. Provan*,[90] evidence showed, *inter alia*, that the testatrix: (1) forgot the burial of three of her children; (2) forgot the execution of papers within a few minutes; (3) attended her grandson's wedding, but did not know he was marrying even though the bride was working for her; and (4) had a terrible memory. The court affirmed the jury's verdict that she lacked testamentary capacity. These manifestations of the testatrix directly related to the fourfold standard of testamentary capacity. A doubt as to her capacity to remember the objects of her bounty would seem readily apparent from the evidence. Her forgetfulness was not of trivial occurrences or facts, but related specifically to close relatives, natural objects of her bounty. Moreover, her ability to know the extent and nature of her property, and particularly the nature of the instrument she was executing, appears doubtful.

In re Estate of Rodgers[91] presents a different fact pattern. In *Rodgers*, the evidence tended to show the following characteristics of the testatrix: (1)

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85 Leonard v. Shane, 182 Iowa 1134, 166 N.W. 373 (1918).
86 202 Iowa 565, 210 N.W. 813 (1926).
87 200 Iowa 1122, 206 N.W. 40 (1925).
88 Albright v. Moeckly, 202 Iowa 565, 210 N.W. 813 (1926).
89 In re Estate of Koll, 200 Iowa 1122, 206 N.W. 40 (1925).
90 108 Iowa 561, 79 N.W. 357 (1899).
91 242 Iowa 627, 47 N.W.2d 89 (1951).

increasing forgetfulness, (2) period of incoherence and confusion, (3) medical opinion of unsound mind, (4) appointment of a guardian after the occurrence of a stroke, (5) misunderstanding of legal rights, and (6) unnatural and unequal distribution of bounty. Although evidence of forgetfulness and incoherence has in many cases been insufficient on the question of capacity, these traits in *Rodgers* were supplemented by the guardianship, misunderstanding of legal rights, and testamentary discrimination. The evidence in *Rodgers* was perhaps not as directly related to one or more of the four criteria of testamentary capacity as it was in *Galt*,[92] but in *Rodgers* the evidence was of substantial weight when applied against the legal standard as a whole. The *Rodgers* case is not one of collecting bits and pieces of the eccentricities of old age, but is a compilation of significant evidence, which when taken as a whole provides a basis for a finding of lack of capacity.

The evidence presented in *In re Estate of Swain*[93] was similar to that in *Rodgers* but appears to have approached the borderline as to sufficiency for generating a jury question. In *Swain*, it was shown that the testator was: (1) an inebriate; (2) filthy and immoral; (3) susceptible of violent passion; (4) quarrelsome, abusive and profane; and (5) suffering from venereal disease which affected his brain. The court held that each factor taken alone would not be sufficient to generate a jury question, but that the factors taken together along with medical opinion were sufficient.[94] The key factor in *Swain* may have been the inebriation, for in *Howe v. Richards*[95] (a case involving long-term drinking) the court stated that long-term drinking may affect the mind, and that this fact can be examined in order to ascertain whether the drinking has impaired the mind. Thus, in *Swain*, a significant evidence of a diseased condition and excessive drinking (which could affect the mind) was supplemented by other not so relevant evidence of bad habits, etc. Perhaps determinative of the issue was the testimony of medical experts as to medical decay. Of final note in this regard is *In re Will of Behrend*.[96] In *Behrend*, medical opinion was almost the only evidence presented by contestants, but this was enough. The physician had treated the testatrix for toxic goiter over a period of years. The effect of the disease was to poison the body of the testatrix and thus prevent the proper nutrition of her organs. The disease affected the brain cells also. There was no other medical evidence presented. The court reversed a directed verdict for the proponents and remanded the case for submission to the jury. *Behrend* points out the effect that strong medical evidence can have upon the question of testamentary capacity, since it comprised nearly all of the contestants' case. Yet, the supreme court's opinion held that it was sufficient to generate a jury question.

The effect of old age on a testator's capacity is often difficult to determine. Ascertaining when testamentary capacity is present or absent as a matter of law

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92 Galt v. Proven, 108 Iowa 561, 79 N.W. 357 (1899).
93 189 Iowa 28, 174 N.W. 493 (1919).
94 In re Estate of Swain, 189 Iowa 28, 174 N.W. 493 (1919).
95 112 Iowa 220, 83 N.W. 909 (1900).
96 227 Iowa 1099, 290 N.W. 78 (1940).

is not easy. Determining when the question changes from one of law to one of fact is equally difficult. Although there is not an answer to these problems, there are certain factors which point in one direction or the other. The court in *Leonard*[97] clearly points out its awareness of contestants' attempts to gather and present strange or eccentric acts of the testator in order to show lack of capacity. The court looks to evidence directly bearing on one or more of the elements in the fourfold standard of testamentary capacity. The fact that an elderly person paints his car pink is irrelevant. The fact that such a person forgets he has a car is relevant. Evidence showing failure by the testator to remember the objects of his bounty, his property, or the execution of the will is important. Eccentricities and peculiarities are but frosting on the cake. Lastly, medical opinion may, as in the *Behrend*[98] case, tip the scales in one direction or the other.

V. Conclusion

The determination of the presence or absence of testamentary capacity is difficult in certain instances. Nevertheless, a proper evaluation of testamentary capacity involves much more than a "feeling." Although there are no formulae which will provide an infallible answer as to whether there is or is not capacity, there are certain factors which when examined provide one with a basis for a reasonable decision. Allegations of monomania, adjudged incompetency, discrimination, or senile dementia are always to be found in contests challenging a testator's capacity. A proper understanding of the nature and effect of each of these factors upon capacity is a *sine qua non* for a proper evaluation of a testator's capacity. One must also understand how a combination of two or more of these factors may affect capacity. Whatever the factors involved, they must relate to the fourfold criteria of capacity. Whether one is contending a lack of capacity or advocating its presence, it must be borne in mind that factors must be established which bear upon the testator's; (1) understanding of the nature of the instrument he executed, (2) knowing and understanding the nature and extent of his bounty, (3) remembering the natural objects of his bounty, and (4) knowing the distribution of his property he desires to make.

Jack C. Williamson

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[97] Leonard v. Shane, 182 Iowa 1134, 166 N.W. 373 (1918).
[98] In re Will of Behrend, 227 Iowa 1099, 290 N.W. 78 (1940).