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In this way more capable and qualified men could be selected—men who are able to grasp fully the importance and responsibility of the office.

MENTAL INCOMPETENCE IN INDIANA: STANDARDS AND TYPES OF EVIDENCE

The Indiana statutes make it clear that mentally ill and incapacitated persons are to be treated differently from other persons in regard to certain attempted legal acts, and the legal consequences which flow from a finding of mental incompetence are fairly uniform. There is, however, some confusion as to the standards which must be met in each of the transactions in order to prove an allegation of mental incompetence, and there is even more confusion as to the types of evidence which must be produced if the applicable standard is to be satisfied. The purpose of this inquiry is to examine these latter questions in four major areas of private law—contracts, wills, gifts, and guardianship. The statutes relevant to these areas, except the ones relating to guardianship, operate directly or indirectly upon the purported legal act of a person "of unsound mind." The guardianship provisions are operative upon an "incompetent." Both of these terms have statutory definitions. The words of

93. "Popular election, wrapped as it is in the American flag, is a very difficult institution to root out even though virtually every student of the problem concludes that the basic reform necessary is the elimination of politics from the office. But the query naturally arises: how would appointment eliminate 'politics'? The answer is best demonstrated by experience. United States attorneys on the whole enjoy a greater prestige, and their records are demonstrably more efficient than those of the elected state prosecutors." Hobbs, Prosecutor's Bias, An Occupational Disease, 2 Ala. L. Rev. 40, 57-58 (1949). Pound wisely adds: "If it is imperative to divorce prosecution from politics, it is no less imperative to divorce the bench from politics." Pound, op. cit. supra note 14, at 192.

1. Mental incompetence is defined as "that type or degree of mental disorder, in any particular case, which is legally significant and which produces a different legal result than would have followed from the same situation had not the particular type or degree of mental disorder been present." Green, Public Policies Underlying the Law of Mental Incompetency, 39 Mich. L. Rev. 1189, 1191-92 (1940).

2. IND. ANN. STAT. § 56-102 (Burns 1951) (alienation of lands) ; IND. ANN. STAT. § 8-141 (Burns 1946) (contracts, sales and conveyances generally) ; IND. ANN. STAT. § 58-102 (Burns 1951) (purchase of necessaries) ; IND. ANN. STAT. § 6-501 (Burns 1953) (testamentary disposition).

3. IND. ANN. STAT. § 8-106 (Burns 1953).

4. IND. ANN. STAT. § 2-4701 (Burns 1946) (general provisions relating to civil procedure). "[Third] The phrase 'of unsound mind' includes idiots, noncompotes [non compositus mentis], lunatics and distracted persons."

IND. ANN. STAT. § 8-101 (Burns 1953). "Definitions and use of terms: . . . (c) An 'incompetent' is any person who is (1) Under the age of majority, (2) Incapable by
definition, however, are largely descriptive and of no aid to a court in attempting to derive a legal standard upon which to decide individual cases. Thus, the question of legal standards of mental competence and the relation of evidence to them must be approached through an analysis of the case law.

STANDARDS

Contracts. The term contract as here used is restricted to a transaction between two or more persons involving a bargained-for consideration. Conveyances based upon bargained-for consideration are included, although there is some authority to the effect that conveyances, whether executed in furtherance of contractual or donative purposes, are subject to a special standard as to the competence of the parties. This distinction is illogical, however, and is not drawn in the better-considered opinions.

The question of whether a party was mentally incompetent to execute a contract arises in four situations. First, the party seeking to avoid the purported contract may have been under active guardianship at the time it was executed. Second, he may never have previously been adjudged incompetent in any legal proceeding. Third, he may have been adjudged insane for purposes of commitment to a mental institution. Fourth, he may have previously been adjudged incompetent for purposes of relief from some former obligation. In the first situation, the purported contract is void; no inquiry into the mental capacity of the party is permitted. The second requires an actual determination of the person’s competence at the time of the act. The last two require the same determination, although they apparently raise a presumption in favor of incompetence. Thus, a legal standard of competence to contract is the crucial factor in each of the last three situations.

This standard has received numerous formulations in the Indiana courts. Disregarding variations and refinements in word usage one may identify three stages of development. The early cases simply required a

reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, old age, infirmity, or other incapacity, of either managing his property or caring for himself or both."

finding that the alleged incompetent lacked the mental capacity to understand and act with discretion in the ordinary affairs of life—an objective standard. Later, the courts began to inquire into the person's ability to act with discretion in regard to the contract involved in the litigation, as well as his ability to act with discretion in the ordinary affairs of life. This subjective approach required a consideration of what the person knew or, ultimately, had the ability to know about the provisions of the agreement itself. Thus, what might be termed a transitional stage appeared incorporating both subjective and objective elements into the contract standard. The elements of the standard were stated as mental capacity to comprehend the subject of the contract, its nature and probable consequences, and to act with discretion in relation thereto or with relation to the ordinary affairs of life. The third stage, represented by the recent cases, omits all reference to the ordinary affairs element and completes the transition from an objective standard to a subjective one. These latter cases, however, are not completely in accord as to the proper formulation of the standard. One group adopts the transitional stage statement without the ordinary affairs element. Another speaks of the ability of the actor "to understand, in a reasonable manner, the nature and effect of the act in which he is engaged; and in order to avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature or terms of the contract." In legal effect there is probably no difference between these statements; but for clarity the first seems preferable.

**Wills.** Every will contest based upon an allegation that the testator was of unsound mind at the time he executed the instrument requires a factual finding of mental incompetence. Although no Indiana cases are

9. The statement usually found is that the alleged incompetent must show an essential privation of the reasoning faculties, or incapacity of understanding and acting with discretion in the ordinary affairs of life. The "essential privation of reasoning" component is merely alternative phraseology and is sometimes omitted. Brannon v. Hayes, 190 Ind. 420, 130 N.E. 803 (1920); Raymond v. Watham, 142 Ind. 367, 41 N.E. 815 (1895); Wray v. Wray, 32 Ind. 126 (1869); Darnell v. Rowland, 30 Ind. 342 (1868); Somers v. Pumphrey, 24 Ind. 231 (1865).


directly in point, there is language in an early case to the effect that an adjudication of mental incompetence for purposes of appointment of a guardian merely creates “prima facie evidence” of incompetence to execute a will.14 Prior adjudications of incompetence or insanity for other purposes would seem to do no more, if as much.15 Thus, in every such case a legal standard of mental competence must guide the direction of trial and ultimately determine the issue.

The standard of testamentary capacity, unlike that of contractual capacity, has from its inception been adapted to the peculiar nature of the transaction involved. The earliest authoritative cases16 recite the following elements: that the testator have sufficient mental capacity to know and understand the business in which he is engaged, the extent of his estate, and the persons who would naturally be the objects of his bounty; that he be able to keep these things in his mind long enough to form a rational judgment in relation thereto; and that he be able to form a rational judgment in relation to the will. A subsequent and equally authoritative line of cases17 modified this statement of the standard by eliminating the requirement of ability to know and understand the business in which the testator is engaged, and adding the requirement that the testator not only be capable of knowing the persons who are the natural objects of his bounty, but also their deserts with reference to their treatment of him and their “capacity and necessity.” These alterations are more than mere refinement of language. The requirement of knowing

14. Harrison v. Bishop, 131 Ind. 161, 30 N.E. 1069 (1891). See also Emry v. Beaver, 192 Ind. 471, 137 N.E. 55 (1922) (discharge of guardian not conclusive of ability to execute will on same day).
15. As to the value of prior commitment to an institution as evidence of mental incompetence to contract, see Mahin v. Soshnick, 148 N.E. 852 (Ind. App. 1958).
16. Blough v. Parry, 144 Ind. 463, 40 N.E. 70 (1895); Harrison v. Bishop, supra note 14; Lowder v. Lowder, 58 Ind. 538 (1877); Rush v. Megee, 36 Ind. 69 (1871). See also Cline v. Lindsay, 110 Ind. 337, 11 N.E. 441 (1886).
17. Wiley v. Gordon, 181 Ind. 252, 104 N.E. 500 (1913); Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N.E. 177 (1912); Hoffbaur v. Morgan, 172 Ind. 273, 88 N.E. 337 (1909); Teegarden v. Lewis, 145 Ind. 98, 40 N.E. 1047 (1895); Burkhart v. Gladish, 123 Ind. 337, 24 N.E. 118 (1899). McReynolds v. Smith, 172 Ind. 556, 86 N.E. 1009 (1909), and Pence v. Meyers, 180 Ind. 202, 101 N.E. 716 (1913), adopt this standard with a slight variation. Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917), adds certain qualifying language. Blough v. Parry, supra note 16, accepts this statement of the rule as well as the previous one. See note 16 supra. Ditton v. Hart, 175 Ind. 181, 93 N.E. 96 (1911), recites as elements of the standard that the testator have sufficient mental capacity to understand the nature of the business in which he is engaged, to recollect the property he means to dispose of and the persons who are the natural objects of his bounty, and to understand the manner in which it is to be distributed among them. This language was taken from Harrison v. Rowan, 11 Fed. Cas. 659 (No. 6141) (C.C.D.N.J. 1820). It was not subsequently followed by the Indiana courts. For another variation which is probably not significant see Whiteman v. Whiteman, 152 Ind. 263, 53 N.E. 225 (1899).
and understanding that one is making a will probably should not be left to implication as would be the situation under the second line of cases. Further, it is arguable that the addition of the "capacity and necessity" element makes the standard stricter than the earlier cases indicated it should be. If "capacity" refers to earning power and "necessity" refers to the purchasing power needed to keep a particular individual or family reasonably happy, the ability to know these things could require considerable mentality. It may have been these considerations which led Justice McMahan of the appellate court to adopt a trial court instruction in 1927, which combined the important elements of both standards in refined and precise language. He wrote:

These instructions follow the law as announced many times by the Supreme Court. They are good ones to follow and for that reason we set them out in full: Instruction 8. . . If he has sufficient mind to enable him to know and understand the extent and value of his property, the number and names of those who are the natural objects of his bounty, their situations and conditions, and their deserts with reference to their conduct towards him and their treatment of him, and he is able to keep these things in his mind long enough to form a rational judgment in relation to them, and to have his will prepared and executed and to understand the nature of the business in which he is engaged, he is capable of making a valid will. 18

This statement of the standard of testamentary capacity has been beyond impeachment. Neither the supreme nor appellate court has since seen fit to modify it or even to rule on the question.

The elements of the standard have undergone considerable refinement as to meaning, so that today there is little chance of misapprehension. The requirement of mind and memory to know the extent and value of one's estate does not mean an ability to know these exactly, 19 nor does the requirement imply that the testator need actually know them. 20 Precisely what is meant by "natural objects of his bounty" has not been defined, but it has been held that erroneous views as to the law of descent constitute slight ground, if any, for an inference of mental incompetence. 21 For the sake of logic and simplicity it would seem that

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21. Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911); Barricklow v. Stewart, 163 Ind. 438, 72 N.E. 128 (1904). In Jewett v. Farlow, 88 Ind. App. 301, 157 N.E. 458 (1927), the court sets out an instruction which states that the question as to who were
the testator should be required to have the ability to know who would take his property if he died intestate. This position is not inconsistent with the holding just mentioned since erroneous views of technical rules of law have little relation to the ability to understand them if one has been properly informed. The requirement that the testator be able to retain the elements in his mind long enough to form a rational judgment in relation to them is an essential one, but failure of the trial court or jury to make a specific finding on the point is not reversible error if such a finding can be inferred from other findings. Capacity to understand the nature of the business in which the testator is engaged and, by implication, the nature and effect of the will does not connote an ability to understand the provisions in their legal form. Finally, if one is of sound mind when the will is prepared, but suffers a serious illness before he is able to sign it, he must have mental ability at the latter time to know more than that he is signing a will which he has already prepared.

Gifts. Inter vivos gifts of personalty and conveyances of land without bargained-for consideration may be grouped together in so far as the applicability of a standard of mental competence to enter into such transactions is concerned. The Indiana courts have equated them in this regard. They have not, however, seen fit to devise a specific standard to apply to the situation. Instead, the question has been approached as one of choosing between the contract standard and the will standard. The courts' preference is clear from the following passage:

If inducements or influences from the donee, to make the gift, should be considered in determining the test of mental capacity, we are unable to discern why the same inducements and influences might not obtain in the execution of a will as of a gift. Either is like the other, in that the donor receives no recompense or equivalent for that which he gives. . . . It is our judgment that the capacity to execute a will is the perfect requisite

25. Terry v. Davenport, 170 Ind. 74, 83 N.E. 636 (1907).
for the execution of a gift inter vivos. 27

However, two recent cases which consider the problem of mental capacity to execute a gift have drawn into doubt not only the holding quoted, but also the entire system of classification of standards previously recognized. 28 Both cases involved gifts of land. In discussing contentions of mental incompetence, the appellate court recited a standard resembling that of contracts but called it a "test of capacity to make a deed." Not only were the previously separate concepts of competence to contract and competence to execute a gift disregarded, but in one of the cases the court went on to say: "No greater degree of mental capacity is required in such a case than is required to make a will." 29 Acceptance of these cases may lead to the somewhat illogical position that the standard of mental competence in a transaction involving a gift of personalty is the same as the will standard, but that the contract standard is used in a transaction involving a gift of land. More probably, these cases represent a recognition that the will standard is not a very useful device when cast in the context of an inter vivos gift.

Guardianship. Prior to the adoption of the Indiana Probate Code, 30 the statutes controlling guardianship provided that a proceeding could be instituted against any person alleged to be "of unsound mind and incapable of managing his own estate." 31 This followed generally the language of the other statutes affecting the legal status of incompetent persons. 32 A proceeding could also be brought against a person alleged to be incapable of managing his estate or business affairs because of old age, infirmity, improvidence, or prodigality. 33 The Probate Code does away with the confusing detailed provisions of the former law, stating simply

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27. Teegarden v. Lewis, 145 Ind. 98, 100, 40 N.E. 1047, 1048 (1895) (gift of personalty). See also Thorne v. Cosand, supra note 26 (conveyance for love and affection).


31. IND. ANN. STAT. § 8-202 (Burns 1933).

32. See notes 2-4 supra.

33. IND. ANN. STAT. § 8-301 (Burns 1933). Although § 8-301 referred primarily to the clerk and prosecutor, the cases under the prior law made it clear that if the complaint alleged only that the person proceeded against was incapable of managing his own estate because of old age or infirmity, it was not necessary to prove any mental impairment to justify appointment of a guardian. In Silver v. Newcomer, 80 Ind. App. 406, 140 N.E. 455 (1923), appointment of a guardian was sustained solely upon evidence of the person's physical incapacity. See also Perry v. Perry, 108 Ind. App. 93, 27 N.E.2d 133 (1940); Harvey v. Rodger, 84 Ind. App. 409, 143 N.E. 8 (1924).
that guardians may be appointed for "minors and other incompetents." The definition of "incompetent" is more comprehensive than was that of "unsound mind" in the former law and is framed so as to point out clearly the ultimate issue, namely, whether the person is incapable of managing his property, caring for himself, or both. The definition also incorporates the words which under the former law were construed to apply to persons whose only disability was physical. Therefore, such persons would seem to fall within the purview of the present statute. The primary problem here, however, is to determine the standard of competence to be applied to mentally incapacitated persons.

Under the former law the test of incompetence most widely cited, whether for appointment of a guardian or for discharge because of restoration of the ward, was that the person must be incapable of conducting the ordinary affairs of life, and in a condition to become the victim of his own folly or the fraud of others. A widely recited variation required simply that the person be incapable of understanding and acting with discretion or with reasonable prudence in the ordinary affairs of life. Occasionally the courts have merely used the words of the statute, i.e., capability of managing one's own estate. Sometimes they have added the ordinary affairs or ordinary "business" affairs test.

The apparent conflict in these statements is lessened when one recognizes, as has the Indiana Supreme Court, that the capacity to understand and act with discretion in ordinary business affairs necessarily implies the capacity to manage one's own estate and that in most cases the ordinary affairs of a person's life will include the management of his estate.

34. IND. ANN. STAT. § 8-118 (Burns 1953).
35. IND. ANN. STAT. § 8-101 (Burns 1953). See note 4 supra.
36. Ibid.
37. See note 4 supra.
38. IND. ANN. STAT. §§ 8-202, 8-204, 8-301 (Burns 1933). There are no significant adjudications under the Indiana Probate Code of 1953.
39. Shafer v. Shafer, 181 Ind. 244, 104 N.E. 507 (1913), and Cochran v. Amsden, 104 Ind. 282, 3 N.E. 934 (1885), indicate that the same test is applicable in both situations. Guardianship based upon incompetence other than minority may not be discharged until there has been judicial inquiry into the ward's capacity to manage his own estate. An entry on court records by the judge finding one previously adjudged mentally incompetent to be restored to sanity on the basis of a state hospital certificate does not amount to a finding of competence sufficient to justify discharge of the guardian. State ex rel Codding v. Eby, 223 Ind. 302, 60 N.E.2d 527 (1945).
40. McCammon v. Cunningham, 108 Ind. 545, 9 N.E. 455 (1886).
41. Shafer v. Shafer, 181 Ind. 244, 104 N.E. 507 (1913) (discretion); Fiscus v. Turner, 125 Ind. 46, 24 N.E. 662 (1890) (discretion); Hamrick v. State ex rel Hamrick, 134 Ind. 324, 34 N.E. 3 (1893) (reasonable prudence).
42. Cochran v. Amsden, 104 Ind. 282, 283, 3 N.E. 934, 935 (1885).
44. Cochran v. Amsden, 104 Ind. 282, 285, 3 N.E. 934, 935 (1885).
It may also be pointed out that the ordinary business affairs test is necessarily very close to the test for capacity to execute a particular contract since managing one's own estate implies the legal ability to contract. The only difference is that in the latter instance it is possible for the court to tie down the standard and the evidence to the specific circumstances of the case, while in the former, the standard must be very general and unrelated to any specific obligation.

Evidence

The facts commonly adduced on the issue of mental incompetence fall roughly into five classes: evidence relating to physical disabilities and physical symptoms of mental illness, evidence describing social behavior, evidence from which inferences of the person's general business acumen may be drawn, evidence which tends to prove or disprove the reasonableness of the contract provisions under the circumstances, and evidence which directly tends to prove the person's capacities and knowledge during negotiation and execution or delivery of the purported contract, will, or gift. In guardianship cases, the appellate courts have not generally recited specific facts as decisive. They usually state that there is or is not sufficient evidence to sustain the verdict upon the whole record. It would seem that any evidence from which inferences as to the alleged incompetent's mentality at the time of the proceeding can be drawn is cognizable under the standard. Under the will and contract standards (including the gift cases), however, the appellate courts do recite and emphasize specific evidentiary facts which are divisible into the above five classes.

When seeking a finding of mental incompetence, counsel have always tended to rely heavily upon physical disabilities and symptoms of mental illness, such as old age, impairment of senses, serious illnesses,

45. But see Perry v. Perry, 108 Ind. App. 93, 27 N.E.2d 133 (1940), where a verdict of incompetence to manage one's own estate or business affairs under Ind. Ann. Stat. § 8-301 (Burns 1933) was sustained on the evidence that the alleged incompetent kept all his income, substantially more than his expenses, in his pockets; that he had borrowed money but did not know how much, or how much he had repaid; and that he had collected part of a note due him but did not know how much he had collected. See also Kutzner v. Meyers, 182 Ind. 669, 108 N.E. 115 (1915), where evidence that the alleged incompetent had conveyed valuable real estate for an agreement by another to keep and look after him was admissible on the question of whether a guardian should be appointed.


47. Brannon v. Hayes, 190 Ind. 420, 130 N.E. 803 (1920).

dizziness,\(^\text{49}\) vacant staring,\(^\text{50}\) and hallucinations,\(^\text{51}\) doubtless because of the sympathy aroused by this type of evidence. Although under both the will standard and the recently-emerged, subjective contract standard it would seem that many of these physical disabilities and symptoms should become immaterial, if not irrelevant, the courts have not taken this position and are inclined to cite such facts as material evidence in both situations.\(^\text{52}\) It is clear, however, that a finding of mental incompetence in a trial court based wholly or substantially upon this class of evidence will not be affirmed on appeal.\(^\text{53}\)

Evidence of normal or abnormal social behavior has always been more voluminous than any other type, especially in the will cases.\(^\text{54}\) Juries tend to be persuaded by such facts as indecent exposure,\(^\text{55}\) attempted suicide,\(^\text{56}\) mental depression,\(^\text{57}\) uncleanness,\(^\text{58}\) and unfriendliness.\(^\text{59}\) The appellate courts of Indiana have also been inclined to give weight to this class of evidence, but the extent is uncertain. When the contract standard was in its earliest stage, evidence relating to social behavior of the individual seems to have been decisive.\(^\text{60}\) The development of the standard noted above, however, would seem to dictate a substantial decline in the

\begin{itemize}
\item \text{49.} Brannon v. Hayes, 190 Ind. 420, 130 N.E. 803 (1920).
\item \text{50.} Haas v. Haas, 121 Ind. App. 335, 96 N.E.2d 116 (1951).
\item \text{51.} \text{Ibid.}
\item \text{52.} See, \text{e.g.,} Brannon v. Hayes, 190 Ind. 420, 130 N.E. 803 (1921) (dizzy spells, saw colors); Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917) (physically unable to work, recent serious illness, insomnia, nervous); Pence v. Meyers, 180 Ind. 282, 101 N.E. 716 (1913) (impairment of speech, intense pain, hallucinations); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940) (old age, 3 serious illnesses, staring look in eyes).
\item \text{53.} In Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E.2d 599 (1944), a trial court finding of mental incompetence to contract based principally upon old age, illness, loss of eye sight, and inability to get about was reversed for insufficiency of evidence. See also Rarick v. Ulmer, 144 Ind. 25, 42 N.E. 1099 (1896); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940).
\item \text{54.} See, \text{e.g.,} Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917); Stevens v. Leonard, 154 Ind. 67, 56 N.E. 27 (1899); Rush v. Megee, 36 Ind. 69 (1871); Haas v. Haas, 121 Ind. App. 335, 96 N.E.2d 116 (1951); Potter v. Emery, \text{supra} note 53.
\item \text{55.} Haas v. Haas, \text{supra} note 54.
\item \text{56.} Rush v. Megee, 36 Ind. 69 (1871).
\item \text{57.} Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917).
\item \text{58.} Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940).
\item \text{59.} \text{Ibid. But see} Stevens v. Leonard, 154 Ind. 67, 56 N.E. 27 (1899).
\item \text{60.} In an early leading case, Somers v. Pumphrey, 24 Ind. 231 (1865), a jury found mental incompetence on the basis of lay testimony that the party was "weak minded" and medical testimony that she was incapable of understanding the future effects upon her legal rights of any transaction without instruction. The Indiana Supreme Court reversed for insufficiency of evidence noting that the party could read and write, was a church member in good standing, a faithful wife and step-mother, and discharged her household duties with ordinary care and judgment. The decision seems correct from the standpoint of the standard applied—capacity to act with discretion in the ordinary affairs of life—but one may wonder what light the ordinary affairs of this person's life threw upon her capacity to execute the contract in question.
\end{itemize}
probative value of such facts. At least, evidence of this class alone will probably no longer support a jury finding of mental incompetence to contract.\textsuperscript{61} The conclusion as to wills is similar—evidence of this class alone would not likely be sufficient to sustain a verdict of mental incompetence.\textsuperscript{62} Evidence of social behavior frequently may qualify as evidence of business acumen, or as directly bearing upon the actor's capacities and knowledge at the time of negotiation and execution or delivery of the contract, will, or gift. In these situations, evidence relating to social behavior should be of much greater significance.\textsuperscript{63}

Evidentiary facts tending to prove the alleged incompetent's general business acumen have always, and properly, been of a high order of importance under both the contract and will standards. At the early stage of the contract standard when it concentrated upon capacity to act in ordinary affairs, business acumen was pertinent in so far as business matters were ordinary affairs of life. Under the present status of the contract standard, capacity to act with discretion in regard to the business transaction in question can be properly inferred from evidence of a person's understanding and discretion in past business affairs. In fact, substantial proof of failure to act with discretion in past business affairs perhaps should raise a presumption that the person lacked the capacity to act with discretion in regard to the transaction in question.\textsuperscript{64} Making a will involves the same knowledge and foreseeability in many respects as a business transaction, even though the question of legal capacity must be cast in different terms. Thus, if evidence of a person's ability to exercise discretion in regard to one business transaction or contract is probative upon the issue of his ability to act with discretion in regard to another business transaction or contract, it should also be probative of his ability to act with discretion in regard to a will.

There is a noticeable absence of business acumen evidence in both will and contract cases, although an examination of the few cases in which such evidence was relied upon indicates its considerable value.\textsuperscript{65} In


\textsuperscript{62} See Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940), where a verdict of mental incompetence based on the facts that the testator was unfriendly, high tempered, anti-social, oppressive to his wife and daughters and that he ignored his children and grandchildren and slept in his clothing on the floor was set aside in the face of evidence that the testator conducted his business satisfactorily.

\textsuperscript{63} See Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917).

\textsuperscript{64} The presumption that prior relief from a legal obligation for mental incompetence creates a presumption in favor of incompetence in subsequent transactions is based on this type of reasoning. See cases cited note 8 supra.

\textsuperscript{65} Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940).
one instance, the principal facts relied upon by the appellate court in sustaining a verdict of mental incompetence to contract were that the party believed she was without financial resources during a period when she had a large bank account, talked of selling her furniture and securities to obtain cash, and sent some ancient, worthless account books to an accountant for examination. Recently, a trial court finding of mental incompetence was reversed partly because the party had taken care of his banking satisfactorily, participated in agricultural programs, and conducted a profitable business in rental properties.

Facts or observations indicating the reasonableness of an agreement, testamentary disposition, or gift are found in many cases where the contract standard is adopted and in nearly every case where the will standard is used, along with comments by the court that the jury may consider such facts in determining the issue of mental competence. Doubtless this factor has some effect upon both juries and courts. In cases where the contract standard is applied, the appellate courts give considerable weight to this class of evidence when ruling upon the sufficiency of evidence to sustain a verdict. In one instance where the court adopted the contract standard to determine the validity of a deed which deprived the grantor's son of a right of survivorship in a half interest in business property, evidence that the grantor was alienated from her son because he had attempted to have her committed to a mental institution went far to establish her competence to execute the deed. In a similar case, the alleged incompetent entered a contract for support whereby he conveyed his farm to one son and cut off his other heirs presumptive. The court reversed a trial court finding of mental incompetence partly on the basis of evidence that the grantor was embittered toward the plaintiffs for having instituted a guardianship action against him. On the other hand, where the will standard is applied, it is difficult to find a case in which an appellate court has relied upon evidence meant to establish the reasonableness of the disposition of property. In one case the supreme court appeared impressed by the fact that the will in question, which made no reference to the testator's three daughters, was not unreasonable under the circumstances, but refused to reverse the jury's finding of mental incompetence even though there was other substantial evidence of

68. See, e.g., Pence v. Meyers, 180 Ind. 282, 101 N.E. 716 (1913); Swygart v. Willard, 166 Ind. 25, 76 N.E. 755 (1906); Rarick v. Ulmer, 144 Ind. 25, 42 N.E. 1099 (1896); Conway v. Vizzard, 122 Ind. 266, 23 N.E. 771 (1889); Rush v. Megee, 36 Ind. 69 (1871); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940).
competence and very little evidence of incompetence.\textsuperscript{71} The same court has said that a finding of incompetence based solely on an unnatural disposition of property must be reversed for lack of evidence.\textsuperscript{72}

Evidence bearing directly upon the alleged incompetent's capacities and knowledge during negotiation and execution or delivery of the purported contract, will, or gift includes a wide variety of facts which are often peculiar to individual cases. Examples which one might expect to encounter with some frequency are: testimony from witnesses who were present during periods of negotiation and at execution or delivery as to the party's demeanor\textsuperscript{73} and the influence, if any, exerted by other persons upon his judgment;\textsuperscript{74} evidence as to whether he received independent advice in the matter or had the agreement or other instrument drawn by his own counsel;\textsuperscript{75} evidence as to whether the alleged incompetent solicited the agreement (if a contract case) himself;\textsuperscript{76} and testimony as to his declared intentions and reasons for entering the contract or making the will or gift, both prior and subsequent to execution, and whether his act tended to effectuate them.\textsuperscript{77} This class of evidence should be important at any stage of development of the contract standard. It would seem to have much bearing upon the individual's capacity to act with discretion in the ordinary affairs of life at the time of the purported legal act. Under the present subjective stage, these facts would seem to be the essence of proof or disproof of mental competence. The will standard has always been oriented toward the testator's capacities and knowledge at the time of execution, so that one might expect to find even greater reliance upon this class of evidence in the will cases than in the contract cases.

There has, however, been conspicuously little reliance upon this kind of evidence in appellate courts under either standard in Indiana. In the contract area such evidence is found only in two recent cases. In one, the plaintiff sought to avoid a contract in settlement of litigation on the ground that he was mentally incompetent at the time it was executed. The Indiana Appellate Court affirmed the trial court finding of competence, citing evidence that the plaintiff had admitted he understood the terms of the contract, that he had personally taken part in the "horse-trading and dickering" involved in negotiation of the contract, and that

\textsuperscript{71} Pence v. Meyers, 180 Ind. 282, 101 N.E. 716 (1913).
\textsuperscript{72} Conway v. Vizzard, 122 Ind. 266, 23 N.E. 771 (1889).
\textsuperscript{73} Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E.2d 599 (1944).
\textsuperscript{74} Wells v. Wells, 197 Ind. 236, 150 N.E. 361 (1926).
\textsuperscript{75} Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E.2d 599 (1944).
\textsuperscript{76} \textit{Ibid}.
\textsuperscript{77} Pence v. Meyers, 180 Ind. 282, 101 N.E. 716 (1913) ; Conway v. Vizzard, 122 Ind. 266, 23 N.E. 771 (1889) ; Daugherty v. Daugherty, \textit{supra} note 76.
he had ably protected his position so that he would not be put in a "squeeze financially." In the other, the alleged incompetent deeded his farm to one of his sons in return for support and maintenance. The other heirs sought to avoid the contract and cancel the deed. In reversing a trial court finding of mental incompetence, the court attached considerable importance to the facts that the alleged incompetent had his lawyer draw the contract in question, that it was drawn so as to protect the client's rights fully, and that he had originally sought the agreement because he feared loss of his property unless other arrangements were made for its maintenance. Countervailing evidence showed that the negotiations had taken place in secret so the favored son was in a position to exert influence. Under the will standard cases, evidence of this class appears somewhat more frequently. When present it assumes prominence. In one case, the most significant facts sustaining the verdict of mental incompetence were that the testator took three hours to prepare his brief will, that it was contradictory in terms, and that he frequently spoke erroneously of its terms thereafter. Evidence that a will is in substantial accord with declarations concerning its provisions made by the testator at times prior or subsequent to the execution has often been given considerable probative value.

**PARTIAL INSANITY**

In both contract and will cases, the courts have made extensive use of the concept of partial insanity, monomania, or the insane delusion. This is a supplemental standard to be applied as an instruction upon request when the evidence suggests that the party was without the ability to act with discretion upon the occasion in question solely because of the peculiarities of the situation, rather than because of a general inability to act with reason at the particular time. The standard is usually stated in the will cases as requiring a spontaneous conception and acceptance as fact of that which has no existence except in the imagination, a persistent belief in the supposed fact against all evidence and probability, and some

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81. See cases cited note 77 supra.
82. The terms are used interchangeably in the decisions. See Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946); Schuff v. Ransom, 79 Ind. 458 (1881).
83. There is no discernible tendency on the part of the Indiana courts to require an instruction on partial insanity in the absence of specific evidence going to that question. But see language to the contrary in Schuff v. Ransom, supra note 82, decided under an earlier statute which included monomania in the definition of a person of unsound mind. Ind. Acts 1876, ch. 5, § 1.
relationship between the belief and the will. The statement in the contract cases is similar, except that there is no requirement of spontaneity. A few statements of the partial insanity test in will cases do not include the element of spontaneity, but these do not seem to be authoritative.

There appears to be no reason why a false belief must have arisen spontaneously, i.e., without inducement from sources outside the testator's own mind, in order to qualify as an insane delusion. The crucial factors appear to be the existence of the belief in the mind of the testator, its persistent character, its absolute falsity, and its relation to the purported legal act. Further, it is unlikely that such beliefs ever, in fact, arise completely divorced from outside sources; in most cases proof of the spontaneity element probably amounts to no more than failure to prove the source of the belief. The mischief of such a requirement is suggested by two Indiana cases. In one, a testator who firmly believed that his wife and daughter were witches was held not to be suffering from an insane delusion since the belief seemed to have had its origin in harsh treatment which he had received at their hands. In the other, a false belief that the testatrix's daughters were trying to poison her was held not to be an insane delusion since the testatrix's son had planted the thought in her mind. It is, of course, possible that the beliefs held by the testators in these cases could not in any event have been characterized as insane delusions, but it is doubtful that the fact of disclosure of sources should have been determinative of the question. Nevertheless, with regard to wills the spontaneity element seems to be firmly established in the case law.

As to the second requirement, that of persistent belief against all evidence and probability, it is clear that in order to prove that a delusion

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84. E.g., Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915); Friedersdorf v. Lacy, 173 Ind. 429, 90 N.E. 766 (1910). In Johnson v. Johnson, 10 Ind. 387 (1858), the plaintiff sought to avoid a contract to sell land on the ground of partial insanity. Evidence was introduced which proved that he believed his wife to be "bewitched." The court held that this fact alone was insufficient basis for a finding of mental incompetence to contract.

85. Nichol v. Thomas, 33 Ind. 42, 47 (1876). An earlier statement of the test required that the belief be an "extravagant" one. Wray v. Wray, 32 Ind. 126, 131 (1869).

86. See Barr v. Sumner, 183 Ind. 402, 107 N.E. (1915), where the court approves a definition which does not include the element of spontaneity citing McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909), and Bundy v. McKnight, 48 Ind. 502 (1874). Such a definition is found in the cited cases, but in the form of a repeated trial court instruction. In neither case was an objection directed to, nor did the court comment upon, this aspect of the instruction. An instruction to this effect was indorsed in Rush v. Megee, 36 Ind. 69 (1871).

87. Addington v. Wilson, 5 Ind. 137 (1854).


89. Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920).
was an insane one, the party seeking to establish the particular delusion must prove that substantial evidence was presented to the alleged incompetent, or argument or persuasion used to convince him of the falsity of the belief.90 An instruction permitting the jury to consider as a circumstance tending to show an insane delusion the fact that the testator falsely believed the plaintiff had assaulted him or otherwise mistreated him was held erroneous because it should have embodied the idea that the testator held this belief in the face of facts to the contrary and in the face of reason.91

The final requirement, that the belief have some bearing upon the instrument (contract or will), is not well defined. In the will cases it has been said alternatively that the partial insanity must have affected the disposition of property,92 controlled or affected the execution of the will,93 or prompted the action and affected the object and purpose in making a will.94 The contract cases have held at various times that the contract must be the "offspring of the partial insanity,"95 that the false belief must impair one's capacity to acquire and dispose of property,96 or that the false belief must control or influence the execution of the contract.97 Strict use of language dictates that the required relationship, however expressed, should not be between the false belief and the execution of the instrument, whether will or contract, but rather between the false belief and the disposition of property in the one case and the particular contractual obligations in the other.

CONCLUSIONS

The striking common feature of the standards of mental competence in contract, will, gift, and guardianship cases is the lack of careful definition either by statute or through case development. In none of the areas do the courts seem to be interested in keeping the standard technically clear and delineated. The reason seems to lie in a lack of faith in the standards which they themselves have drawn, in a misconception

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90. Robbins v. Fugit, supra note 89. See also Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915), which recognizes that there may be a belief the falsity of which cannot be proved.
91. Robbins v. Fugit, supra note 89.
93. Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917); Wiley v. Gordon, 181 Ind. 252, 104 N.E. 500 (1913); Harbison v. Boyd, 177 Ind. 267, 96 N.E. 587 (1912); McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909); Swygart v. Willard, 166 Ind. 25, 76 N.E. 755 (1906); Wait v. Westfall, 161 Ind. 648, 68 N.E. 274 (1903).
94. Swygart v. Willard, supra note 93 at 37, 76 N.E. at 760.
95. Nichol v. Thomas, 53 Ind. 42, 47 (1876).
96. Crouse v. Holman, 19 Ind. 30 (1862).
97. Teegarden v. Lewis, 145 Ind. 98, 40 N.E. 1047 (1895).
of the functions of legal standards, or perhaps in both. Standards should guide lawyers in gathering and presenting evidence which is relevant to the inquiry. The weight of evidence indicated by the standard, and none other, should determine the issue. In the Indiana cases, however, one finds the courts discussing the standard merely as it was given in an instruction. The applicable standard is treated as a formality rather than a tool, with few cases actually attempting to relate the evidence to it.

Nor do the elements of the standard adopted seem to be particularly determinative of many cases. It has been noted that in cases of contracts, wills, and gifts great emphasis has been put upon the objective question of whether the act of the alleged incompetent was reasonable under the circumstances, while the standards adopted were almost wholly subjective. Further, lay opinions when based at least partly on conduct described in testimony apparently have carried more weight with the courts than those of experts, although experts would seem more qualified by their experience and scientific approach to observation to answer questions which require "looking into the mind" of the individual. This may indicate that the courts are more interested in what the ordinary man thinks of the nature of the motivation behind the act than in attempting to answer the much more difficult questions presented by a subjective standard.

One may also question the wide acceptance of evidence of physical disabilities and symptoms of mental illness as probative under the articulate standards. Except where guardianship of the person is the issue, physical disabilities as such seem immaterial. The probative value of physical symptoms as manifestations of mental illness should be deemphasized unless such evidence is accompanied by competent expert testimony as to what type or types of mental illness are suggested by the evidence and what effect such illness would be likely to have upon the capacities required under the particular standard. Jurors should not be

98. This phenomenon is not explainable on the theory that the state of a person's mind may be determined from his observable conduct, since the conduct being observed is precisely that which is to be judged from a subjective approach. When the judge or jury is permitted to determine whether an act was done by an incompetent person on the basis of whether a reasonable man might have done likewise under the known circumstances, the standard is objective. This position is supported by the observation that in a number of cases evidence of many unreasonable acts by the alleged incompetent prior and subsequent to the act sought to be nullified has not been controlling where the latter act might be considered reasonable under the known circumstances. E.g., Pence v. Meyers, 180 Ind. 282, 101 N.E. 716 (1913); Buuck v. Kruckeberg, 121 Ind. App. 262, 95 N.E.2d 304 (1950).

expected to draw correct inferences from evidence of physical symptoms of mental illness to the person's ability to satisfy a subjective legal standard of mental competence, or even the objective business affairs standard frequently applied in the guardianship of estate cases.

These inconsistencies between standards and evidence do not necessarily mean that the subjective approach is misleading or unworkable and should be abandoned in favor of an objective standard. On the contrary, unless the proceeding is one for guardianship, it is not necessary or proper for the court to make broad findings as to a person's competence where the only question pertinent to the litigation is whether the person was capable of sufficiently understanding the legal act in which he purported to engage. The standard should measure the depth, or quantity, or quality of understanding which as a matter of public policy should be required to give legal effect to the act. This varies with the complexity of the act and can only be reached by specific findings relating directly to the person's capabilities at the time of the act. Thus, the subjective standards present a more satisfactory approach to the issues involved.

In order for these standards to achieve their proper significance, however, certain weaknesses in their usual constructions should be eliminated. First, when the capacity to act with discretion in the ordinary affairs of life is an element, whether it be for contracts, wills, or gifts, the standard is misleading. The ordinary affairs of one person's life do not necessarily correspond to the ordinary affairs of another's life. Further, the capacity to act in the ordinary affairs of an ordinary person's life is so broad a standard that it has little bearing upon the question of the capacity of a particular person to understand a particular transaction. It has been noted that this element is tending to disappear in both the contract and will standards.

Another problem which should be resolved before the standards of mental competence for contracts, wills, and gifts can become fully workable relates to partial insanity. Although partial insanity as a supplemental test of mental competence is a firmly established concept, its utility is questionable at least under the present standards. In the contract cases when the principal standard has as one of its elements the ability to act with discretion in relation to the matters contained in the contract, the partial insanity situation would seem to be within its scope. Likewise, when the will standard is stated to include the ability to form a rational standards.

100. Professor Green advocates abandonment of the subjective standards in favor of objective ones in Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271 (1944).
judgment in relation to matters contained in the will, the test seems to be superfluous rather than supplemen
tal. Furthermore, the tendency to set partial insanity aside as a special problem of mental incompetence has resulted in confusion as to when the test is applicable and in undue and technical refinements upon its use.

A third problem involves the quest for a standard which is applicable in the gift situation. It is difficult to criticize the theory of the Indiana courts that no greater mental capacity should be required of an individual to execute an inter vivos gift than is required to make a testamentary disposition. Yet if one accepts the idea that a standard of mental competence should measure subjectively the alleged incompetent's capacity to comprehend the transaction in question, it follows that some of the elements of the standard for making a will are not appropriate in the gift situation. To put it more broadly, one may say that generally the same mental capacity should be required to execute a will or a gift, or even a contract, but when it comes to a determination of fact whether such capacity existed in a particular case, the standard in order to be fully workable should be phrased in terms of the factors which are relevant to that particular inquiry. Thus, the elements of a standard for mental capacity to execute a gift inter vivos might approach a contract standard more nearly than a will standard and would include recognition and comprehension of the donee, the property affected, the probable consequences of the act, and the ability to act with discretion in relation to the matter.

Finally, the question of mental incompetence in guardianship proceedings needs to be re-examined. It is of a different nature than the same question in a contract, will, or gift situation. There is no particular act in regard to which the alleged incompetent's capacity can be determined. The subjective approach used in contract, will, and gift cases is therefore impossible. The issue in these cases seems to be whether the person has some level of capacity which the law considers a pre-requisite to carrying on certain ordinary affairs in the life of an ordinary man. Since in Indiana, guardianship may be instituted for the protection of the person, the estate, or both, the standard to be employed should embrace only those ordinary affairs which are within the purpose of the proceeding. Thus, if the proceeding is based upon an allegation that the alleged incompetent is unable to take care of his personal needs or social responsibilities, as may be the case with one who is physically handicapped

101. Not all statements of the will standard include this particular element, but it certainly is not error to do so. See cases cited notes 16 and 17 supra.

102. E.g., requirement of spontaneity, requirement of proof that attempts were made to dissuade the alleged incompetent. See cases cited notes 86 and 90 supra.

or emotionally unbalanced, the standard should be based on the capacity necessary to satisfy the personal needs or social responsibilities of an ordinary person. A substantial showing under such a standard would justify appointment of a guardian of the person, but not of the estate. The standard in the latter situation should go to the ability to act with discretion in the ordinary business affairs of an ordinary person. Finally, appointment of a guardian of both person and estate should require a substantial showing under both standards.

**CONTRIBUTORY NEGLIGENCE OF CHILDREN IN INDIANA: CAPACITY AND STANDARD OF CARE**

There appear to be two major views in the United States today concerning the issue of contributory negligence of children. These are usually denominated as the Illinois rule and the Massachusetts rule. It is not the purpose of this note to make an exhaustive study of cases in the various states or even to determine which is the majority rule. The purpose is to examine the cases in Indiana and determine which, if either, of the rules the Indiana courts follow. In discussing the doctrine of contributory negligence of children, it is important at the outset to distinguish between the terms capacity and standard of care. Generally when a court is speaking of a child's capacity, it is referring to his ability to realize and appreciate a given danger or risk; but when it speaks of a standard of care it means the standard to which the child will be held after it is determined that he has the required capacity.

The Massachusetts rule, as generally stated, is that a child, regardless of age, is held to the same standard of care which is ordinarily exercised under similar circumstances by children of the same age, intelligence, and experience. Whether or not this standard has been met is a question of fact and must be determined by the jury. Many states follow the same rule but alter the language slightly, substituting capacity,

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2. See 5 Fordham L. Rev. 367 (1936).
4. Ibid.