CA 1212/91

1. LIBI The Fund for Strengthening Israel's Defence
2. Advocate Alberto Shrem
v.
1. Felicia Binstock
2. Rachel Teig
3. Esther Cohen
4. Uri Binstock
5. Hebrew University of Jerusalem — Formal Respondent and counter-appeal of respondents 1-4

The Supreme Court sitting as the Court of Civil Appeal

[28 August 1994]

Before President M. Shamgar and Justices E. Goldberg, M. Cheshin

An appeal and counter-appeal on the judgment of the Jerusalem District Court (Vice-President Y. Bazak) dated 18 February 1991 in CC 379/89.

Facts: The late Shalom Wagner, in his last will, disinherited his sister and her children, who were his closest family, and left the residue of his estate to the LIBI Fund. The family challenged the will, on the grounds that the deceased had been hospitalized with mental illness shortly before making the will and also subsequently, and at those times he suffered from delusions that his sister was trying to poison him. The deceased's lawyer, however, testified that the deceased's reason for changing the will was the fact that his nephew had not returned to him money that he deposited with the nephew before he was hospitalized; when the deceased asked for the money to be returned, the nephew claimed he could not return it because he had used it.

The trial judge held the will to be invalid in so far as it disinherited the sister and her two daughters, since the deceased had no reason to disinherit them, but valid in that it disinherited the nephew, since he had an objective reason for disinheriting the nephew. The trial judge held that the sister and her daughters were disinherited because of a mistaken belief that they were trying to kill the deceased, and so the will was one made as a result of a mistake and therefore was invalid.

Held: The doctrine of mistake was not applicable. The relevant question was the effect of mental illness on the deceased's testamentary capacity. Under the law, it was necessary to prove that the deceased suffered from delusions at the time he made the will. But this, in itself, was not enough. It was also necessary to prove that these delusions affected the contents of the will. Neither of these were proved in this case, and, in view of the behaviour of the nephew, it need not have been only mental illness that led the deceased to disinherit not only the nephew but his mother and sisters also. Therefore the will was admitted to probate on appeal.

Appeal allowed. Counter-appeal denied.

Legislation cited:

Foundations of Justice Law, 5740-1980.

Inheritance Law, 5725-1965, ss. 1, 2, 22(b), 25(a), 26, 30(b), 32, 150, article 2 of chapter 3.

Inheritance Ordinance, s. 12(b).

Legal Capacity and Guardianship Law, 5722-1962, s 2.

Palestine Order in Council, 1922, s. 46.

Israeli Supreme Court cases cited:

[1] CA 851/79 *Bendel v. Bendel* [1981] IsrSC 35(3) 101.

[2] CA 245/85 *Engelman v. Klein* [1987] IsrSC 43(1) 772.

[3] CA 190/68 *Sotitzky v. Kleinbrot* [1968] IsrSC 22(2) 138.

[4] CA 564/71 *Adler (Nesher) v. Adler* [1972] IsrSC 26(2) 745.

[5] CA 119/89 *Turner v. Turner* [1991] IsrSC 45(2) 81.

[6] CA 236/84 *Administrator of the Estate of Hila Yaffe v. Schwartz* [1991] IsrSC 45(5) 18.

[7] CA 2061/90 *Marcelli v. State of Israel, Ministry of Education and Culture* [1993] IsrSC 47(1) 802.

[8] CA 724/87 *Kalfa (Gold) v. Gold* [1994] IsrSC 48(1) 22.

[9] CA 1182/90 *Shaham v. Rotman* [1992] IsrSC 46(4) 330.

[10] CrimA 118/53 *Mandelbrot v. Attorney-General* [1956] IsrSC 10 281; IsrSJ 2 116.

[11] CA 279/87 *Rubinowitz v. Kreizel* [1989] IsrSC 43(1) 760.

[12] CA 16/85 *Mizrahi v. Raz* [1987] IsrSC 41(4) 454.

[13] CA 175/87 *Lubetsky v. Gilgor* [1987] Takdin 87(4) 75.

[14] CA 598/75 *Resnick v. Resnick* [1976] IsrSC 30(1) 749.

[15] CA 869/75 *Brill v. Attorney-General* [1978] IsrSC 32(1) 98.

[16] FH 40/80 *Koenig v. Cohen* [1982] IsrSC 36(3) 724.

Israel District Court cases cited:

[17] EC (Jerusalem) 514/79 *Estate of Felicia Hirsch* IsrDC 5741(1) 419.

American cases cited:

[18] *Williams' Ex'r v. Williams* 13 S.W. 250 (1890).

English cases cited:

[19] *Banks v. Goodfellow* (1870) 5 Q.B. 549.

[20] *Boughton and Marston v. Knight and others* (1873) 28 L.T. 562 (Prob.).

Jewish law sources cited:

[21] Ecclesiastes 9, 4.

[22] Isaiah 11, 9.

For the first appellant — O. Elitzur.
The second appellant represented himself.
For respondents 1-4 — M. Schecter.
For the fifth respondent — D. Sinclair.

JUDGMENT

Justice M. Cheshin

1. This is an appeal and counter-appeal on the judgment of the Jerusalem District Court, given by Vice-President, his honour Justice Y. Bazak. The District Court considered the question of the probate and invalidity of a will, and at the end of the trial it decided to admit the will to probate with an amendment. One party is challenging the probate and the other the amendment, and this is the appeal before us.

The judgment of the trial court, CC (Jerusalem) 379/89[*], was reported (in Hebrew) in Israel District Court Judgments; in our judgment below we will refer to this.

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[*] *Binstock v. Hebrew University* IsrDC 5751(2) 234.

The main facts of the case

2. a. Shalom Wagner (the deceased) died in 1989, and he left the following three wills:

(1) A will dated 24 July 1984, which he signed before an authority, in which he bequeathed part of his property to the Hebrew University (the fifth respondent), and the residue to his sister, her son and her two daughters (none of whom is a minor), who are the respondents 1-4 (the first will).

(2) A will dated 8 November 1984, which the deceased also signed before an authority. In this will, the deceased disinherited his relations — his sister and her three children — of their share of the estate, and he bequeathed their share to LIBI The Fund for Strengthening Israel's Defence, the first appellant (the second will). The deceased made no change to the share of the Hebrew University.

(3) Because of a technical mistake in signing before the authority, the deceased went with his lawyer to the court to sign, once again, a will before an authority. The signature was done on 3 December 1984 before Justice E.C. Ben Zimra (the third will). In content the third will is identical to its predecessor.

b. In each of the three wills, the deceased bequeathed his apartment to the Hebrew University of Jerusalem, where he worked for many years, and the University is merely a formal party to the proceedings. The difference between the second and third will and the first will is that in the first will the deceased bequeathed the residue of his estate to his family — his sister and her three children — whereas in the second and third wills he disinherited them of their share of the estate, and he stipulated that the residue of the money and the rights should be transferred in full to the LIBI Fund. In clause 14 of these wills, the deceased further stipulated: 'I hereby bequeath to each of my statutory heirs who can ever be found the sum of 1 sheqel.'

c. For the sake of completeness it should be stated that the wife of the deceased died in 1984, and the couple had no children. The only statutory heir of the deceased is his sister, Felicia Binstock (the first respondent).

3. Beginning in 1968, the deceased was hospitalized several times, since he suffered from paranoid schizophrenia accompanied by depression and suicidal tendencies. The mental state of the deceased went up and down over the years — *lucidum intervallum* — and following the death of his wife in 1984 there was a marked deterioration in his condition.

Let us now consider the development of events against this general background.

4. a. The deceased made his first will, as stated, on 24 July 1984.

b. Two weeks later, on 5 August 1984, the deceased was hospitalized at the Blumenthal Psychiatric Hospital in Haifa for severe depression. He stayed in this hospital until 27 August 1984. After that, during the period between 23 September 1984 until 21 October 1984, the deceased stayed in the psychiatric ward of 'Hadassah' Hospital in Jerusalem.

c. Before he was hospitalized at 'Hadassah' Hospital, the deceased deposited jewellery and cash ($15,000) with his sister and her son (the first and fourth respondents). After he was released from the hospital, the deceased asked to receive back the money and jewellery which he deposited with them, but they refused his request, claiming that the money and jewellery were not in their possession. After discussions between the lawyer of the deceased, Rami Artman, and the nephew, the jewellery was returned to the deceased. The cash was not returned, and the nephew claimed that he had used it.

d. After this, the deceased went to his legal advisor, Advocate Rami Artman, and informed him that he wished to disinherit his sister's family of their share in the estate. As a prudent and cautious lawyer — and it should be noted that he acted in this way throughout — and in order to ascertain that the deceased was of sound mind as required of someone making a will, Advocate Artman advised the deceased to submit himself to a psychiatric examination before signing the new will. The deceased accepted the suggestion, and went to be examined by Prof. E. Edelstein in the psychiatric ward at 'Hadassah' hospital. Prof. Edelstein examined the deceased on 7 November 1984, and this is what he wrote in his report on that day:

> 'I hereby certify that after examining Mr Shalom Wagner, I found that he knows how to understand the nature of a will, changing it, revoking it and its content and everything involved therein, and that his mental state allows him to sign and understand what he is doing with regard to the will that he is making.'

e. The next day, on 8 November 1984, the deceased signed the second will, in which he disinherited the members of his family of their share in the estate and he bequeathed that share to the LIBI Fund.

f. Beginning on 20 November 1984, for two years, the deceased was hospitalized at the 'Talbieh' Psychiatric Hospital in Jerusalem, first in the open ward, and as of 30 January 1985 — after there was a deterioration in his

condition — in the closed ward. When he signed the third will, on 3 December 1984, the deceased was an 'outpatient' at this hospital.

5. These main facts are not disputed. The dispute between the parties is about the following: the mental state of the deceased when he wrote the third will, and the cause or causes that led the deceased to disinherit the members of his family from their share of the estate. We will consider this further below.

Summary of the proceedings in the District Court, the judgment given and the appeal thereon

6. The deceased died on 28 January 1989. On 18 April 1989 Advocate Alberto Shrem (the second appellant), in his capacity as temporary administrator of the estate, submitted an application to the Jerusalem District Court for probate of the third will of the deceased. Mrs Felicia Binstock (the sister) submitted on 9 May 1989 an objection to the probate of the will. Her main argument was that when he made the will, the deceased was mentally ill, so that 'he did not know how to understand the nature of a will' (in accordance with the language of s. 26 of the Inheritance Law, 5725-1965), for which reason the will was invalid. She claimed as follows:

> '1. The applicant is the only sister of the deceased and entitled to be the statutory heir of the whole of the deceased's estate.
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> 2. On 3 December 1984, the deceased made a will before an authority, namely before the registrar of the honourable court, and this is the will which is the subject of the probate application in this case.
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> 3. The applicant will contend that at the time of making the will and/or at any other time which is relevant in the circumstances of the case, the deceased did not know the significance of making a will and for this reason, under the provisions of s. 26 of the Inheritance Law, 5725-1965, the will is invalid.
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> 4. The contention of the applicant is based, *inter alia*, on the fact that on the date of making the will and/or at any other relevant date, the deceased was mentally ill and/or was incompetent at law, even if he was not declared such, and/or was in a psychotic mental state that did not allow him to know the significance of a will and/or was subject to the influence of medications and/or other treatment that deprived him of the ability to know the aforesaid significance.

> 5. The applicant will contend that on the date of making the will and/or on any other relevant date, the testator was not aware of the fact that he was making a will and/or did not know the extent of his property and his heirs and/or was not aware of the consequences that making the will would have for his heirs and/or was unable to be aware of any other relevant matter in the circumstances of the case.'

7. a. The LIBI Fund and the sister were the disputants in the District Court, and the question in dispute was whether the deceased 'knew the significance of a will' according to the provision of s. 26 of the Inheritance Law, since if he did not, the will was invalid. The court heard testimony and admitted evidence, including two opinions of psychiatric experts: one from Prof. E. Edelstein on behalf of the LIBI Fund and a rebutting opinion from Dr Shalom Litman on behalf of the family. The experts were examined on the opinions that they gave.

b. It will be remembered that the wife of the deceased died in April 1984. According to the opinion of Dr Litman, the deceased developed after her death 'within three months a paranoia to the point of psychotic paranoia, the focus of which was his fears that his sister wanted to poison him.' Dr Litman added that when he signed the will, the deceased was under the influence of antipsychotic medication, but he was still under the influence of the psychotic state. The feelings of persecution and the beliefs that his sister was trying to poison him were, according to Dr Litman, the cause of the deceased's wish to disinherit his sister of a share in the estate, even though these thoughts were devoid of any realistic or objective basis. Depriving the sister of the deceased's property was, in the opinion of the expert, an 'insane translation of an unusual phenomenon that reflects the psychotic state in which the deceased found himself at the time of making the will and which reflects an insane and distorted vision of reality.' Most important of all, 'the content of this will [was influenced] by his psychotic state at that time, i.e., paranoid schizophrenia, which focussed on paranoid thoughts, which overcame him altogether, about the desire of his sister to poison him' (square parentheses added). In his cross-examination in court, Dr Litman repeated the essence of his written opinion. Prof. Edelstein, on the other side, concentrated on the general mental condition of the testator, and his ability to understand that he was making a will. He also wrote a detailed opinion about this, and he was cross-examined on this opinion in court.

c. The trial court preferred the opinion of Dr Litman over that of Prof. Edelstein, holding that were it not for the insane fantasies the deceased would not have disinherited his sister and her family of their share in the estate. The exception thereto was the nephew, with whom the deceased had deposited money, and who had refused to return it. With regard to him, the esteemed judge held that his being disinherited was for '"normal" reasons.'* The trial judge found that the deceased 'knew the significance of a will' as stated in s. 26 of the Inheritance Law, but because of his illness he was not in control of his mental faculty and therefore he disinherited his family (apart from his nephew) from its share of the estate for 'irrational or erroneous reasons… [dictated] to him by the delusions of his mental illness…'† Moreover, the deceased 'disinherited… his sister and her children from the share that he left them in his first will, because of insane delusions that he had about them, and had it not been for these delusions, he would not have disinherited them of their inheritance.'‡ The judge further held that:§

> 'It is clear that a will or a part thereof should be disqualified when it is clearly proved that the mental illness caused the testator not to have the ability to consider properly the considerations that he would have taken into account had he not become insane.'

d. The court then turned to the relevant provisions of the law, and when it thought that it could not find a specific provision in the Inheritance Law that relates to a testator who is mentally ill, it referred to s. 30(b) of the law, which deals with a provision in a will that was made as a result of a mistake. In the opinion of the honourable Justice Bazak, the provision of s. 30(b) of the law is relevant to this case: it concerns 'a fundamental mistake relating to the very considerations that the testator took into account when making the will'** as he did, and this, he thought, is what happened to the deceased. From this it was only a short distance for the court to determine the 'true intention' of the deceased, and to amend the will in accordance with that intention. The court held that the deceased disinherited his sister and her two daughters from their share of the estate because of a mistake that derived from the mental illness (the thought that his sister wanted to poison him), and therefore:

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* IsrDC 5751(2), at p. 242.
† *Ibid*., at p. 243.
‡ *Ibid*., at p. 242.
§ *Ibid.*, at p. 244.
** *Ibid.*, at p. 244.

> 'It is possible to conclude clearly that had it not been for the mistake that derived from the mental illness, the deceased would not have disinherited his sister and her two daughters from the inheritance, but it is not possible to conclude this clearly with regard to the nephew with whom he had a real quarrel…'[*]

e. After all this, the District Court decided to uphold the will, but with the amendment that the money and rights given in the will to the LIBI Fund would be given in equal shares to the sister, her two daughters and the LIBI Fund.

The appeal before us was submitted against this decision.

8. It will be remembered that the disputants in the trial court were the LIBI Fund (and the administrator of the estate) on one side, and the sister of the deceased on the other. The Hebrew University was merely a formal party to the proceedings. After the appeal was filed by the LIBI Fund, the children of the sister — her son, Uri Binstock, and her two daughters, Rachel Teig and Esther Cohen — applied to be joined as additional respondents in the appeal, and when we granted their application, they submitted a counter-appeal on the judgment.

So the positions before us are as follows: the LIBI Fund, as appellant, asks for the judgment of the trial court to be overturned and for the third will to be admitted to probate, whereas the sister and her three children ask for one of the following three things: not to admit the third will to probate and to declare the sister the sole heir; to amend the third will by giving the whole estate to the sister and her three children, or to the sister and her two daughters; to overturn the decision of the trial court in so far as it decided to uphold the instructions of the deceased to disinherit the nephew from any share whatsoever in the estate.

Preliminary arguments

9. Before we consider the merits of the case, we must remove from our path several vexatious preliminary arguments raised by counsel for the parties. The LIBI Fund argues that the trial court exceeded its authority in deciding to amend the will without being asked to do so by either of the parties. This argument should be rejected. The trial court held — in pursuing the course that it chose for itself — that the third will should not be admitted to probate. Had it stopped at that point, then it would have dismissed the application of the LIBI Fund to admit the will to probate, and at the same time it would have

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[*] *Ibid.*, at p. 246.

accepted the opposition of the sister to probate of the will. Had that been the case, the LIBI Fund would not have received anything, and the sister might have received the whole inheritance. When the trial court decided to amend the will, it merely benefited the LIBI Fund, for in this way it received a part of the estate. What therefore is the argument of the LIBI Fund? Second, in the trial court the point of dispute between the parties was established: the disagreement between them concentrated on the mental state of the deceased when he wrote the will, and his motives in changing his will of 24 July 1984. When the trial court decided to prefer the opinion of Dr Litman to the opinion of Prof. Edelstein, then the question of not admitting the will to probate or, alternatively, amending the will under the Inheritance Law — according to the construction of the law by the trial court — was merely a secondary question and subordinate to the main question. Amending the will — in the circumstances of the case — was self-evident, and moreover the amending of the will merely benefited the LIBI Fund.

10. For their part, the sister and her children also raised a preliminary argument, that the third will should be invalidated — and the sister should be declared the sole heir by law — for the reason that there was a defect in that will. What is this defect? According to the sister and her children, it is merely that his honour Justice Ben Zimra did not certify 'on the will' — according to the requirement of s. 22(b) of the Inheritance Law — that the deceased declared the will to be his will. This argument should be rejected, even if only for the reason that it was not raised at all in the trial court, no evidence was brought with regard to it, and in any event the LIBI Fund was not given a chance to disprove it and bring its own evidence. We should mention and remember that a defect of this kind — and it is a defect of form — can be repaired under s. 25(a) of the Inheritance Law, provided that the court is convinced that the will is genuine. In our case no-one has suggested that the will is not genuine; See and cf. CA 851/79 *Bendel v. Bendel* [1], at p. 108. See also CA 245/85 *Engelman v. Klein* [2], at p. 778.

The questions in dispute

11. Now that we have removed the initial arguments from our path, we can enter into the heart of the matter before us, and so we can consider the real disputes and the merits of the case. This case concerns the question of the capacity of a person who is mentally ill to make a will — where the mental illness directly influences the contents of the will — and our main question can be stated in varying degrees of simplification.

With regard to this case we can ask the following: *A* is overcome by delusions. Paranoia attacks him, and in his delusions he thinks that his close relations — his potential and natural heirs — are quarrelling with him, wish to do him harm, and even want to speed his end. Because of the illness from which he suffers, and because of that distorted perception of reality, *A* decides to disinherit his relations of their share in his estate after his death (an estate which they would have inherited in the normal course of events, whether by law or under a previous will that *A* made). *A* sits down, writes a will, and disinherits these relations from their share of the estate that he will leave after him. Does the law regard *A*, in the circumstances that we have described, as lacking the capacity to make a will, and consequently his will must be seen as void? Moreover, on a more abstract level: does the law regard a mental illness that distorts reality as something that deprives a person of capacity to write a will whose contents are affected by that distorted reality? This is the first and main question.

12. Assuming that the distorted reality as explained makes the will invalid, then a second question arises: did the deceased suffer from a mental illness and from delusions that were sufficient to invalidate the third will? Conversely, assuming that such a mental illness is not sufficient to deprive a testator of the capacity to make a will because he is under the influence of the distorted reality, does this mean that the court is bound to admit the will to probate as it stands, or is the court perhaps authorized to change and amend — and possibly to cancel — the will, as in the decision of the trial court?

These questions that we have raised, and secondary questions that derive from them, are not merely isolated questions, but they are also interrelated, and we will consider them in the order that we will set out below.

Capacity and incapacity to make a will — preliminary remarks

13. The premise is that a person is capable of performing legal acts, including the making of a will. This is stated in s. 2 of the Legal Capacity and Guardianship Law, 5752-1962:

> ‘Capacity for legal acts
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> 2. Every person is capable of legal acts, unless this capacity is disqualified or restricted by law or by a judgment of a court.’

The presumption is that a person is capable of legal acts — including making a will — and whoever denies this capacity has the burden of proof. See and cf. *Bendel v. Bendel* [1], at pp. 104-105; CA 190/68 *Sotitzky v. Kleinbrot* [3] at pp. 139-140. It is a principle that a person has the capacity to

judge correctly the reality around him, the ability to form a purpose and desire, and finally — an ability and power to direct his behaviour according to that reality and in accordance with that intention and desire. Limiting capacity will occur where the judgment of a person is so damaged that society sees a need to protect him from himself — from his acts and from his omissions deriving from a defective perception of reality — and from others who may take advantage of his weakness of mind and his defective judgment. See and cf. Prof. I. Englard in his work 'The Legal Capacity and Guardianship Law', *Commentary on Contract Laws*, The Harry Sacher Institute for Research on Legislation and Comparative Law, G. Tedeschi ed., 1972, at p. 32.

14. Capacity applies to every legal act, and the disqualification or restriction of capacity may be in the form of an absolute disqualification or restriction, or a disqualification or restriction for certain types of act only. We are dealing in this case with the disqualification or restriction of the capacity to make a will, and in this regard s. 26 of the Inheritance Law (found in article 2 of chapter 3 of the law, which is entitled 'Validity of the Will') states:

'Capacity to make a will

> 26. A will made by a minor or by someone declared incompetent or which was made *when the testator did not know the significance of a will* is invalid.' (emphasis added)

There are three kinds of person who are incapable of making a will: a minor, someone who has been declared incompetent and a testator who 'did not know the significance of a will'. The deceased was not a minor and was also not declared incompetent. We are concerned therefore with the question whether the deceased 'did not know the significance of a will' when he made the third will.

15. What is the meaning of the provision of this law and what is its application? Suppose someone has a mental illness, has delusions, and when he is under the influence of these delusions — and because of these delusions — he bequeaths his future estate to whoever he wishes to inherit, and disinherits whomever he wishes to disinherit. Should we recognize that person as capable of making the will that he made and give legal force to the bequests that he made in his will? Or should we rather say: a will must reflect the 'true' will of the testator; then — and only then we will give it legal force. But if a will is written while the testator was overcome by delusions and those delusions are what guided his hand and led him to write the will he wrote, we will not recognize it as valid, but we will consider it invalid, like a will made

by a person without legal capacity. This is the key question in this case, and it is the cornerstone for everything that we will say.

The question is somewhat complex, and the problem will not reveal its solution nor allow itself to be answered easily. It involves the interpretation of linguistic questions and policy decisions — as in other questions of interpretation — but in this instance to a greater extent than usual, both linguistically and with regard to legal policy.

16. Contrary to the usual method of interpretation, we will not begin this time with the language of the law, but we shall wander far and try to obtain knowledge from legal systems that are familiar to us and cherished by us, namely the English legal system and the legal system practised in the United States. We do not do this because these legal systems bind us, or even because they may 'persuade' us in interpreting the Inheritance Law. We know that the Inheritance Law is independent, and the legislator expressly stated in it that we have severed the connection with English law (see s. 150 of the Inheritance Law). This is certainly the case after the Foundations of Justice Law, 5740-1980, which decisively repealed s. 46 of the Palestine Order in Council, 1922, and severed the connection with English law. But severing a connection does not mean that all wisdom is to be found in us, and that we will sustain ourselves only with our own wisdom. We may — and we should — look around us, try to identify the path of other legal systems, and we may learn from them wisdom and knowledge that will enlighten us. In the words of Justice Berinson in CA 564/71 *Adler (Nesher) v. Adler* [4], at p. 748:

> 'It is clear and self-evident that when considering the construction and application of original Israeli legislation (that is different both in its language and its content from the corresponding English law), we need not rely on English case-law, and moreover s. 150 of the Inheritance Law expressly directs us that in matters of inheritance s. 46 of the Palestine Order in Council does not apply. But we may learn from the experience and wisdom of others, and it seems to me that this rule is correct and wise, and we would also do well to act accordingly.'

If we look around us, possible solutions will present themselves to us for the problem that has come before us for consideration and resolution; and by studying the essence of the matter, we will succeed in building objective methods of construction, and we will discover the path that we ought to follow.

If this is true as a rule, it is even more true with regard to the Inheritance Law which — as we shall see below — is built, if only in part, on English law. Let us therefore consider carefully the rules prevailing in English law and the law of the United States, and perhaps these will be able to teach us wisdom, understanding and knowledge.

Capacity to make a will in English law and the law of the United States

17. What is the law in England with regard to the capacity of a person to make a will, and mainly in the case of a person whose mind is not sound and the reality surrounding him is absorbed by his consciousness in a distorted fashion? The rule accepted and practised in English law can be summarized in the saying that in order to determine the capacity of a person to make a will with regard to his property, the testator must be 'of sound disposing mind', which means that he must be of sound mind for the purpose of writing a will. This guideline for determining the capacity of a person to make a will only provides us with a principle — its boundaries are defined only in a very general way, such that they are almost undefined — but it contains an important value determination, an unambiguous policy decision: if a person who judges the reality around him deficiently — for the moment it is unnecessary for us to consider in detail the nature of that defect — the legal system may disqualify his capacity to make a will. So it transpires that a person may seem to us to be a normal person and his behaviour in everyday life may be like that of ordinary people; but if it is proved — usually after his death — that he wrote a will and left assets that he bequeathed in his will while he viewed the reality around him differently from what it really was, interpreting phenomena in an insane and distorted fashion, we may decide that at the time of writing the will he lacked capacity to write it, and a will that he wrote will be completely invalid.

18. That is the general rule. But English law did not satisfy itself with formulating a principle; it went further and gave details of secondary principles: the testator must understand the nature of the act of making a will and its consequences; the testator must know the extent of his property that he is bequeathing to his beneficiaries; the testator must understand and know what expectations his relations have to inherit his property after his death; to whom is he bequeathing his property and whom is he disinheriting from his estate? With regard to all of these, the mind of the testator must be sound and not deranged, and mental illness must not distort his judgment; delusions resulting from mental illness must not influence his will to bequeath his property after his death, a will that, were it not for those delusions and mental

illness, would have led to another decision with regard to bequeathing his property. The following is what Cockburn C.J. said in his admirable judgment in the case of *Banks v. Goodfellow* (1870) [19], at p. 565, about the capacity of a person to make a will:

> 'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence — in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.'

The same can be found also in the words of W.J. Williams, *The Law Relating to Wills*, London, 6th ed., by C.H. Sherrin and others, 1987, at p. 26:

> 'Criterion of sound disposing mind: Sound testamentary capacity means that three things must exist at one and the same time: (i) The testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from his will.
>
> The testator must realise that he is signing a will and his mind and will must accompany the physical act of execution.'

We can say of someone that he is prey to fancies and delusions if he believes in a reality that a rational person — a person of sound mind — would not believe in, and at the same time it is not possible to convince the person that such a reality does not exist. In the words of Williams (*ibid*., at p. 29):

> 'A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief… For the will to stand the testator's mind must not be dominated by an insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will.'

19. This is also the way of the law in the United States, according to the summary of the law in 79 *Am. Jur.* 2d, Rochester and San Francisco, 1975, at p. 328 *et seq.*:

> 'A testator, at the time of executing his will, must have sufficient mental capacity to know the natural objects of his bounty, to comprehend the kind and character of his property, to understand the nature and effect of his act, and to make a disposition of his property according to some plan formed in his mind. "Soundness of mind" means ability of the testator to mentally understand in a general way the nature and extent of his property, his relation to those who naturally have a claim to benefit from the property left by him, and a general understanding of the practical effect of the will as executed' (*ibid*., at p. 329).

And below, *ibid.*, at p. 330:

> 'A more complete statement is that a disposing mind and memory is one in which the testator has a full and intelligent consciousness of the nature and effect of the act he is engaged in, a knowledge of the property he possesses, and an understanding of the disposition he wishes to make of it by will and of the persons and objects he desires to participate in his bounty, or, as it is often expressed, a knowledge of the natural objects of his bounty. This includes a recollection of the persons related to him by ties of blood and affection, and of the nature of the claims of those who are excluded from participating in his estate.'

And on pages 339-341:

> 'A will which is the product of an insane delusion also is invalid for want of testamentary capacity, and when a will is ascertained to be the result of an insane delusion, it should be declared void without inquiring what the testator would or would not have done if he had been of sound mind. Thus, an insane delusion affecting a will generally makes it invalid *in toto*.
>
> But to avoid a will because the testator entertained a delusion, the delusion must be an insane delusion, and the will must be the product thereof. An insane delusion which will render one incapable of making a will is difficult to define, but, generally speaking, it may be defined as a belief in things which do not exist, and which no rational mind would believe to exist. It is such an aberration as indicates an unsound and deranged condition of the mental faculties. The essence of an insane delusion is that it has no basis in reason, cannot be dispelled by reason and can be accounted for only as the product of mental disorder.'

See further: 94 *C. J. S.*, Brooklyn, 1956, at pp. 690-706, 708-715; *Bendel v. Bendel* [1], at p. 105.

20. In summary, both English law and the law practised in the States of the United States of America do not recognize the capacity of a person to write a will if mental illness distorts his rational judgment, if reality is perceived by him in a distorted fashion, and especially — and this is relevant in our case — if fancies and delusions pursue him and lead him to write a will in which he disinherits from his estate his potential and natural heirs. According to the criterion of Anglo-American law, we must make a clear distinction between mental illness in general, however severe it is — or mental illness for other purposes in law — and mental illness that causes delusions and negates the soundness of mind of the testator *for the purpose of making a will*; the fact that the testator is 'of sound disposing mind', whatever the testator's capacity for other purposes in law, is the decisive criterion with regard to a will that turns on the ability of the testator to judge correctly the reality around him, and consequently his capacity to make up his mind with regard to bequeathing his property after his death. We are not concerned with mental illness *per se*, but with mental illness that distorts reality and so directly affects the contents of the will; in other words, delusions that lead the testator to make a will that he would not make — that is, he would not distribute his property as he did in the will — had he not been prey to those thoughts.

In concluding our remarks until now, we should also say the following: it is the way of the world that a person leaves his property to those who are close to him — to his wife, his children, his parents, and to a lesser degree to his brothers and sisters — and a mental illness that distorts reality is, usually, a mental illness that leads to the disinheritance of these from the estate. This is the model that we are setting out before us, and on the basis of this we are supposed to build a legal norm. When whatever we decide has been decided, the norm will apply of course in all cases of mental illness that distorts reality — whether in the family or outside the family — but the source will always remain within the family circle of the testator, which is the place where the norm was born. We will discuss below the significance of this.

Thus far we have considered the actual law. Now we will turn to the reasoning behind it.

The law and the reasoning behind it — human instinct

21. The rule adopted in Anglo-American law, whereby we may and should disqualify a will made as a result of a mental illness that led to delusions and fancies is not at all self-evident. The establishing of this rule involves a policy decision which is not simple, and certainly cannot be taken for granted. The main rule is that we — the living — must respect the wishes of the deceased, and that we must do our best to give effect to his intention in so far as it is reflected in his will. After all, the deceased did not hurt anyone — he merely disposed of his property — and there is no ostensible reason why we should not honour his desire with regard to distributing his assets after his death. And yet, despite this main and important rule about respecting the wishes of the deceased — and this is the cornerstone of the law of wills — we, the living, come and effectively disqualify his wishes. Had the deceased distributed his property *inter vivos* — in the same way that he wishes to distribute his property after his death — we would have met with great and possibly insurmountable difficulty in voiding a disposition that he made. But now, when the distribution is after his death — *mortis causa* — we take the liberty of not recognizing his will, and cancel dispositions that the deceased wished to make! Everyone would agree that the will under consideration reflects the wishes of the deceased when he wrote the will — even if they were wishes built on a false reality — that his property would be distributed after his death in the way that he stipulated. Ignoring these wishes of the deceased has a strong element of paternalism — and maybe even an insult to his dignity — and there are some who would add that it contains not a little conceit and arrogance, that the living should decide the fate of the deceased's property, even though the

deceased expressed his wishes — in unambiguous language — as to how to distribute his property after his death. When he was still alive, a person can decide to do as he wishes, and no-one will tell him otherwise; now that he has died, the living decide for him, contrary to his express wishes! Those who like overstatement might say: this is an example of the proverb 'for it is better to be a live dog than a dead lion' (Ecclesiastes 9, 4 [21]).

22. Moreover, we should remember that we are talking of the sound mind — or the unsound mind — of a testator with regard to his property, and the capacity of a testator is not necessarily identical to the capacity of a person to be liable, for example, in the law of contract, the law of unjust enrichment, the law of torts or the criminal law. Each of these branches of law is guided by considerations that characterize it and make it unique, and there is no uniformity between the relevant considerations — whether between the law of wills and the other branches of law, or between those branches of law *inter se*.

The law of contract is governed by the principle of reliance, and a contract that is made should reflect a kind of average of interests that attract the parties; the laws of unjust enrichment are concerned with situations where *A* becomes rich unjustly at the expense of *B*; the law of torts is designed to determine who is liable for damage and pecuniary loss suffered by *B* — will *A* who caused the damage be liable, or perhaps *B* the victim will be liable, even though he did nothing wrong — and the principles of fault and liability without fault operate in tandem; the criminal law is supposed to determine questions of reward and punishment — where someone deviates from the minimum norms that are laid down — and principles of morality and interpersonal relationships teach us, in principle, that intention and criminal purpose are decisive. There is absolutely no connection between all of these and the law of wills, and in the matter of inheritance (and similarly with gifts) the testator is alone: his wishes — and his wishes alone — are decisive. Indeed, in all the other branches of law that we have mentioned there is a reciprocal relationship — interaction, if you wish, in the widest sense of the concept — between two (or more) persons; such is the case in contracts, in unjust enrichment, in torts and in criminal law. But in the law of wills the testator is alone: he did not delude anyone, and no-one relied — nor is anyone entitled to rely — on an act of making a will that he may make; he does not have possession of the property of another; so it is his wishes — and his wishes only — that are decisive:

> 'In our law, the institution of the will is entirely built on the principal of respect for the wishes of the testator: if he wishes, he

> may give an inheritance, and if he wishes, he may disinherit. Unlike the law of contract, we are concerned here with an unilateral will, which is not affected at all by the will or desires of the potential heirs' (*Engelman v. Klein* [2], at p. 781; CivA 119/89 *Turner v. Turner* [5], at p. 85).

See also CA 236/84 *Administrator of the Estate of Hila Yaffe v. Schwartz* [6], at pp. 25 *et seq.*. Indeed, the making of a will does not require the consent of the heirs — it is possible that they will not even know either about the existence of a will or its contents — and 'natural' heirs have no vested right in the estate. This difference between the law of wills and other branches of law that we have mentioned can prevent the making of analogies, and the uniqueness of a will — as a legal instrument for expressing the wishes of the testator — requires that it has a law of its own, a law that derives from the essence of the law of wills.

23. The question that arises is: the wishes of the testator were — wishes uninfluenced by external forces — that his property would be distributed in a certain way, but these wishes were based on a faulty judgment of reality, a distorted view of his surroundings, fantasies and delusions as compared with reality. In these circumstances, shall we continue to respect the wishes of the deceased, take hold of human dignity as an instrument for admitting the will to probate, ignore psychological pressures that led the testator to make his will as he did? Or perhaps we should say: When is human dignity applicable, and when should the law respect the wishes of the deceased? When a person is like most people, of sound mind and aware of reality as it truly is. But when that person is prey to fantasies and delusions, and the reality around him is perceived by him in a distorted fashion and not as it really is, it is no longer correct and proper to give effect to his last wishes.

24. Notwithstanding all the considerations to the contrary, Anglo-American law made its decision as it did, and this decision, as it stands, was influenced to a very significant degree by questions of policy. In this respect let us once again consider the example of a mental illness that distorts reality, which is the example of disinheriting very close relations from the estate (see paragraph 20 above). Usually a person leaves his property after his death to his wife and children, but because of delusions to which he was prey (for example, a persecution complex), someone wants to disinherit these from his estate, and in their place he designates as his heirs various public institutions. Disqualifying a will written in this way will automatically lead us to that universal practice, and entitle those close relations to the inheritance that they would have

inherited had not the testator's mind been led astray. Knowing all of this, and without minimizing the importance of other considerations, it seems to us that the decisive factor in determining the law was — and is — the existence of the human instinct, that instinct of survival and continuity, an instinct that begins with the need that compels us to have children, continues with the parental care of their children when they are helpless (which is the animal instinct), continues further with parental concern for their adult children, and ends with the parental desire to benefit their children after death (for the instinct of survival and the need for continuity as a basis for creating rights and obligations in law, see and cf. CA 2061/90 *Marcelli v. State of Israel, Ministry of Education and Culture* [7], at p. 811). This is the case with children and their children — a person's direct descendants — and so it is too, to a lesser degree, with regard to other relations.

This important factor — the instinct given to each of us — also led to the provisions of the Inheritance Law being as they are, to the determination of the law with regard to the distribution of the estate of a deceased, who did not leave a will, among his closest relations. Once again, without minimizing the importance of other policy considerations with regard to the distribution of the estate of a deceased — a policy that is reflected in these and other provisions of the law — the distribution of the estate among the heirs as prescribed in the Inheritance Law is based on the being and existence of that innate human instinct, and the amounts of the distribution of the estate between the heirs, *inter se*, are designed to reflect the outlook of society with regard to the wishes of the 'average' person. This is what was stated by Chief Justice Cockburn in *Banks v. Goodfellow* [19], at pp. 563-565:

> 'The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed.

The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men agree in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favour of the testamentary power. Among those, who, as a man's nearest relatives, would be entitled to share the fortune his leaves behind him, some may be better provided for than others; some may be more deserving than others; some from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded… The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

It is necessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition.'

These remarks of Chief Justice Cockburn faithfully reflect — so we may assume — the attitudes that prevailed in English society in his time, namely the Victorian era. Those attitudes are not necessarily our outlooks, in our time and in our country. However, we do not need to agree with all these remarks of the Chief Justice, in order to know that they fundamentally reflect attitudes that are common today. Human instinct, in any event, remains unchanged. It appears that those very reasons led to the rule in Jewish law, that if someone disinherits his relations from his estate after his death, his act is valid, but he does not meet with the approval of the rabbis; see: M. Elon, *Jewish Law — Its History, Sources and Principles*, Magnes, 3rd edition, 5748, at pp. 89, 134 *et seq*.. Cf. also CA 724/87 *Kalfa (Gold) v. Gold* [8], at pp. 37-38 (Justice Malz).

25. From this we derive the rule that distribution of an estate as prescribed in the Inheritance Law — and this is also the law of inheritance everywhere — should reflect the presumed wishes of the individual as to the distribution of his property after his death, and these are the 'average' wishes of a member of the society. See and cf.: S. Shilo, *Commentary on the Inheritance Law*, 5725-1965, Nevo, 5753, at pp. 29-30. A person in our country is presumed therefore, unless he makes a will that stipulates the contrary, to wish to distribute his property after death in accordance with the Inheritance Law. This presumption should reflect the principle of the autonomy of the individual — or if you prefer, respecting the presumed wishes of the individual, which amounts to human dignity — where the individual did not expressly reveal his wishes; but where the individual did reveal his wishes, we will respect his wishes. This is exactly what is stated in the Inheritance Law in ss. 1 and 2:

> 'Inheritance 1. Upon a person's death, his property passes to his heirs.
>
> The heirs 2. The heirs are the statutory heirs or those entitled under a will; inheritance is by law except to the extent that it is by will.'

Prima facie, therefore, we are obliged to uphold a will in letter and in spirit, since in it the deceased revealed his wishes as to what should be done with his property after his death. However, this autonomy of the wishes of the individual is not of unqualified supremacy, but it is limited — albeit partially — by that basic instinct. This is the basis for the decision in Anglo-American law — and the same is also true of other legal systems — that the instinct will prevail in a case where a person is of unsound mind, and his

perception of reality is unrecognizably distorted because of the mental illness to which he is prey. This rule can be expressed in different ways; for example, the 'wishes' of someone who is prey to delusions are not his real 'wishes', but the wishes of the 'demon' that has taken possession of him; the law is supposed to respect the 'true' wishes of a deceased, and therefore it disqualifies his capacity to make the will that he made. Alternatively, we are supposed to respect the 'true' wishes of a deceased — wishes that would exist were it not for the delusions and fantasies that attacked him — and we know what these wishes are: either by reading the previous will that the deceased made — which bequeathed his estate to his relations — or by reading the Inheritance Law, which establishes the presumed wishes of a deceased in our country. However, whatever the wording is, in some form or other we are propelled forward by policy considerations — policy considerations that are dominated by the principle of paternalism.

26. What is our opinion of the decision that Anglo-American law has adopted for itself? Here we can be brief, and say clearly: in our opinion the decision made is sound, in every respect. Applying the principle of human dignity in order to uphold a will that was made by someone prey to delusions and fantasies, where the reality perceived by him is merely a distorted reality, seems to me to be a corruption of basic principles. The statement that we must respect a person's wishes — knowing that the person did not have any true wishes — is an statement that is an empty shell, and it distorts both language and basic principles in our legal thinking.

27. Now that we have reviewed Anglo-American law, and we are equipped with the rule that was established and with the basic considerations that led to the formulation of the rule that was established, let us now return to our own law and to the construction of s. 26 of the Inheritance Law.

The construction of s. 26 of the Inheritance Law — a testator who did not know how to understand the nature of a will

28. The key provision in this case can be found in section 26 of the Inheritance Law, according to which we regard someone not to have testamentary capacity — and if he makes a will it is deemed to be invalid — if at the time of making it the testator 'did not know how to understand the nature of a will'. What is the meaning of this statutory provision, and what is the scope of its application? The trial court thought that the provision of s. 26 does not include the case of a mentally ill person who makes a will when ill, at

a time when his delusions dictate to him a reality that simply does not exist. The court said:*

> 'The Inheritance Law states (in s. 26) that a will made when the testator did not know how to understand the nature of a will is void. But it is important to emphasize that this provision does not mention a mentally ill person at all, and it does not refer specifically to a mentally ill person, but it applies to anyone who did not know how to understand the nature of a will, for any reason. In truth, this provision does not tell us anything new and it is completely redundant. For someone who made a will at a time that he did not know how to understand the nature of a will did not, from a legal viewpoint, do anything, and his 'will' is invalid, even without the existence of this section in the Inheritance Law.
>
> The problem with regard to a mentally ill person arises precisely when the ill person *knows* how to understand the nature of a will and for this reason decides to make a will, but because of his illness he lacks the power of judgment and is likely to bequeath his estate or to disinherit persons from his estate in accordance with irrational or erroneous considerations, dictated to him by the delusions of the mental illness from which he suffers.'

The trial court goes on to mention an article written by Prof. I. Englard and Mr M. Bass (see *infra*), and it then continues:†

> '… There is no doubt that the limited provisions set out in the Inheritance Law with regard to a mentally ill person who makes a will do not exhaust the subject, and it is inconceivable that if someone has not been declared incompetent and his mental state has not declined to such an extent that he does not know how to understand the nature of a will, his will is valid, even if his mind is deranged and he thinks that he is being persecuted by his neighbours or he has hallucinations of sound or sight. It is clear that a will or a part of a will should be disqualified when it has been clearly proved that the mental illness caused the testator to lack the capacity to consider properly the considerations that he would have taken into account had he not been insane. All of this

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* IsrDC 5751(2), at p. 243.

† *Ibid.*, at pp. 243-244.

> is subject to the basic rule that whoever wishes to disqualify a will has the burden of proof and that any doubt will result in the upholding of the will and not its disqualification.'

The court went on to point to various possibilities, in its opinion, of disqualifying a will made by someone whose mind was deranged, but the solutions which it considered we will discuss elsewhere. The question that should be asked now is whether the provision of s. 26 of the Inheritance Law really does not include the case of a mentally ill testator whose delusions dictate to him the contents of a will.

29. The statement that someone 'did not know how to understand the nature of a will' is not unambiguous in its scope, and it is open to several constructions. Let us consider several different methods of construction. One method of construction will rely on the literal wording of the law: we will recognize the capacity of a testator to make a will if he knows the effect of a will, i.e., that a will — as a legal instrument created by the law — is intended to determine the distribution of the property of a testator after his death. This construction of the law is based on the general normative principle of a will, and a testator will be deemed to know how to 'understand the nature of a will' if he understands what a 'will' is; this will be so, even if he does not understand the contents of his will, and he is unaware of its significance and its implications. This meaning of the law is given by Prof. I. Englard and Mr M. Bass in their article 'The Legal Acts of a Mentally Defective Person, before he is Declared to be Incompetent (a Proposed Statutory Arrangement)', 9 *Mishpatim*, 1978, at pp. 335, 341:

> 'In accordance with its precise wording, this criterion is very limited; someone who claims that a will is not valid must show a very specific mental state: lack of understanding as to the nature of a will in general, as distinct from the significance of the specific will.
>
> It follows that a will made by a testator who suffered from paranoid delusions, or was not able to understand the full significance of that specific will, is apparently valid.'

This restricted interpretation sticks closely to the text of the law in its most precise meaning, and according to this the legislator established a very narrow criterion for the capacity of a person to make a will. According to this construction, it makes no difference if the testator does not know who his potential heirs are, what is the extent of his property, what is the significance

of his will and what are its implications, provided that if he is asked: what is a 'will', he will be able to answer: a will is an instruction that a person gives orally or in writing, as to how to act with regard to his body and his property after his death.

This construction seems wrong to me, mainly because if we adopt it, I do not know what purpose it achieves and what interest we are protecting. This method of construction is tantamount to creating a separation between the purpose of the law and the result achieved; as if we are being told: since the testator understands what a 'will' is in general, we will uphold the will that he wrote, even though he is not aware of the contents of his own will. This construction is certainly not required by the language of the law, and since in my opinion it does not achieve a proper purpose, I will not accept it. Indeed, my opinion is that the ability 'to understand the nature of a will' automatically includes — and this is self-evident — the specific will that the testator made, and therefore I cannot accept this narrow construction that is suggested with regard to testamentary capacity.

30. A second construction of the capacity formula will refer to the specific testator and the will under discussion, and not merely to a will in general, according to the method of the first construction. According to this second criterion, we will require the testator to know how to understand the nature of his will, assess its significance and its effect, know whom he wishes to inherit and whom he wishes to disinherit, and only then we will recognize his capacity to make that will. This construction of the law is tantamount to saying to us the following: a testator should understand the nature of a will — only then will we recognize his capacity to make a will — and it is self-evident that understanding the nature of a will naturally includes understanding the nature of his own will in all its aspects.

This construction of the law is wider in its application than the first construction that we considered, but it is still possible to uphold a will of someone mentally ill who is under the influence of delusions and fancies and who writes the contents of his will in accordance with a distorted reality that only exists in his insane mind. This mentally ill person knows what a will is, and he knows and is aware of the consequences of his will: what is the extent of his property, to whom he is bequeathing his property, and mainly whom he is disinheriting from his estate after his death. But he is held captive by irrational delusions, and they are what decide the contents of his will. This construction of the law is satisfied by the requirement that the testator has an

intellectual faculty, even if the contents of the will are not dictated by his free and 'true' wishes.

31. A third method of construction — the widest construction — maintains that the testator's knowledge 'to understand the nature of a will' means this: it is not sufficient for the testator to be aware of the nature of a will in general (as in the first construction); we will also not be satisfied with the requirement that the testator is aware of the nature of his will in particular (as in the second construction); but we will demand in addition that in giving instructions as to what will be done with his property after his death the testator is of sound mind and correctly interprets the reality around him. The real wishes of the testator — free of insane psychological pressures — is what will determine the contents of the will, and we will insist that in the will he makes, the testator will not be prey to fantasies and insane delusions. Only a person of sound mind can 'understand the nature of a will' — and in this way we will construe the law. Only a combination of understanding and free will together will enable a person to 'understand the nature of a will', i.e., to understand the nature of his own will, and only if the two are present and are combined will we recognize a person's testamentary capacity and the validity of a will that he made. The need for the existence of free will is a fundamental principle in our legal thinking; this is true in other branches of law and it is also true in the law of wills.

32. In our opinion, the struggle for preference will be between the second construction and the third construction, and now we will try to choose which of the two constructions we will prefer. First we will agree that the stipulation of the legislator that a will is invalid when 'the testator did not know how to understand the nature of a will' is not unambiguous in its meaning, and that it is possible to discover various interpretations of it. We should also remember that we are not dealing merely with language or combinations of words in the Hebrew language, but with substantive content wrapped in a cloak of language, without derogating from the rule that language is content and content is language. A statute is an instrument for achieving a purpose, and therefore we will consider purpose and objective, and these will be given decisive weight in the construction. We are obliged, as faithful construers of the law, to do our best to pierce the words to the content, and to combine language and content. Examining the matter closely will teach us, so we believe, that the third method of construction — the wide method of construction — is the proper method that we should adopt. We will therefore

examine the matter closely, and we will begin with the history of the statute before it was finalized and made into law.

33. The starting point is the Inheritance Ordinance, and according to s. 12(b), a will should be upheld is the maker was not 'suffering from mental infirmity or otherwise incapable of making a will'. The original (English) text states:

'Wills in civil form

> 12. The civil courts shall hold a will to be valid in civil form if it complies with the following conditions:-
>
> (a) ……
>
> (b) the testator was not under the age of eighteen years at the time of the execution of the will or *suffering from mental infirmity* or otherwise incapable of making a will according to the law governing his personal status applicable to him in Palestine' (emphasis added).

In 5712-1952, a draft Inheritance Law was first published in a separate booklet (Ministry of Justice, 5712). The draft was the work of Prof. U. Yadin, the head of the Legislation Department at the Ministry of Justice, and even the explanatory notes to the draft law were written by him. With regard to testamentary capacity, s. 28 of the draft law stated the following:

'Testamentary capacity

> 28. (a) Any person who is eighteen or older is capable of making a will, *unless when he made the will he did not know the nature of a will*.
>
> (b) Someone declared by the court to be insane, an idiot or a spendthrift is presumed not to know the nature of a will' (emphasis added).

Here we find for the first time the combination of words 'he did not know the nature of a will', which is explained in the explanatory notes (*ibid.*, at p. 75):

> 'The condition of "knowing the nature of a will" which was taken from Jewish law sources and from English law "sound disposing mind" (see Halsbury, vol. 34, p. 38) is a general

> condition that disqualifies both someone who is insane and also someone whose mind or understanding are defective because of drunkenness, being a spendthrift, etc.. The capacity depends on the condition of the testator when making the will. Therefore a will of a person who is intermittently sane and deranged should not be disqualified if it was made when he was sane (*lucidum intervallum*). This rule is consistent both with Jewish law and modern statutes. A will of a person who was well when he made the will and who afterwards became insane should also not be disqualified.'

This draft developed into the draft Inheritance Law of 5818-1958, and according to s. 34(a) of that proposal:

> 'Knowledge of the nature of the will
>
> 34. (a) A will made when the testator did not know the nature of a will is invalid.
>
> ……'

It is superfluous to state that the explanatory notes to the draft law of 1952 are applicable also to this draft law, and the explanatory notes tell us this expressly (*ibid.*, at p. 236).

So we see that an examination of the development of the law teaches us — unambiguously — that in speaking of a testator who did not know how to understand the nature of a will, the wording of the law intended to include also someone whose mind is deranged, namely someone whose mind perceives the reality around him in a distorted and untrue fashion, following the path of English law. We are prepared to concede that the combination of words 'did not know how to understand the nature of a will' is not a literal translation of the English expression 'of sound disposing mind', but in the final analysis we must remember that we are not concerned merely with writing styles but with familiar concepts that are cloaked in language. In other words, for the purpose of establishing the testamentary capacity of a testator, the parliamentary draftsman did not intend to perform an act of creation nor to mark out new territory unexplored by previous generations. His intention was to follow a well-trodden path, and his work lay merely in describing that path. From the outset therefore the language was only given a secondary role (so to speak) of describing what was already known, and it is clear to me that the relationship between language and content — content that we knew — is a relationship of interconnected vessels: the flow is not merely from language to content, but also — and perhaps mainly — from content to language.

Lacuna?

34. The trial court thought, as we have seen, that anyone who makes a will while he is ill — when his mind is deranged and he regards the reality around him in a distorted and untrue fashion — does not fall into the category of someone who did not know how to understand the nature of a will. It follows, *prima facie*, that he has capacity and that his will is valid. But the trial court says that it is 'inconceivable' that we should uphold the will of someone whose mind is deranged. How then can we resolve the two? The court answers that we have merely encountered a lacuna, and therefore we must look for other ways of disqualifying the will. In other words, since we cannot accept that the case of a mentally ill person is not regulated expressly in the Inheritance Law, we must conclude that the provision of s. 26 of the law contains a lacuna or quasi-lacuna (as distinct from a negative provision). From this the court moved towards a will made by mistake and it saw fit to apply the norms of a mistake in our case. We will discuss the issue of mistake elsewhere (see below, paragraphs 49-50), but with regard to the manner in which the court construed the law, we think that the contrary is the case.

Were we dealing with a trivial matter, that is tangential and can be forgotten and left by the wayside, we might have followed the path of the trial court and we might have taken a different route. It is possible to conceive that the legislator decided to ignore a trivial and marginal matter (we should remember the 'substance of the common law, and the *doctrines* of equity' (emphasis added) in article 46 of the Palestine Order in Council), or, alternatively, it might be squeezed into a framework that was not originally designed for it, provided that it does not remain alone and without any arrangement. But we cannot accept that a central and important issue like the sanity of a testator does not have a place on centre stage, does not have an arrangement of its own, and we will have to borrow arrangements that were not originally designed for it. Knowing all this, it is easier for us to say that the provisions of s. 26 of the Inheritance Law — which deals with a 'testator who did not know how to understand the nature of a will' — extend also to someone who made a will when his mind was deranged; the alternative, that the Inheritance Law says that we must uphold the will of someone who is mentally ill — in all circumstances — as if he were of sound mind, is totally inconceivable. It would also appear that in order to construe the provision of s. 26 of the Inheritance Law in this way, it is unnecessary to stretch the wording of the law beyond their significance in human language.

Instinct and free will

35. Finally, we discussed above the human instinct that directs us to disqualify a will made by someone who is prey to delusions that distort reality. It seems to me that the basic factors that led to the rule laid down in Anglo-American law are the very same factors that will lead us directly to the conclusion that the provisions of s. 26 of the Inheritance Law apply to this case, with full force. But since we have already gone to some length, we will say no more.

36. Let us turn from instinct to the wishes of the testator. It is a fundamental principle in the law of wills — and it is first and foremost among all principles — that it is a 'duty to carry out the wishes of the deceased.' We recognize the right of man — which means each one of us — to control the distribution of his assets after death, and that everything should be done according to his wishes. See, for example, CA 1182/90 *Shaham v. Rotman* [9], at p. 334, and the references there. See also Shilo, *supra*, on pp. 229, 446; *Kalfa (Gold) v. Gold* [8], at pp. 28-30, 37-38.

We will respect someone's wishes in their will, no matter how capricious, unreasonable, unfair and even cruel it is. In the words of the court in *Bendel v. Bendel* [1], at p. 106 (*per* Justice Barak):

> 'We are not concerned here either with wisdom or reasonableness of the acts of the testator, nor even with the degree of humanity in them.
>
> The only question before us is whether the overall behaviour of the deceased when he signed the will indicates that he did not know how to understand the nature of a will.'

Cf. also *Kalfa (Gold) v. Gold* [8], at pp. 29-30, 32-33, 37-38.

Respecting the wishes of a person are an element of human dignity ('the wishes of a person are his dignity'). We must respect the dignity of the dead, for this is the dignity of the living. But we must always be mindful of this: a person's wishes are always the product of free will. Where there is no freedom of choice, there is no free will. One might say that even someone suffering from paranoia — someone prey to delusions and illusions — may form a will, and it is possible and proper to respect that will, since that is his dignity. But we say that such a 'will' is not his real will, and were we to ask him — when he was still of sound mind — whether this is his will, he would answer that it is not. We are supposed to respect the will of a person and not the will of a demon inside a person. In the words of Justice Sir James Hannen in *Boughton and Marston v. Knight and others* (1873) [20], at p. 563:

> 'But the law does not say that a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, of frivolous, or mean, or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this — to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will.'

Similarly in *Williams' Ex'r v. Williams* (1890) [18], at p. 252, the court held that a will should be disqualified if the testator —

> '… was… dominated by some unnatural or irrational bias of mind, so as to overrule, and control his own rational will-power…'

The concept of free will — which is the freedom of choice — is a fundamental principle, and the need for it to exist is so manifest that it need not be stated. Cf. CrimA 118/53 *Mandelbrot v. Attorney-General* [10], at pp. 309 {153} *et seq*.. Sometimes, a conflicting interest, such as the reliance interest, will challenge it, and sometimes it will even prevail, but in the absence of conflicting interests, free will takes its place and shapes the appearance of legal rules. Albeit we will be very careful not to disqualify a will for lack of capacity, unless we can determine clearly that it is not the free will of the testator that dictated to him his last testament. Only if we are convinced that the mind of the testator was swayed significantly by delusions and illusions shall we disqualify a will, whereas where there is doubt we will uphold a will and not disqualify it. But when we are convinced that the testator was not impelled by his free will, we will not hesitate to rule that the will is absolutely invalid.

37. The rule, in our opinion, is that we will not recognize a will unless we know that it is the result of the free will of the testator, whereas a will written by someone who is as if impelled by external forces — forces that present to him a distorted reality that does not exist — will not be recognized and we will declare it void *ab initio* in accordance with s. 26 of the Inheritance Law. The principle that prevails in Anglo-American law, which is embodied in the expression 'of sound disposing mind', will also apply in our legal system — within the framework of s. 26 of the Inheritance Law — and it is superfluous to say that we will adopt our own policy and we will not necessarily follow theirs. See also and cf. Shilo, *supra*, at pp. 247-248. This was, in principle, the path pursued by case-law. See, for example, *Bendel v. Bendel* [1], at p. 105. It seems to me that the court also thought this way in *Kalfa (Gold) v.*

Gold [8]. The court will declare a will invalid if 'it was made when the testator did not know how to understand the nature of a will.' 'Know' how to understand the nature of a will does not only concern itself only with knowledge in the sense of information but also in the sense of understanding, which is the essence of man: 'for the earth shall be full of knowledge of the Lord, like water covering the sea' (Isaiah 11, 9 [22]).

From the norm to the specific case

38. Now that we have covered our topic and stated the principles of law that apply, let us turn our attention from the general rule to the specific case and consider the actual will of the deceased. In the trial court the sister argued that the third will ought to be disqualified — according to the provision of s. 26 of the Inheritance Law — because of delusions to which the deceased was prey, and that she ought to receive the whole estate. The trial court did not grant this request — in its opinion, the provision of s. 26 of the Inheritance Law does not apply to testators who are mentally ill — but it thought that the provisions of the will should be amended as if they were provisions made on account of a mistake, in accordance with s. 30(b) of the Inheritance Law. Finally it decided that the estate would be divided between the sister, her two daughters and LIBI. The sister also repeats in this court her argument that the third will is invalid, and this time her son and two daughters join her.

39. As stated, our opinion is — unlike the opinion of the trial court — that the provisions of s. 26 of the Inheritance Law do indeed apply in cases of mentally ill persons, and in any case we are obliged to consider the question whether the conditions of s. 26 have been proved for the will to be invalid. In this respect, the sister and her children argue that when the third will was written, the deceased was prey to delusions and fantasies — to the effect that his sister wanted to poison him — and because he thought this he disinherited his sister and her family from the share of the estate. Knowing this, they go on to argue, the deceased was in a state of not knowing how to understand the nature of a will, and therefore his will is void *ab initio*. But the examination of the question whether a specific testator knew — or did not know — how to understand the nature of a will is always a factual examination of the circumstances of the specific case (see, for example, CA 279/87 *Rubinowitz v. Kreizel* [11]), and we will do this also in the case before us. We should also remember that the premise when making the examination is the presumption of general capacity — the presumption of capacity that exists as long as someone has not been declared incompetent, and the deceased was not declared incompetent — and the burden of proof for rebutting the presumption rests

with the person alleging this. See, for example, CA 15/85 *Mizrahi v. Raz* [12] (in that case the deceased suffered from 'a severe emotional disturbance to the extent that there was a clear deviation from the norm' (*ibid*., at p. 458), and despite this it was accepted that he had testamentary capacity).

40. It will be remembered that two expert opinions were brought before the court: the opinion of Dr Litman, on the one hand, and the opinion of Prof. Edelstein, on the other, and the two experts were cross-examined on the opinions that they gave. According to the opinion of Dr Litman, 'the deceased suffered from a mental illness that caused him to distort reality and the contents of this will are affected by his psychotic state at that time, i.e., paranoid schizophrenia that focussed on paranoid thoughts that overcame him entirely about the desire of his sister to poison him.' Prof. Edelstein thought otherwise, but the trial court saw fit to prefer the opinion of Dr Litman, and in accordance with this it decided the case. Relying on this decision, the sister and her children argue before us that insane thoughts caused the brain of the deceased to be deranged to the extent that he was not able to understand the nature of a will; that those thoughts impaired his awareness of the results of making the will on his heirs; and therefore his will should be regarded as void *ab initio*.

A main finding in the judgment of the trial court was the preference of the opinion of Dr Litman to the opinion of Prof. Edelstein; once it decided to prefer the one to the other, the court went on to base its judgment on the opinion of Dr Litman. In my opinion, this conclusion is problematic; I do not see why we should prefer the opinion of Dr Litman, and there are several reasons for this.

41. First, Dr Litman never met the deceased, His opinion was prepared merely on the basis of records made with regard to the deceased, mainly at the time he was hospitalized. In this respect, Dr Litman points out that 'the large quantity of medical documentation in the psychiatric sphere with regard to the deceased allows a reasonable opportunity of making a reconstruction of the medical circumstances, and examining various claims on the basis of valid evidence written "in real time".' Notwithstanding, Dr Litman adds the following:

> 'I would like to point out that I did not know the deceased, and my evaluation is based on study of the existing medical material. I know that in giving an opinion about a person not examined directly by a doctor (in this case because he is not alive), he is

> deprived of a most significant source for basing his evaluation on evidence of his own eyes and ears.'

In my opinion, it seems that an opinion of this kind, which is not based on an examination of a patient by the expert writing the opinion is very defective in its weight in comparison with an opinion based on a direct examination. If this is true as a rule, it is particularly true when the opposing opinion was written by Prof. Edelstein who examined the deceased personally and knew his medical history (see also below).

Second, it is established law that the question of the capacity of a testator is determined according to the date on which he made the will; this is stated in s. 26 of the Inheritance Law, which speaks of a will made '*when* the testator did not know how to understand the nature of a will' (emphasis added), and this is case-law: see, for example, *Bendel v. Bendel* [1], at p. 105. The third will was signed on 3 December 1984, but Dr Litman did not have any information about the state of the deceased that day. The records on which Dr Litman relied, and in which the delusions of the deceased are mentioned, were: a letter of discharge from 'Blumenthal' hospital, dated 23 August 1984, and a letter of discharge from 'Hadassah' hospital dated 21 October 1984. The remainder of the medical records speak, in the main, only of a state of depression, and there is no mention in them of delusions of the deceased with regard to his family. We did not therefore find any solid factual basis for the positive finding of Dr Litman, that on 3 December 1984 delusions preyed on the deceased to the effect that his sister wanted to put an end to his life. Dr Litman gave his opinion based, apparently, on a deterioration of the deceased's condition, but in this respect let us not forget that even during the period *after* writing the third will some of the records speak only of a depressed state only. Moreover, the deceased made his first will on 24 July 1984, and with regard to that date Dr Litman determined that there were no delusions, and the family members were included in the will. On the other hand, approximately one month thereafter — when he was discharged from 'Blumenthal' hospital — delusions appeared. The last record that mentioned these delusions is dated 21 October 1984, approximately two months before writing the third will. It is therefore possible that the delusions appeared and disappeared several times before the writing of the third will, and it is also possible that they did not trouble the deceased at all during that period. Indeed, we must raise doubts about the positive and unambiguous finding of the expert Dr Litman about the condition of the deceased when he made the will.

Third, the reasons given by the trial court for preferring the opinion of Dr Litman to the opinion of Prof. Edelstein are in our opinion problematic. The trial court was convinced by the opinion of Dr Litman, who described in detail the course of the deceased's disease, discussing the various periods of hospitalizations and the persecution complex that accompanied him. But not only did the trial court not give the proper weight to the fact that Dr Litman never saw the deceased, it also ignored the fact that Dr Litman did not discuss at all the serious money dispute that occurred between the deceased and his family members, a dispute which had a direct effect on the change in the provisions of the will (as we will see below).

42. Opposing this was the opinion of Prof. Edelstein, who examined the deceased on 7 November 1984 — the day before the writing of the second will, a will identical in every respect to the third will — and put his opinion into writing on that day, holding that the deceased had testamentary capacity. In his opinion to the court, Prof. Edelstein explained the background to the certificate he gave to the deceased on 7 November 1984 (see para. 4d., *supra*), adding that he gave that certificate 'after I had become acquainted with him [with the deceased] in the psychiatric ward at Hadassah University Hospital and after another examination' (square parentheses added). In his opinion, Prof. Edelstein explains several times more that he knew the deceased before 7 November 1984, when he was hospitalized in the psychiatric ward of 'Hadassah' Hospital. It is important to remember this, since the opposing opinion — that of Dr Litman — was written without the expert having ever seen the deceased or having examined him personally.

Prof. Edelstein explained that the deceased was hospitalized in the psychiatric ward at 'Hadassah' until 21 October 1984 'because of endogenous depression with paranoid thoughts' — but when he was discharged from the hospital the delusions had gone, as stated by Dr Buchman, the doctor in charge of the ward (see below). Prof. Edelstein further determined that —

> 'After I became acquainted with him in the ward, I examined him at his request in order to determine from a psychiatric point of view whether he was capable of making a will. At that time (7 November 1984) after he left the ward in a good state, he did not suffer from depression or from deranged thinking tending either towards depression or towards paranoia, and therefore I found him capable and competent as I wrote.'

In the summary of his opinion, Prof. Edelstein points out that on 7 November 1984 the deceased was —

> 'in complete remission when I examined him. Even if he showed anger or hatred towards someone in the family, that was his own business and his personal right.'

The trial judge points out that these last remarks show that Prof. Edelstein did not attribute any importance to the possibility that the anger of the deceased derived from insane delusions; but this is not so. Prof. Edelstein expressly rejected the possibility of the existence of delusions and paranoia at the time of writing the second will. He says:

> 'Delusions do not occur all the time… when I examined him… I knew that he left the ward in good condition. He was not, or was almost not, depressed at all. There were not yet any delusions, either about his wife, his sister or anyone in the family, and he felt good.'

And further on:

> '… when I examined him, he had already left the ward, he was not depressed, and there were no delusions, he was of sound mind, his effect was still only slightly depressed, his thoughts were rational without wandering…'

But this is not all. The deceased signed the third will on 3 December 1984, approximately three weeks after writing the second will, and after the certificate of Prof. Edelstein about the deceased's capacity. We also find that Dr Buchman, the doctor that treated the deceased in the psychiatric ward at 'Hadassah' during the period before the second will, wrote in her 'Illness summary report' (after the discharge of the deceased from Hadassah Hospital on 21 October 1984) that 'as the neuroleptic treatment continued, the delusions disappeared, the effect stopped to be depressed, he began to cooperate with the staff, became a likeable person who was prepared to help, the process and content of his thinking was sound, the effect was appropriate, concentration and orientation and memory were intact.' On 20 November 1984, the deceased was hospitalized in 'Talbieh' Hospital, and when he wrote the third will he was an outpatient at that hospital. In that hospital, it will be remembered, there was no evidence of the condition of the deceased at the time of writing this will, except for the evidence of Adv. Artman. Adv. Artman testified that he asked the testator —

> '…what he wanted? He told me what he wanted. I drafted it, read it to him and he told me where he wanted to make changes. I

made changes. I printed it again and then he said to me "I am prepared to sign that".'

The cumulative weight of all this evidence leads, in my opinion, to the conclusion that the persons opposing the probate of the will did not succeed in discharging the burden of proof that rested on them with regard to the capacity of the testator. In this respect we should remember that in order to discharge the burden of proof resting on someone who argues the lack of testamentary capacity, it is insufficient merely to raise doubts (*Bendel v. Bendel* [1], at p. 105; *Rubinowitz v. Kreizel* [11], at p. 762).

43. Indeed, Prof. Edelstein examined the deceased in the way we think fit, and these are the two questions that he asked himself (in his opinion to the court):

'a. Did the person understand the nature of the act?

b. Was he aware of his duties and wishes with regard to this act?'

If we examine these questions, we will see that they include the tests of capacity that seem to us to be required by the law: an understanding and knowledge of the nature of a will, awareness of the act, the duties of the testator (the instinct principle), and his free will. This is Prof. Edelstein's answer to the questions he asked himself:

'With regard to the two questions, I did not have any doubt that he was competent to understand the nature of a will and was aware of the substance of his acts and their results, and that he had the right to bequeath his property to whomsoever he wished and that he had free will and absolute awareness.'

We should also remember the testimony of Adv. Artman, which we will consider below:

With regard to the causal link

44. To declare someone's will invalid, it is not sufficient to prove that that person was prey to delusions and fantasies. Proof of the existence of delusions and seeing a distorted reality is albeit an essential condition, but it is not sufficient; in addition one must prove that those delusions and hallucinations are what led, in practice, to the writing of the will as it was written. In the absence of a causal link between the delusions that distorted reality and the contents of the will, the capacity of the testator will not be impaired nor will the will be declared void. This is self-evident and does not need further

explanation. So it is that a close examination of our case shows us that even were we to say that the deceased was prey to delusions when he wrote the third will — and we did not say that — those delusions did not change his mind. We should remember the dispute between the deceased and his nephew, when the nephew took money from the deceased — before his hospitalization — and after the deceased was released from the hospital he refused to return to him the money that he took. Express evidence of this was given by Advocate Artman in his affidavit to the court, and even though the court mentions this at the beginning of the judgment — when it describes the chain of events — it does not analyse its significance, nor does it deduce the proper conclusions from it. In his affidavit Advocate Artman tells of the writing of the first will on 24 July 1984 — a will in which the deceased bequeathed his property, except for the apartment where he lived, to his sister and her three children — and he goes on to write as follows:

> '10. A few weeks afterwards, I found out that the late Mr Wagner had been hospitalized at Hadassah Hospital in Ein Kerem, Jerusalem, and that he was in the psychiatric ward.
>
> 11. I went to visit him in the hospital several times until he came out of the hospital.
>
> 12. A few days after he left the hospital, the late Mr Wagner told me that before he was hospitalized, he deposited cash and valuables with members of his family, and when he asked to receive them back, they told him that they no longer had them. After I intervened, the late Mr Wagner and his nephew reached an arrangement whereby the nephew returned to him the valuables but not the cash, on the grounds that he had spent it.
>
> 13. The late Mr Wagner said to me that in view of the behaviour of the members of his family, he no longer wanted then to receive a share of his estate after his death, and I should advise him how he could change the will that he had already made.
>
> 14. I explained to him that it is possible to change a will by making a new will, and after he told me what his wishes were with regard to the distribution of his assets, I prepared a new will.
>
> 15. However, since I knew that the late Mr Wagner had recently been in the psychiatric ward of the hospital, I asked him to contact the hospital and obtain for me a certificate from the

> psychiatric ward to the effect that he understood and was able to make a will.
>
> 16. The late Mr Wagner gave me on 7 November 1984 such a certificate, a copy of which is attached hereto.
>
> 17. Following this, and because of the desire of Mr Wagner to sign the will before an authority, I accompanied the late Mr Wagner on 8 November 1984 to the Jerusalem District Court where he signed the will before her honour Justice Dorner.
>
> 18. Several days later, the Jerusalem District Court office called my office and told me that there had been some kind of error in the proceeding in which Mr Wagner signed the will and that I should tell Mr Wagner that if he so wished, he should sign a second time on the will before another judge.
>
> 19. I notified the late Mr Wagner of this and on 3 December 1984 I accompanied him again to the court where he signed the will before his honour Justice E. Ben-Zimra and afterwards deposited it in the court.
>
> 20. The text of the will that the late Mr Wagner signed on 3 December 1984 was the same text of the will that the late Mr Wagner signed on 8 November 1984.'

In his cross-examination, Adv. Artman repeated the main points in his affidavit, and no evidence was adduced to rebut his testimony.

45. It therefore transpires that the deceased knew well what he was doing, and of his own free will he did what he did, made his will as he did, and disinherited whomsoever he disinherited from the estate that he would leave behind him. Would only a person who was prey to delusions do what the deceased did? Did the deceased really not have a good reason to do as he did? Admittedly, it was his nephew who did not return to the deceased what he was obliged to return to him, but does a person really have to suffer from delusions in order to infer that the nephew was in league with his sisters and mother? In any event, why was the deceased not entitled to say to himself that he did not want to bequeath anything to his sister and her children merely because of the serious act that the nephew did? As stated in 79 *Am. Jur.* 2d, *supra*, at 346:

> 'The prejudice of the testator against a relative is not ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion…
>
> As a general rule, if a testator's antipathy towards a relative is attributable to some action by the relative adverse to the testator's interest, it cannot be found to have been an insane delusion or monomania.'

See also and cf. *Kalfa (Gold) v. Gold* [8], at pp. 33-35; EC (Jerusalem) 514/79 *Estate of Felicia Hirsch* [17], at p. 428, 429-430 (Justice D. Bein). We can only conclude the following, that the deceased acted deliberately, with free will, rationally and even reasonably. It was not delusions that led him to disinherit the members of his family from his property after his death, but reality, a wretched reality that we sometimes see in relationships between family members. Were it not for that quarrel that occurred between the deceased and his family members, we might (perhaps) have been able to consider a possibility of accepting the opinion of Dr Litman, with regard to a will written under the influence of delusions, and fears of persecution that resulted from a distorted view of reality. However, since we know about that quarrel, we can no longer say that it was delusions that led the deceased to write the third will. Indeed, had it been delusions that led the deceased to write the third will, why did he not say to Adv. Artman that his sister was trying to poison him, and for that reason he wanted to disinherit her and her children from his property? In view of what Adv. Artman said, and what he did not say, we know that it was not delusions that settled the mind of the deceased.

46. The trial judge held in his judgment that the financial dispute was between the deceased and the nephew only, and relying upon the opinion of Dr Litman, he further determined that as a result of delusions the deceased saw the sister and her children as one unit. The trial judge therefore saw fit to distinguish between the sister and her two daughters, on the one hand — with regard to whom he held that the deceased was motivated by delusions — and the nephew on the other hand — with regard to whom he held that a real dispute had occurred between the deceased and the nephew. The trial court's conclusion was therefore that there was a proper reason to disinherit only the nephew from the will, and he therefore saw fit to change the will in such a way that the sister herself and her two daughters — together with the LIBI Fund — would inherit the estate in equal shares. We cannot agree with this verdict.

First of all, as stated above, a sufficient basis in evidence has not been adduced for the determination with regard to the existence of the delusions. Second, the distinction between the nephew and the sister and her daughters seems to us artificial. The opposite is true. Regarding the sister and her family precisely as one entity was merely natural and rational, even to a person not prey to delusions. At the time of writing the will, the sister and her three children lived in one house; in so far as it concerned the deceased, they all had one interest; and therefore it was merely natural that the deceased should regard all four of them as one entity. Moreover, even the members of the sister's family regard themselves as one entity in the question of the financial dispute. We should also remember that Adv. Artman stated in his affidavit that the deposit of cash and valuables was 'in the possession of the members of his family', and he repeated this during the cross-examination. But the sister of the deceased and the son chose not to testify in the trial court, and therefore no evidence was brought to rebut the testimony of Adv. Artman.

Against this whole background, all that can be said is that there was a real motive — a reasonable motive — for the desire of the deceased to change his will; that the deceased had free will that was not taken captive by compulsive psychological constraints; it follows that there is no defect in the third will.

47. The conclusion is that the sister and her children did not succeed in proving that what led to the making of the third will (i.e., the second and the third wills) was mental illness of the deceased — an illness that led to delusions and fantasies about harm that they wanted to cause him. The contrary is true. Once we knew that the nephew took control illegally of the deceased's money, the deceased had a good reason to disinherit his nephew from his share in the estate, and in the circumstances of the case it was not a remote possibility that the deceased would identify the sister and her daughters with the nephew. And even were we to say that such an identification was not a necessary outcome — and we did not say this — even then we would not find that the identification resulted from delusions and insane fantasies. It is a rule — and this rule is appropriate in this case — that delusions are thoughts with no basis in reality; but if there is any evidence, and even weak evidence, that may lead to a thought about the existence of a certain reality, we will not deem the thoughts to be delusions. See and cf. 79 *Am. Jur.* 2d, *supra*, at 343, 345, 346. A testator may be arbitrary in distributing his property, and this is the autonomy of free will; but without saying that the deceased was motivated by arbitrariness — we are a long way from saying this — we should remember that the court will also respect wishes for which there is no rational

explanation, provided that they are made freely. It is superfluous to say that the testator's *motives* are irrelevant to the case: 'The court does not interfere with the motives of the testator as long as it is convinced that the testator indeed wished that certain property would pass on his death to *A* and not to *B*' CA 175/87 *Lubetsky v. Gilgor* [13], at p. 78. The deceased had capacity to make the third will, and if my opinion is accepted, we must uphold this will in spirit and in letter.

48. Let me say a final word on the subject of delusions and fantasies. We are dealing with a testator who is alleged to have been mentally ill, to have been deranged in his mind, and who is said to have suffered from paranoid schizophrenia in thinking that the members of his family wanted to bring about his end. For this reason we have discussed, in the main, not only someone who was prey to illusions, but a testator whose mind was deranged because of a mental illness. In principle, it may be that one should not distinguish between someone who was mentally ill whose mind and will were taken captive by delusions, and someone who was prey to delusions and who lost his free will even without being mentally ill. But without mental illness, it will be difficult for us to distinguish between someone who has testamentary capacity and someone who does not have testamentary capacity, between someone prey to fantasies but who has testamentary capacity and someone prey to fantasies whose testamentary capacity is impaired. The boundaries are likely to be blurred, and to distinguish one from the other is like trying to distinguish colours in the dark.

In order to describe persons with testamentary capacity and those without it, various formulae may be used, such as: a defect in judgment, no ability to decide, incapacity to act wisely, and other similar phrases that are supposed to define a defect in capacity. However all of these will only manage to equip us with tools that are not sufficiently sharp and fine for a decision in one case or another. Let us not forget that strangeness of behaviour is not sufficient for cancelling a will, and the same is true of eccentricity, which, in itself, does not revoke testamentary capacity. What is the difference between someone who speaks lovingly to dogs and cats, but hates people — whose 'inclination is evil from his youth' — and who has testamentary capacity (cf. *Estate of Felicia Hirsch* [17]), and someone who sees reality in a distorted fashion, as a result of which he bequeaths his property after his death — who may not have testamentary capacity?

In mental illnesses there are degrees of illness; some diseases take full control of their victim, who becomes putty in the hands of the disease to

mould, and there are some that only have partial control (and what is 'partial control'?) and the victim continues to live his life in his home (cf. *Estate of Felicia Hirsch* [17], at p. 428). The same is true of someone who is not mentally ill at all. There are many thoughts in the mind of man: love and affections and hatreds and jealousies and superstitions and the nursing of grudges. Who can weigh all of these up in the scales and measure them? It is inconceivable to impugn the validity of a will just because of one of all these. A person may feel hatred to one of his children since birth. When he disinherits his son from his estate after his death, it will not be said that he lacked capacity to do what he did merely because of that hatred, even if it is unfounded hatred, hatred that lacks any rational basis. A person is 'entitled' to hate someone, and he is entitled to express his hatred in his will (cf. 79 *Am. Jur*. 2d, *supra*, at 336-337). How shall we distinguish between a person motivated by hatred whose will is valid and someone motivated by hatred whose will is invalid? Indeed, there are many questions and the answers to them cannot be discovered easily. And although the cases are related to one another, and are even based on the same sources, we only spoke of someone who was prey to a mental illness and whose illness deranged his mind and distorted in his brain the reality around him. Someone who is not attacked by a mental illness but has a distorted perception of reality will be discussed elsewhere.

Provision of a will made as a result of a mistake

49. The trial court thought — unlike us — that the provision of s. 26 of the Inheritance Law does not extend to someone who makes a will if he is mentally ill and does not understand what is happening to him. When it thought that it was inconceivable that the Inheritance Law should not discuss the case of a will made by someone mentally ill, it searched and found the provision of s. 30(b) of the law that speaks of a provision of a will made by mistake. The Inheritance Law determines two provisions with regard to a case of a mistake in a will. One provision is in s. 32 of the law and refers to a scribal error:

> 'Scribal error, etc.
>
> 32. If there occurred a scribal error or an error in the description of a person or an asset, in a date, a number, a calculation or the like, and it is possible to determine clearly the true intention of the testator, the court shall amend the mistake.'

This provision is, according to everyone, irrelevant to our case, since the third will does not contain any mistake of the kind described in s. 32 of the law. However, in the opinion of the trial court, the provision of s. 30(b) of the Inheritance Law does apply to our case, and this states:

> 'Duress, threat, etc.
>
> (a) ……
>
> (b) When a provision of a will was made as a result of a mistake — if it is possible to determine clearly what instructions the testator would have given in his will were it not for the mistake, the court shall amend the text of the will accordingly; if it is not possible to do this — the provision of the will is void.'

The trial court thought that someone who is prey to delusions and whose mind perceives reality in a distorted manner falls into the scope of a mistake with regard to the reality surrounding him, and therefore the provision of s. 30(b) of the law applies to him. As the court said:*

> 'It seems to me that one can clearly conclude from all of the aforesaid ("a proven theory") that the testator disinherited his sister and her two daughters from the will as a result of a mistake, a mistake that derived from the mental illness and which caused him to think that his sister intended to poison him. It was only because of this that he decided to change his first will and disinherit from the will his sister and her children, and to give the LIBI Fund what he had given in the first will to his sister and her children…
>
> It can be clearly deduced that were it not for the mistake that resulted from the mental illness, the deceased would not have disinherited his sister and her two daughters from the inheritance…'

In our opinion, the trial court itself is the one that made a mistake. The 'mistake' that the provision of s. 30(b) discusses is a human error, for *errare humanum est*: there is no person who does not err. Just as a person may make a mistake with regard to a contract, so too may he err with regard to a will (see and cf. Prof. G. Tedeschi, 'A will and a legal mistake', *Essays in Law*, the Harry Sacher Institute for Research of Legislation and Comparative Law,

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* IsrDC 5751(2), at p. 246.

1978, at pp. 307, 311-314; Shilo, *supra*, at pp. 276 *et seq*.). However, a mistake is one thing, whereas a mental illness that presents reality to the insane person in a distorted manner is quite another. Each one of these is a separate legal category, and the method of dealing with each one of these is different. As we have seen, a 'mistake' of someone prey to illusions is an irrational mistake, and because he is mentally ill it is not possible to apprise him of his 'mistake' by rational reasoning. A mistake, in its basic sense, means a mistake of a rational person; it is possible to convince the person that he erred, and he erred as a human being. These two mistakes — the one that is a mistake and the one that is not a 'mistake' — belong to different families, and they are not similar to one another. This also is clearly stated in the explanatory notes to the draft Inheritance Law, at pp. 80-81 of the booklet of the draft and the explanatory notes), and this is also implied by the references to which the explanatory notes refer, including Jewish law (some of the explanatory notes are quoted by the trial court in its judgment).[*] This is also the case in Anglo-American law. See, for example, Williams, *supra*, at pp. 40 *et seq*.; 79 *Am. Jur.* 2d, *supra*, at 344; *Boughton and Marston* [20]. See also: CA 598/75 *Resnick v. Resnick* [14], at p. 753 (Justice Landau); Prof. Tedeschi, in his article *supra*; *Kalfa (Gold) v. Gold* [8], at pp. 33-35.

50. Applying the provisions of the law dealing with a mistake to a will made by someone who is mentally ill is equivalent to mixing two unrelated issues, and we should beware of this. Indeed, when the trial court found — erroneously, in our opinion — that the provision of s. 26 of the Inheritance Law did not apply to a mentally ill person who is prey to illusions, it did well (in principle) when it tried to find another provision of law that would encompass a will made by someone mentally ill. But since we are of the opinion that the provision of s. 26 of the Inheritance Law does apply with full force to a mentally ill person, we say that the application of the provision of s. 30(b) of the law to a mentally ill person is based on a mistake. In order that our remarks may not be misunderstood, we will add this comment with regard to method: although the issue of a mistake and the issue of mentally ill persons are two separate and unrelated issues, the legislator *could* in theory had included the mistake of someone prey to delusions within the framework of the rule relating to a mistake. But such a classification — had it been made — would have crossed accepted boundaries in law, and it certainly would have led to confusion in classification and understanding. The reason for this is that the case of mentally ill persons belongs in the chapter on capacity — which is

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[*] *Ibid.*, at p. 245.

one of the first chapters and deals with the person (*persona*) — whereas the case of a mistake concerns the actual will and its contents (i.e., *materia*). A person who is prey to illusions may not have testamentary capacity, because he 'does not know how to understand the nature of a will'. If he overcomes this hurdle — and he has testamentary capacity — it is still possible that he will make a mistake. Testamentary capacity comes first, a mistake in a will afterwards, and each is unconnected with the other. This is the accepted classification in Israeli law — and not merely with regard to wills — and this is the path we should follow unless the legislator tells us otherwise. Cf. M. Cheshin, *Movable Property in Tort Law*, Y. L. Magnes, 5731, 157-158, 160-162. But see also Englard and Bass, in their article *supra*, at p. 345.

Conclusion

51. We have reached the end of a journey and we have a valid will. In these circumstances, I can do no better than to quote what we said in *Shaham v. Rotman* [9], at p. 347:

> 'I am pleased with the result that we have reached, which in my opinion realizes the wishes of the deceased. The wishes of a person are his dignity — this is human dignity — but the dead lack the capacity to carry out their wishes and to protect their dignity. We have therefore acted to carry out his wishes and to protect the dignity of the deceased.'

If my opinion is accepted, then we will allow the appeal of the LIBI Fund and Adv. Alberto Shrem, we will dismiss the counter-appeal, and we will order the probate of the third will as it stands. I would also propose that the respondents 1-4 should pay the costs of each of the appellants in a sum of NIS 10,000 as of today.

President M. Shamgar

I agree.

Justice E. Goldberg

1. The principle of respecting the wishes of the testator is the golden thread running through case-law on the subject of probating wills, and it is the basis for interpreting the various provisions in the Inheritance Law. As Justice H. Cohn (later Vice-President) said in CA 869/75 *Brill v. Attorney-General* [15], at p. 102: '…the "basic policy" of the legislator in the law of wills is

merely that it is meritorious to uphold the wishes of the deceased…'. The lack of reasonableness in a will and the lack of fairness in it are not grounds to disqualify the will, and even when it is 'unjust', it should be upheld in accordance with the wishes of the testator. For —

> 'In a will there is no equality of standing and a balance between the parties, just as there is no "weaker" or "stronger" party. The public interest is not in ensuring the rights of the weak but in upholding the wishes of the testator, who dictates in his will the rights of each of the beneficiaries thereunder, who will benefit and who will be overlooked, who will receive a large amount and who a small one' (*Engelman v. Klein* [2], at p. 782).

2. The intention in the will is what causes the inheritance (FH 40/80 *Koenig v. Cohen* [16], at p. 724), and when the intention exists, the court must merely uphold the will, for no-one is the guardian of someone else's will. In this way the protection of human freedom is realized, since one aspect of this is the freedom to control one's property. In the words of Prof. Y. Weisman, in his book *Property Law — General Part*, The Harry Sacher Institute for Research on Legislation and Comparative Law, 1993, 20:

> '… The desire to make dispositions of property is a way to express the personality of a person, and the protection of this desire, by way of respecting the right to property with regard to which a person has expressed his will, is in fact a protection of his personality and his liberties. The freedom to control one's assets is what makes a person free…'

Included in this freedom of a person to control his property is also the freedom to bequeath it for reasons that seem to us perverse, irrational, arbitrary and improper. 'In favour of the accepted principle there are two substantial reasons: first, without this, a person's property right is incomplete, and second, in every case of inheritance the circumstances are different, and only the testator has the ability to know them and evaluate them' (Prof. G. Tedeschi, 'Rights outside the Estate', 11 *Mishpatim*, 1981, at 20, 33).

3. The court must uphold the will, unless it was made '… by a minor or by someone declared incompetent or it was made when the testator did not know how to understand the nature of a will…' (s. 26 of the Inheritance Law). The subject of the first two cases is someone who does not have independent legal capacity, whereas with regard to the last expression in s. 26 of the law, which is not defined in the law, Justice Barak said in *Bendel v. Bendel* [1], at p. 105:

> '… It is not desirable that we should lay down hard rules. The legislator only determined a general guideline, the purpose of which is to examine whether the testator was aware of the nature of his acts and their consequences. In this respect, we can take into account the testator's awareness of the fact that he made a will, his knowledge of the extent of his property and his heirs, his awareness of the consequences of making the will for the heirs… the weight, given to these and other considerations, is something that varies from one matter to another, in accordance with the circumstances of each case.'

This issue in section 26 of the Inheritance Law does not concern the capacity of the testator to make a will, but a mental defect that affects the ability of the testator to formulate a true will, and in the absence of a true will there is no bequest, since we already said that the intention in the will is what causes the inheritance.

4. In our case, the testator was not declared incompetent, but he was mentally ill and suffered from paranoid delusions. These did not affect his awareness that he was making a will, nor his knowledge of the extent of his property and his heirs, nor his awareness of the results of making the will on his heirs. Should his will be regarded as invalid?

No-one disputes that a will in which a father disinherits his son, because in his opinion his son does not respect him as he should, is valid, even if the son is widely regarded as a very devoted son. The Inheritance Law 'accepts' the testator as he is, with his defects, his failings, his faults and his weaknesses. The objective criterion was not adopted by the Inheritance Law, and the extent of the deviation from the objective standard is not a sufficient reason to enforce this standard in the will. The Inheritance Law respects the will of a person with an 'eggshell head', just as it respects the person with the 'eggshell head'.

> 'In this respect, the doctrine of testamentary freedom and capacity reflect notions that are fundamental to liberal political theory. "The political doctrine of liberalism does not acknowledge communal values… The individuality of values is the very basis of personal identity in liberal thought…".' (J. B. Baron, 'Empathy, Subjectivity and Testamentary Capacity', 24 *San Diego L. Rev.*, 1987, at 1043, 1049).

5. A distorted reality perceived by a testator who does not suffer from delusions as a result of a mental illness does not, then, affect his will. Why should we say otherwise for someone whose perception of reality is deranged as a result of a defect in his cognitive faculties? Is such a distinction justified merely for the reason that the second is 'recognized' by medical science as suffering from that mental defect? I think that there should be one law for *all* the cases in which the will reflects the testator's emotional, ethical and mental baggage, and there is no basis for replacing his distorted will with the will of the reasonable person in those circumstances. A distortion in a person's will does not mean that the distorted will is not the *real* will of the testator. Otherwise, we are intruding into the 'normality', as we see it, of someone who lived his life outside this framework, and thereby *we* distort the true will of the testator. The unusual person (whether 'recognized' as such or not 'recognized' as such) has a will of his own and a truth of his own, in accordance with his own reality. He lives his life in his own bubble, and smashing this after his death, in the guise of a desire to discover his 'true', internal world, is merely an attempt to reconstruct what was never in his mind in his lifetime. If there is a justification for smashing the bubble, then that exists also in his life, and yet we do not intervene in his acts and he may during his life do what he wishes with his property (as long as he is not declared incompetent). Is the mere fact that he has died a reason to justify our intervention? Once we have determined that the distorted wishes of the testator are his true wishes, these wishes, even though they are distorted, have the power to make a will. Social intervention in this is a violation of the individual's property rights, and it takes away from the owner of the property the power to control the property and to dispose of it. The considerations underlying the Legal Capacity and Guardianship Law are also irrelevant to this matter. The restrictions on the capacity of someone incompetent at law to make dispositions are *protective* in nature, and the object of the protection is the individual himself. Restricting the capacity of someone who suffers from a mental illness is intended to protect *him and his property*. This consideration does not exist at all for a will, since there is no apprehension that the testator will do himself damage, since his parting from his property takes place when he dies. His discretion is limited then merely to the choice of the identity of the beneficiaries under the will, and with regard to others he has no duty to bequeath his property, and he has no duty to realize their expectations. This is the reason for the distinction between the degree of capacity needed to make a will and the degree of capacity needed to make a contract:

> 'However, even in the face of a statue which sets up a sound mind as a prerequisite to capacity to make a will, much authority can be found for the proposition that it takes less mental capacity to execute a valid will than it does to execute a valid contract' (M.D. Green, 'Public Policies Underlying the Law of Mental Incompetency', 38 *Mich. L. Rev.*, 1939-1940, at 1189, 1204).

6. Therefore, I do not see any reason to deviate from the interpretation given in *Bendel v. Bendel* [1] to s. 26 of the Inheritance Law, and to apply the words 'when the testator does not know how to understand the nature of a will' to someone mentally ill who suffers from delusions but has not been declared incompetent. This was the opinion of Prof. Englard and Mr Bass in their article *supra*, at p. 341, and in the same vein it was held in *Kalfa (Gold) v. Gold* [8], at p. 32, that:

> 'Even if we make the far-reaching assumption that the deceased had a mental disturbance that was reflected in jealous delusions of her daughter, which developed into bitter hatred, without the other aspects of functioning being affected, such a disturbance will not necessarily harm the mental faculties to the extent of a lack of capacity to make a will or a lack of capacity to understand what is the nature of a will… what the doctor calls an "illness" is not necessarily also an illness in the sight of the law (CrimA 187/61 *Pano v. Attorney-General*, at p. 1112). Even if a person suffers from mental disturbances, instability, etc., this does not deprive him of capacity to carry out legal acts, including a will, as long as he complies with the condition at the end of s. 26, i.e., he knows how to understand the nature of a will.'

7. A distorted perception of reality, that underlies a will, also does not constitute a mistake under s. 30(b) of the Inheritance Law. In cases where the source of the gap between the objective reality and the subjective reality is a flawed capacity to *process* data (as distinct from a lack of data), we should not think that this is a 'mistake' in the sense of the said s. 30(b). The significance of a mistake in a will is not the same as the significance of a mistake in a contract. 'In wills we must protect the just expectation that the words of the party to the contract who made the error raise in the other party, whereas in a will this is not the case' (Prof. Tedeschi, in his article *supra*, *Essays in Law*, at p. 313).

8. Since the freedom of choice, which is the source of the existence of the will, also includes the freedom of the testator to determine his heirs out of

unreasonable motives, there is no basis for holding that we must ignore the wishes of the testator when these reflect his internal world, even if these wishes seem to us distorted. These wishes are the true wishes of the testator, and we must respect them after his death. We are not permitted to replace his wishes with wishes that we think were his true wishes.

9. In view of this conclusion, the appeal should, in my opinion, be allowed and the counter-appeal should be dismissed.

Appeal allowed; counter-appeal denied.

28 August 1993.