

PLAYER 1



HIGHSCORE 2500



PLAYER 2

"INSANE IN THE BRAIN"

CAPACITY DISPUTES IN
ESTATE AND TRUST
LITIGATION 

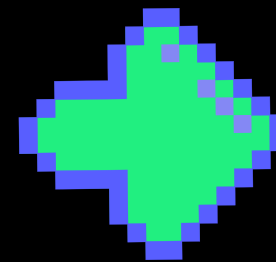


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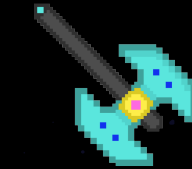
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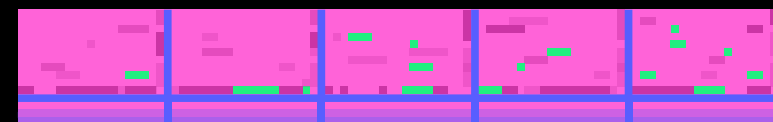


THIS CLE WILL ADDRESS THE INS AND OUTS OF CAPACITY CLAIMS, INCLUDING RELEVANT STANDARDS, COMMON ISSUES, AND PRACTICAL TIPS FOR LITIGATING SUCH CLAIMS IN ESTATE AND TRUST LITIGATION.

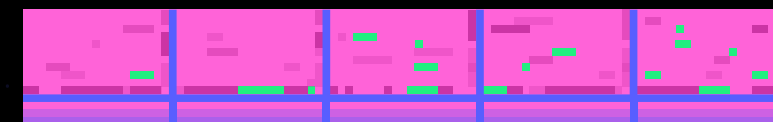
AS ARIZONA LAW CREATES CONFUSING AND INCONSISTENT CONSIDERATIONS IN THIS AREA, IT POSES THE QUESTION, AS THE CYPRESS HILL SONG SAYS, "WHO YOU TRYING TO GET CRAZY WITH ESE? DON'T YOU KNOW I'M LOCO?"



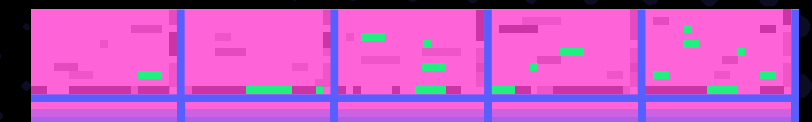
WILLS



TRUSTS



OTHER STANDARDS



FUTURE OF THE LAW

Tip: Use links to go to a different page inside your presentation.

How: Highlight text, click on the link symbol on the toolbar, and select the page in your presentation you want to connect.

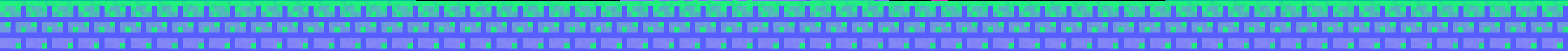
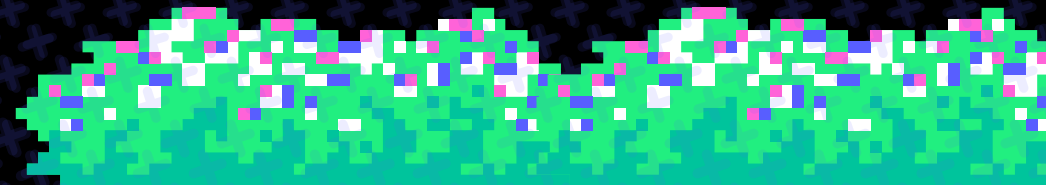
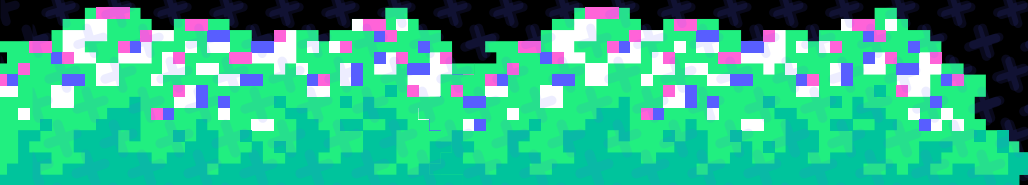
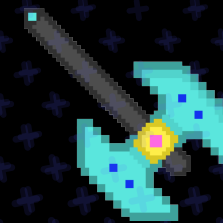
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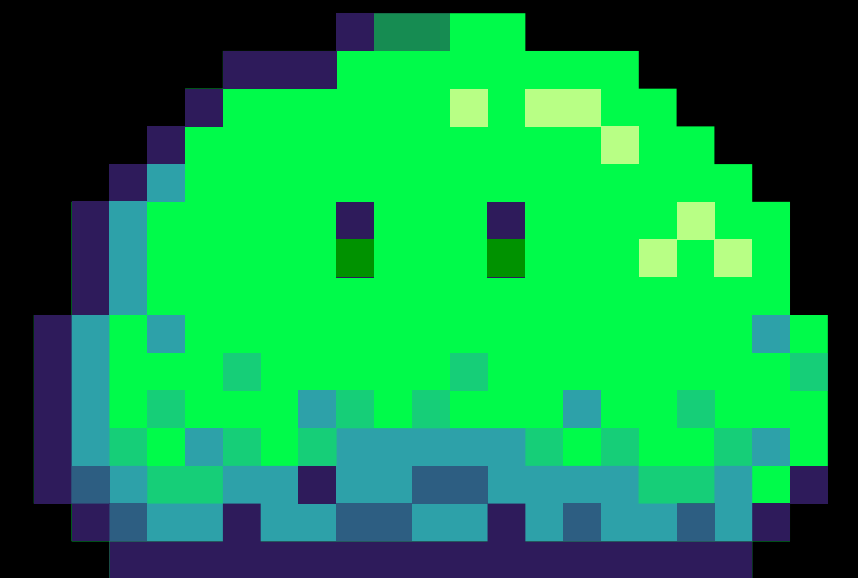


WILLS



KEEP IT, ON THE REAL: IF
YOU'RE REAL WITH ME, I'LL
BE REAL WITH YOU ABOUT
TESTAMENTARY CAPACITY

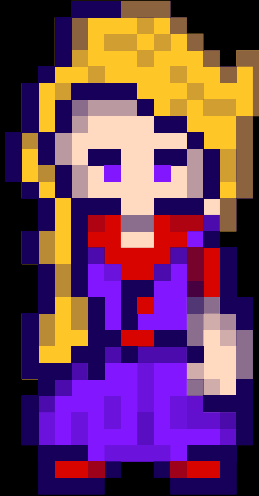
- STANDARDS
- STATUTORY REFERENCES
- APPLICATIONS AND
COMPLICATIONS
- BEST PRACTICES



MIND PLAYING TRICKS ON ME? WHAT ARE THE STANDARDS FOR TESTAMENTARY CAPACITY?

- INCAPACITY IS TYPICALLY RELEGATED TO THE DETERMINATION OF ONE OR TWO PHYSICIANS HAVING KNOWLEDGE OF INDIVIDUAL'S MEDICAL CONDITION OR HISTORY
- DOCUMENT PROVIDES STANDARD FOR SEEKING A FINDING OF INCAPACITY WHEN IN QUESTION DURING THE INDIVIDUAL'S LIFETIME WHEN INDIVIDUAL IS UNABLE TO MANAGE PROPERTY, FINANCIAL AFFAIRS, MEDICAL DECISIONS, ETC. – TYPICALLY DEFINED IN A DURABLE POA OR TRUST
- SIGNATURE BLOCK STATEMENT OF TESTATOR CONTAINING LANGUAGE TO AFFIRM THEY ARE OF "SOUND MIND" AND NOT UNDER DURESS OR UNDUE INFLUENCE; WITNESS SIGNATURE BLOCK MAKING SIMILAR STATEMENTS AS OBSERVATIONS
- FUNCTION OF THESE STATEMENTS – TO UNDERSCORE THE PRESUMPTION OF NO UNDUE INFLUENCE VIA STATUTE.

MAMA SAID KNOCK YOU OUT...OF HER WILL - BUT IS SHE OF "SOUND MIND"?



STATUTORY DEFINITIONS

- WHO MAY MAKE A WILL: A PERSON WHO IS EIGHTEEN YEARS OF AGE OR OLDER AND WHO IS SOUND MIND MAY MAKE A WILL (§ 14-2501)
- WHAT DOES "SOUND MIND" MEAN IN THIS CONTEXT?
- BURDENS RELATING TO VALIDITY OF GOVERNING INSTRUMENT § 14-2712:
 - (A) A PROPONENT OF A GOVERNING INSTRUMENT HAS THE BURDEN OF ESTABLISHING PRIMA FACIE PROOF OF DUE EXECUTION IN ALL CASES
 - (B) IT IS A REBUTTABLE PRESUMPTION THAT A PERSON WHO EXECUTES A GOVERNING INSTRUMENT IS PRESUMED TO HAVE CAPACITY TO EXECUTE THE GOVERNING INSTRUMENT AND TO HAVE DONE SO FREE FROM UNDUPLICATE INFLUENCE AND DURESS.
- WHAT DOES "HAVE CAPACITY" MEAN IN THIS CONTEXT?
- SOUND MIND AND CAPACITY ARE NOT DEFINED IN THE STATUTES; CASE LAW MADE ATTEMPTS TO ADDRESS THE PROBLEMATIC STATUTORY PHRASING, LACK OF CONSISTENCY

STAKES IS HIGH, YOU KNOW THEM STAKES IS HIGH: COMPLICATIONS ARISING FROM TESTAMENTARY CAPACITY ISSUES

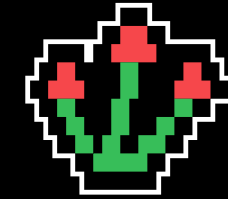
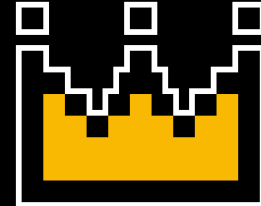
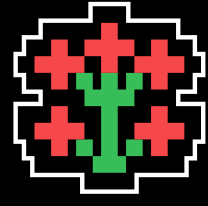
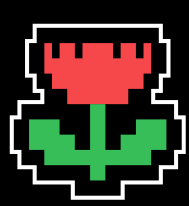
CAPACITY ISSUES IN DRAFTING

- ABILITY TO KNOWINGLY AND INTELLIGENTLY CONTRIBUTE TO THE PROCUREMENT AND CREATION OF ESTATE PLANNING DOCUMENTS
- SUSCEPTIBILITY TO UNDUE INFLUENCE – VULNERABLE = LACK OF CAPACITY?
- DIAGNOSIS OF COGNITIVE DECLINE = LACK OF CAPACITY?
- ALL ADULTS LACKING CAPACITY ARE VULNERABLE, NOT ALL VULNERABLE ADULTS LACK CAPACITY.

CAPACITY ISSUES IN PROBATING A WILL

- QUESTIONS ABOVE AT A FUTURE POINT IN TIME – WERE THE RIGHT STEPS TAKEN?
- DETERMINING WHETHER DECEDENT HAD CAPACITY WHEN TESTAMENTARY DOCUMENTS WERE EXECUTED; WHETHER DOCUMENTATION EXISTED (WAS NECESSARY?) TO CONFIRM CAPACITY
- DO CONCERNS REGARDING UNDUE INFLUENCE, FINANCIAL EXPLOITATION EXIST
 - DOES THE CRITERIA REASONABLY EXIST TO PURSUE A CLAIM BASED ON QUESTIONS OF CAPACITY?

NO DIGGITY, NO DOUBT: APPROACHING QUESTIONS OF CAPACITY WITH CLIENTS



- BE INQUISITIVE AND OBSERVANT DURING MEETINGS WITH CLIENT TO DETERMINE NECESSITY OF ENGAGING QUESTIONS RELATED TO HEALTH, COGNITION, DIAGNOSIS, COGNITIVE TESTING, FAMILY INVOLVEMENT, FAMILY DYNAMICS, ETC.

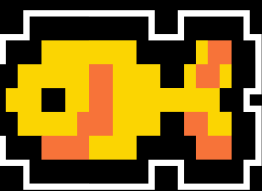
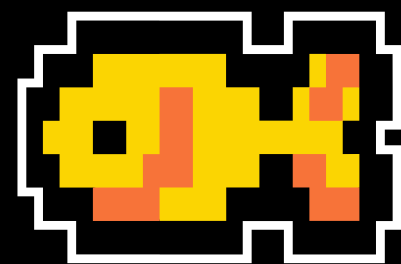
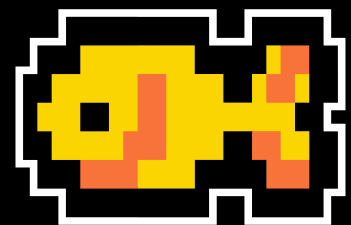
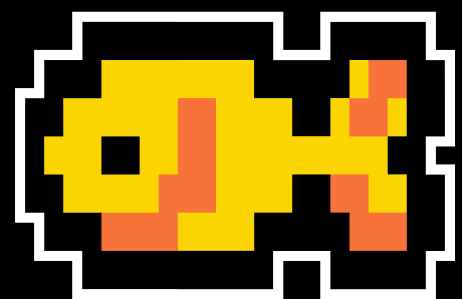
-IF DIAGNOSIS HAS BEEN MADE RELATED TO DECLINING COGNITION OR OTHER COGNITIVE IMPAIRMENT, ENCOURAGE/REQUIRE CLIENT TO MEET WITH PHYSICIAN SPECIFICALLY FOR PURPOSE OF DETERMINING CAPACITY TO PARTICIPATE IN PLANNING; HAVE OPINION IN WRITING AND PART OF THE FILE

- EXPLAIN PURPOSE OF SUCH A WRITTEN OPINION IS FOR THE PROTECTION OF THE ESTATE AND TO GET AHEAD OF ANY FUTURE POSSIBLE CLAIMS
- IF RECENT TESTING HAS BEEN COMPLETED AS A COMPANION TO DIAGNOSIS OF COGNITIVE DECLINE, REQUEST COPY OF TEST RESULTS FOR THE FILE

APPROACHING QUESTIONS OF CAPACITY WITH CLIENTS: CONT.

- ALWAYS ENSURE MEETINGS WITH CLIENT ARE PRIVATE AND TAKE ADDITIONAL PRECAUTIONS TO ENSURE CONTRIBUTIONS FROM CLIENT ORIGINATE WITH THEM AND NOT FROM FAMILY MEMBERS SEEKING TO INFLUENCE OR INSERT THEIR OWN AGENDA

-IN THE EVENT FAMILY INVOLVEMENT OR DYNAMICS ARE OF CONCERN, CONSIDER MULTIPLE INDIVIDUAL, IN-PERSON MEETINGS WITH CLIENT TO DETERMINE WHETHER CLIENT'S CONCERNS AND INTENTIONS ARE THEIR OWN; DOCUMENT MEETINGS AND CALL BACK TO MEETING NOTES WITH CLIENTS AS A TOOL



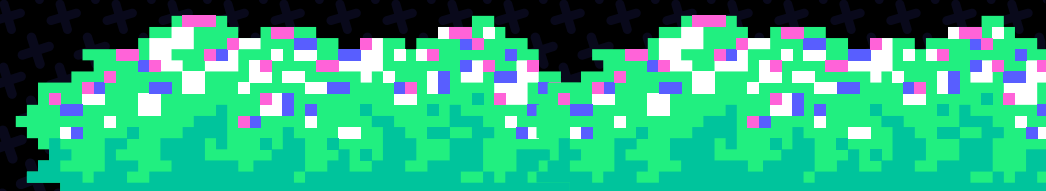
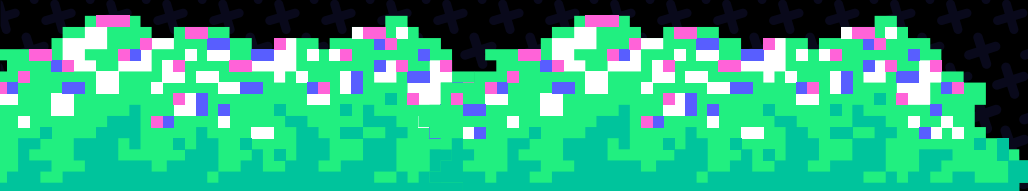
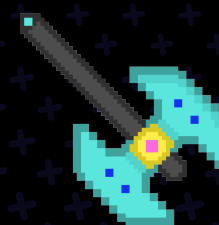
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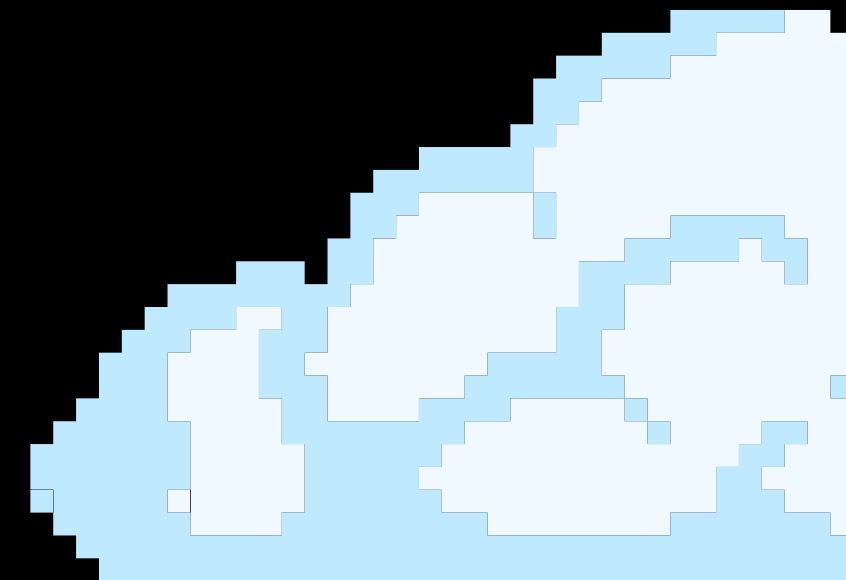
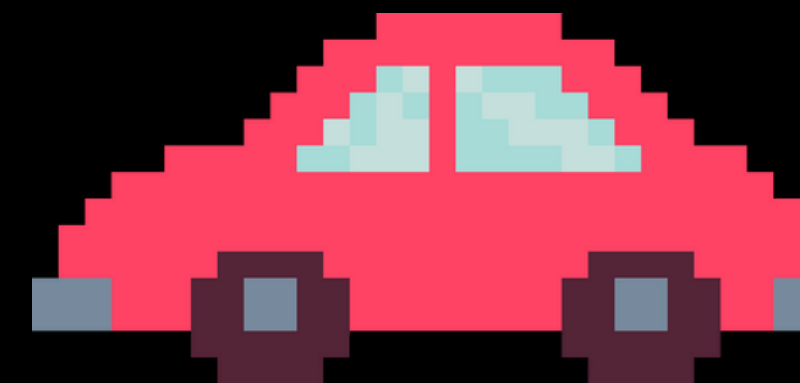
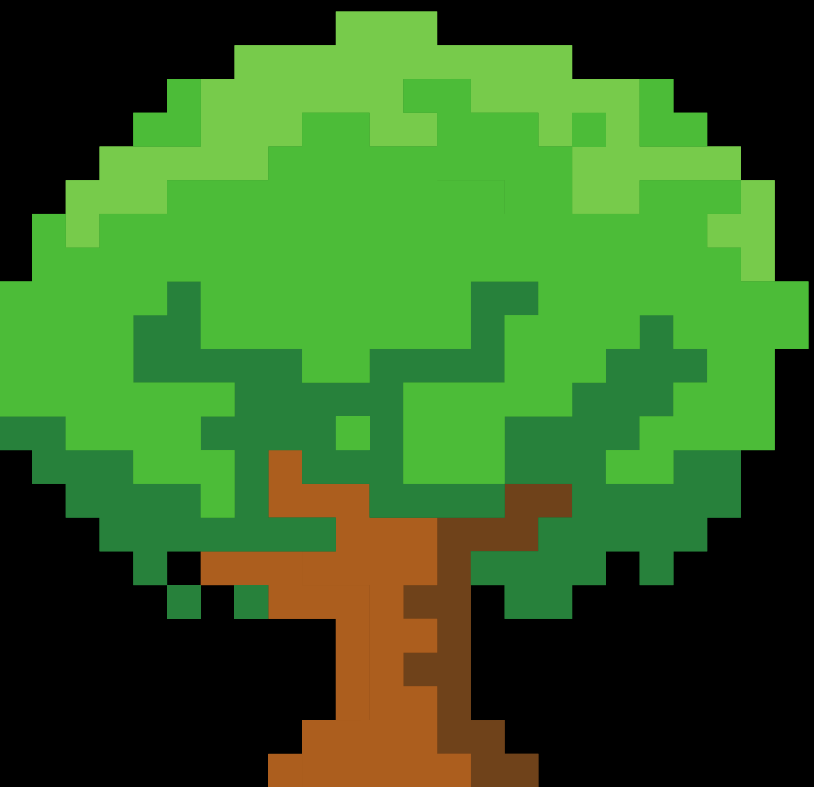


TRUSTS



WE REGULATE ANY STEALIN' OF HIS PROPERTY AND
WE'RE DAMN GOOD TOO. REGULATORS, MOUNT UP:
WHAT AUTHORITY "REGULATES" CAPACITY ISSUES
FOR TRUSTS?

- CASE LAW
- LEGISLATIVE ENACTMENTS
- RESTATEMENT (THIRD) OF TRUSTS

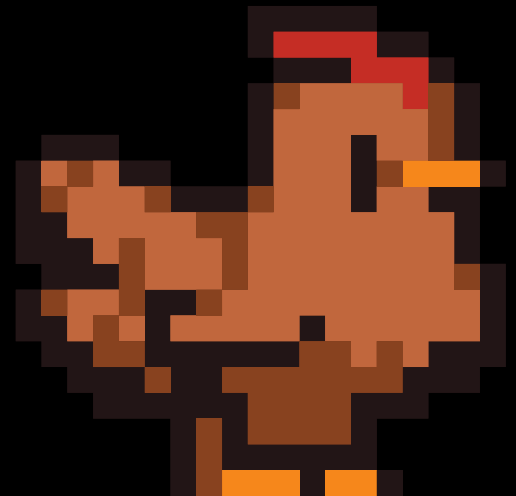


I GOT 5 ON IT: THE 5 REQUIREMENTS FOR CREATING A TRUST IN ARIZONA

- (1) THE SETTLOR HAS CAPACITY TO CREATE THE TRUST;
- (2) THE SETTLOR INTENDS TO CREATE THE TRUST;
- (3) THE TRUST HAS A DEFINITE BENEFICIARY OR IS A CHARITABLE TRUST, ANIMAL TRUST OR NON-CHARITABLE PURPOSE TRUST;
- (4) THE TRUSTEE HAS DUTIES TO PERFORM; AND
- (5) THE SAME PERSON IS NOT THE SOLE TRUSTEE AND SOLE BENEFICIARY.

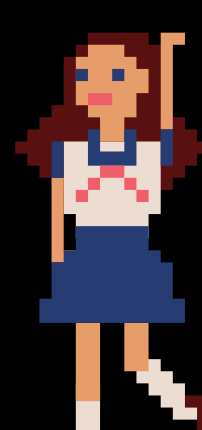
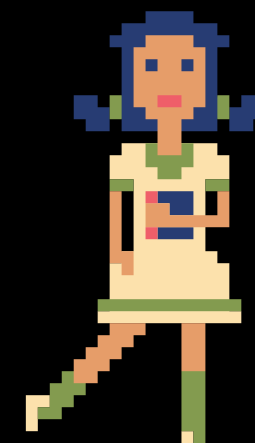
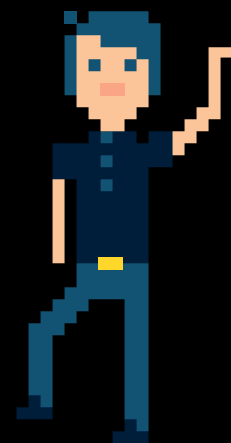
I'VE GOT MY MIND ON MY MONEY,
AND MY MONEY ON MY MIND:
MENTAL CAPACITY TO CREATE A
 TRUST

- THE MENTAL CAPACITY REQUIRED TO MAKE A REVOCABLE OR TESTAMENTARY TRUST, IS THE SAME AS THE MENTAL CAPACITY REQUIRED TO MAKE A WILL.
- IF A PERSON HAS TESTAMENTARY CAPACITY TO CREATE A WILL, THEN THE PERSON ALSO HAS MENTAL CAPACITY TO CREATE A REVOCABLE TRUST OR TESTAMENTARY TRUST.

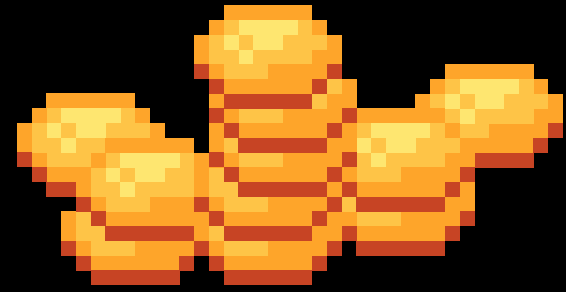


YOU DOWN WITH OPP? (OTHER PEOPLE'S PROVISIONS): WHEN CAN A TRUST CREATE CUSTOM PROVISIONS REGARDING CAPACITY?

- THE MENTAL CAPACITY REQUIRED TO CREATE ANY TYPE OF TRUST IS GOVERNED BY ARIZONA LAW, REGARDLESS OF ANY STANDARD SET FORTH IN THE TRUST ITSELF.
- THE MENTAL CAPACITY REQUIRED TO REVOKE OR AMEND A REVOCABLE TRUST MAY BE GOVERNED BY A PROVISION SET FORTH IN THE TRUST ITSELF, WHICH COULD BE HIGHER OR LOWER THAN THE LEGAL STANDARD FOR CREATING A TRUST.



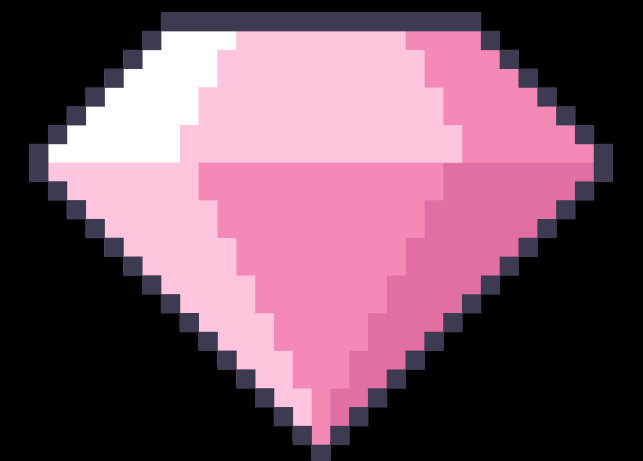
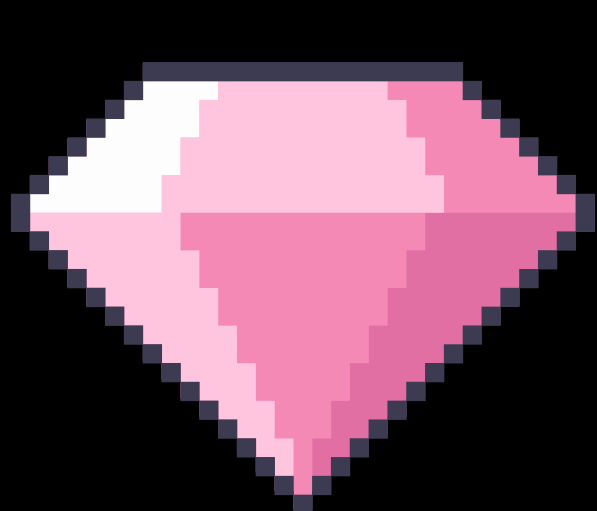
GIFTS: AINT NUTHIN' BUT A "G" THANG



- THE MENTAL CAPACITY REQUIRED TO MAKE AN IRREVOCABLE TRUST IS THE SAME AS THE MENTAL CAPACITY REQUIRED TO MAKE AN INTER VIVOS TRANSFER OR GIFT, WHICH IS HIGHER THAN THAT REQUIRED FOR WILLS AND REVOCABLE TRUSTS.
 - FOR GIFTS AND IRREVOCABLE TRUSTS, THE DONOR MUST HAVE THE MENTAL CAPACITY NECESSARY TO MAKE OR REVOKE A WILL AND BE CAPABLE OF UNDERSTANDING THE EFFECT THAT THE GIFT MAY HAVE ON THE FUTURE FINANCIAL SECURITY OF THE DONOR AND OF ANYONE WHO MAY BE DEPENDENT ON THE DONOR.
- MERE MENTAL WEAKNESS WILL NOT INVALIDATE A GIFT. RATHER, THE MENTAL POWER "MUST BE SO FAR DETERIORATED OR DESTROYED THAT THE GRANTOR IS INCAPABLE OF UNDERSTANDING IN A REASONABLE DEGREE AND KNOWING THE CONSEQUENCE OF THE INSTRUMENT HE EXECUTES." *PASS V. STEPHENS*, 22 ARIZ. 461, 470, 198 P. 712, 715 (1921).

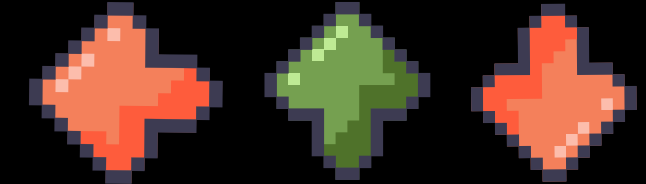
THIS IS HOW WE DO IT:
BURDEN OF PROOF RE:
EXECUTION

A.R.S. § 14-2712(A): A PROPONENT OF A GOVERNING INSTRUMENT BEARS THE BURDEN OF PROVING A PRIMA FACIE CASE OF DUE EXECUTION IN ALL CASES.





CAN'T TOUCH THIS (OR CAN YOU?): BURDEN OF PROOF RE: CAPACITY



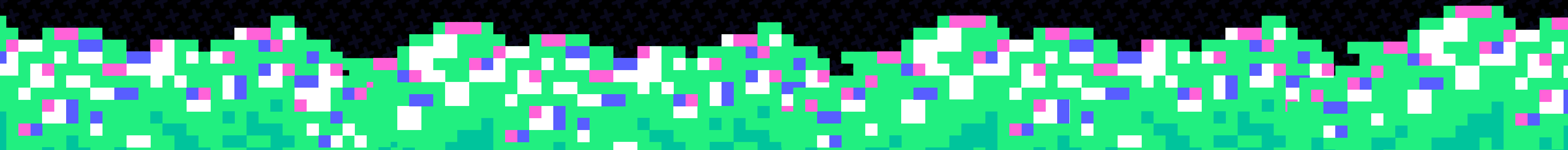
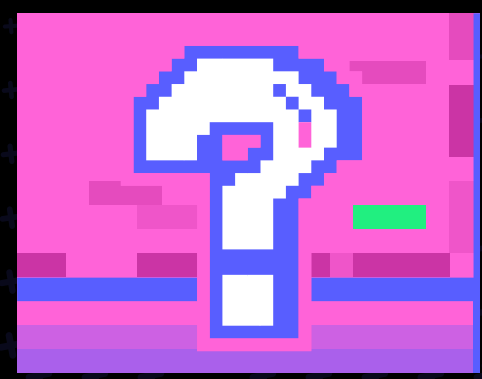
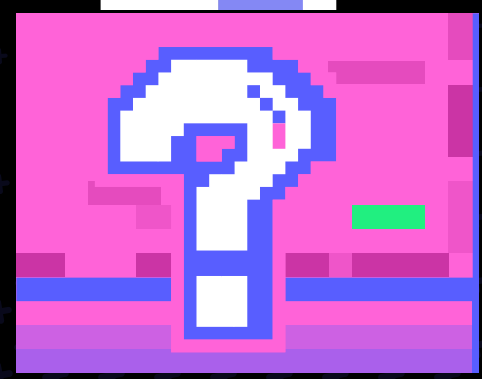
- A.R.S. § 14-2712(B): IF A WILL OR TRUST IS DULY EXECUTED, IT IS LEGALLY PRESUMED THAT THE PERSON WHO EXECUTED IT HAD THE MENTAL CAPACITY TO DO SO.
 - BEING ADJUDGED INCOMPETENT UNDER THE GUARDIAN STATUTE AND APPOINTED A GUARDIAN DOES NOT CHANGE THE PRESUMPTION OF CAPACITY. THOMAS' ESTATE, 105 ARIZ. AT 189, 461 P.2D AT 487.
- THE PRESUMPTION OF CAPACITY CAN ONLY BE OVERCOME BY PROVING, BY A PREPONDERANCE OF EVIDENCE, THAT ONE OR MORE OF THREE ESSENTIAL ELEMENTS FOR CAPACITY WAS MISSING AT THE TIME WHEN THE PERSON EXECUTED THE INSTRUMENT.

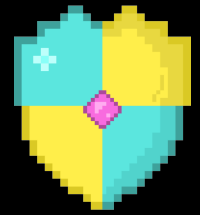
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OTHER STANDARDS

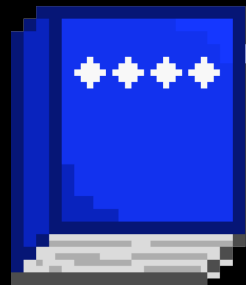




GUARDIANSHIPS



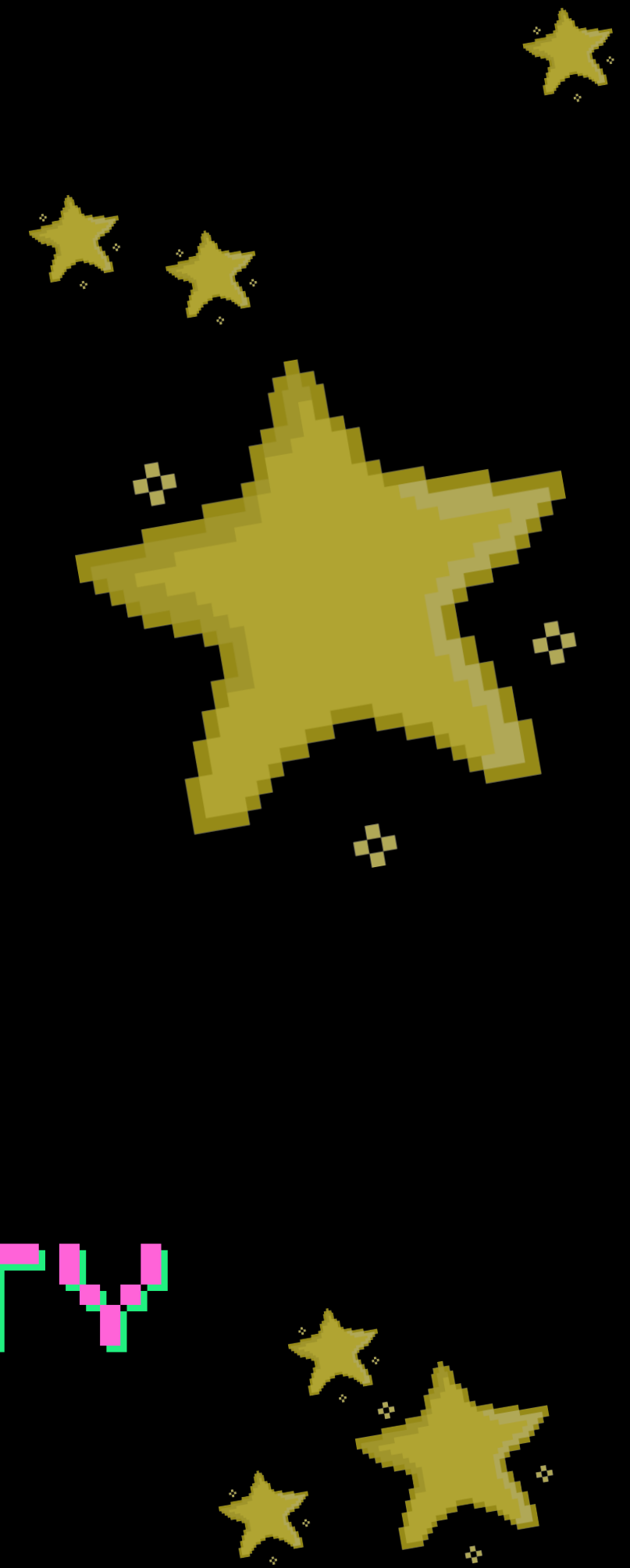
CONSERVATORSHIPS



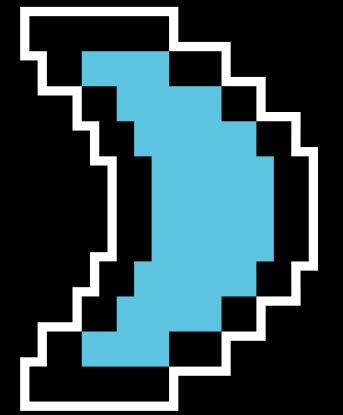
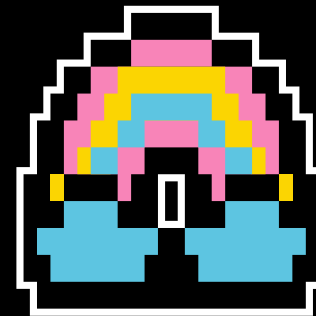
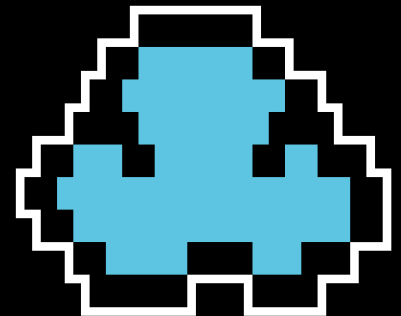
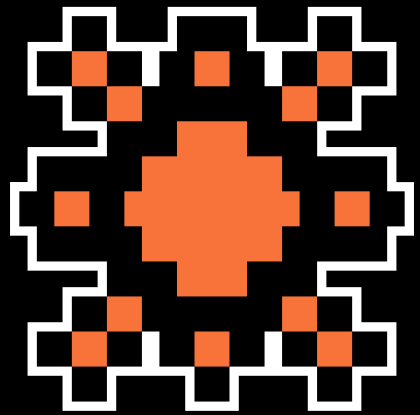
TESTIFYING



DIMINISHED CAPACITY
(ER 1.14)



"HOW CAN A PERSON LIKE ME CARE FOR YOU? I SAW THE SIGN AND IT OPENED UP MY EYES"-GUARDIANSHIPS



"INCAPACITATED PERSON" (A.R.S.14-5101(1)): IMPAIRED BY REASON OF MENTAL ILLNESS, MENTAL DEFICIENCY, MENTAL DISORDER, PHYSICAL ILLNESS OR DISABILITY, CHRONIC USE OF DRUGS, CHRONIC INTOXICATION OR OTHER CAUSE, EXCEPT MINORITY, TO THE EXTENT THAT HE LACKS SUFFICIENT UNDERSTANDING OR CAPACITY TO MAKE OR COMMUNICATE RESPONSIBLE DECISIONS CONCERNING HIS PERSON."

"AND IF YOU DON'T KNOW, NOW YOU KNOW"- TESTIFYING

✘ TWO CLASSES FOR CIVIL CASES (A.R.S. § 12-2202) INCOMPETENT TO TESTIFY:

1. PERSONS OF UNSOUND MIND AT THE TIME CALLED TO TESTIFY.

INCAPACITY DEPRIVES THE WITNESS "OF THE ABILITY TO PERCEIVE THE EVENT ABOUT WHICH [THE WITNESS] IS TO TESTIFY OR ... OF THE ABILITY TO RECOLLECT AND COMMUNICATE WITH REFERENCE THERETO." STATE V. GRIFFIN, 117 ARIZ. 54, 57, 570 P.2D 1067, 1070 (1977).

"2. CHILDREN UNDER TEN YEARS OF AGE WHO APPEAR INCAPABLE OF RECEIVING JUST IMPRESSIONS OF THE FACTS RESPECTING WHICH THEY ARE TO TESTIFY, OR OF RELATING THEM TRULY."

ANALYSIS AS TO WHETHER THE CHILD HAS SUFFICIENT UNDERSTANDING, KNOWLEDGE, AND ABILITY TO PERCEIVE AND RELATE FACTS." STATE V. BOWIE, 119 ARIZ. 336, 341-342, 580 P.2D 1190, 1195-96 (1978) (CITATIONS OMITTED). AZ PRACTICE SERIES 601:3.

"CAUSE IT'S A BITTER SWEET
SYMPHONY, THAT'S LIFE"-
DIMINISHED CAPACITY EA 1.14

COMMENT 6: "IN DETERMINING THE EXTENT OF THE CLIENT'S DIMINISHED CAPACITY, THE LAWYER SHOULD CONSIDER AND BALANCE SUCH FACTORS AS: THE CLIENT'S ABILITY TO ARTICULATE REASONING LEADING TO A DECISION, VARIABILITY OF STATE OF MIND AND ABILITY TO APPRECIATE CONSEQUENCES OF A DECISION; THE SUBSTANTIVE FAIRNESS OF A DECISION; AND THE CONSISTENCY OF A DECISION WITH THE KNOWN LONG-TERM COMMITMENTS AND VALUES OF THE CLIENT. IN APPROPRIATE CIRCUMSTANCES, THE LAWYER MAY SEEK GUIDANCE FROM AN APPROPRIATE DIAGNOSTICIAN. AZ PRACTICE SERIES 601.03.

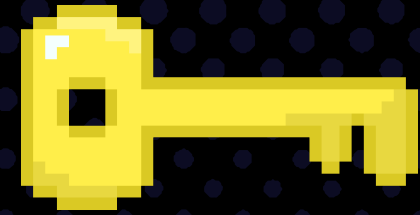
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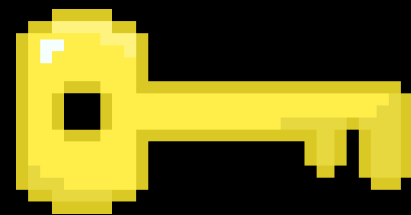
FUTURE OF THE LAW



PLAYER 1



ELECTRONIC
WILLS

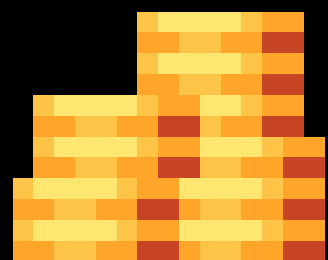
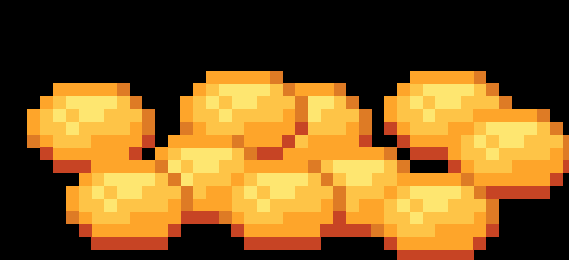
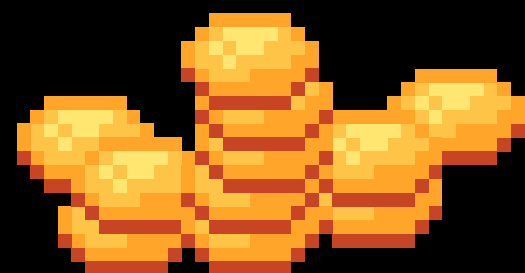


CLARIFICATIONS
TO THE LAW

BACK TO AGENDA PAGE

"IT'S LIKE THE MORE MONEY WE COME
ACROSS
THE MORE PROBLEMS WE SEE"
-ELECTRONIC WILLS

ELECTRONIC WILLS CAN PINPOINT TO THE EXACT SECOND WHEN
A WILL WAS SIGNED. IT COULD SET UP INTERESTING ANALYSES
ABOUT MOMENTS OF CLARITY OR DETERMINING CAPACITY.



"FUTURES MADE OF VIRTUAL INSANITY"



CLARIFICATIONS OF THE LAW

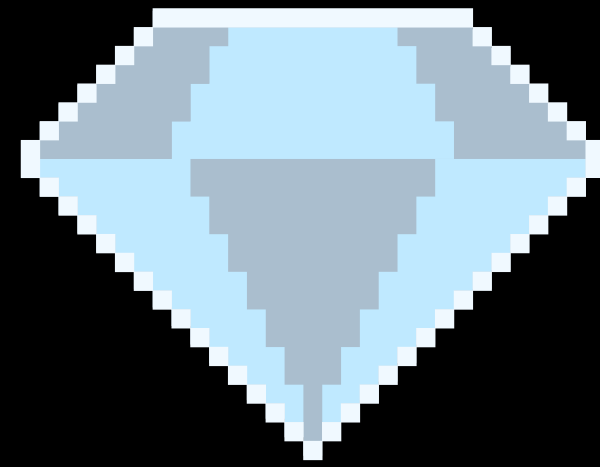
HOPEFULLY CASES WILL ARISE IN THE FUTURE THAT GIVE ARIZONA COURTS AN OPPORTUNITY TO ADDRESS THE OTHER TWO ELEMENTS OF TESTAMENTARY CAPACITY: WHAT IT MEANS FOR A TESTATOR TO KNOW THE NATURE OR CHARACTER AND EXTENT OF THE TESTATOR'S PROPERTY AND TO UNDERSTAND THE NATURE OF THE TESTAMENTARY ACT. ADDITIONAL CASE LAW AFFIRMING A FINDING A LACK OF TESTAMENTARY CAPACITY WOULD ALSO BE INSTRUCTIVE.

YO MAN, LET'S GET OUT OF HERE

WORD TO YOUR MOTHER



ICE ICE BABY (TOO COLD)



ICE ICE BABY (TOO COLD, TOO COLD)

ICE ICE BABY (TOO COLD, TOO COLD)

ICE ICE BABY (TOO COLD, TOO COLD)

MENU



THANK YOU!

NORA JONES: NLJ@TBLAW.COM
CHELSEA HESLA: CAH@TBLAW.COM
VANESSA HEIM: VRH@TBLAW.COM
SARAH DEUTSCH: SKD@TBLAW.COM

