

Incapacity

Contract law is founded on the principle that upholding the voluntary private choices of the contracting parties is typically socially and economically desirable. However, there are instances, many of which are discussed in other sections concerning formation defenses, where the law refuses to enforce contracts when the choices were not truly voluntary because, for example, one party misled the other or coerced its acceptance. This section addresses scenarios where at least one party lacks the capability to make voluntary decisions that would promote their own wellbeing. The law's primary aim is to safeguard such individuals from unfavorable decisions and exploitation by others. Whether it is successful in doing so and how it balances this safeguarding goal against the legitimate interests of others are some of the core questions of this section.

It is generally assumed that all human beings possess the capacity to enter into contracts unless they fall within one of the specific categories of individuals who lack such capacity. The Restatement identifies four such categories: people under guardianship, minors (which the Restatement and some of the caselaw call infants), those with severe mental illness, and those who are intoxicated. This section discusses all those categories, focusing on minors and the mentally ill.

A. Infancy

A contract between a minor and an adult is treated differently from one between two adults. Under certain circumstances, which will be further explored in this section, such contracts are voidable, meaning the minors can disaffirm them. The main question with those contracts concerns the implications of avoiding them. The following cases address that question.

Halbman v. Lemke

99 Wis.2d 241, 298 N.W.2d 562 (Supreme Court of Wisconsin, 1980)

CALLOW, Justice.

On this review we must decide whether a minor who disaffirms a contract for the purchase of a vehicle which is not a necessity must make restitution to the vendor for damage sustained by the vehicle prior to the time the contract was disaffirmed.

I.

On or about July 13, 1973, James Halbman, Jr. (Halbman), a minor, entered into an agreement with Michael Lemke (Lemke) whereby Lemke agreed to sell Halbman a 1968 Oldsmobile for the sum of \$1,250. At the time the agreement was made Halbman paid Lemke \$1,000 cash and took possession of the car. Arrangements were made for Halbman to pay \$25 per week until the balance was paid, at which time title would be transferred. About five weeks after the purchase agreement, and after Halbman had paid a total of \$1,100 of the purchase price, a connecting rod on the vehicle's engine broke.... Halbman ... in September took the vehicle to a garage where it was repaired at a cost of \$637.40. Halbman did not pay the repair bill.

In October of 1973 Lemke endorsed the vehicle's title over to Halbman, although the full purchase price had not been paid by Halbman, in an effort to avoid any liability for the operation, maintenance, or use of the vehicle. On October 15, 1973, Halbman returned the title to Lemke by letter which disaffirmed the purchase contract and demanded the return of all money theretofore paid by Halbman. Lemke did not return the money paid by Halbman.

The repair bill remained unpaid, and the vehicle remained in the garage where the repairs had been made. In the spring of 1974, in satisfaction of a garageman's lien for the outstanding amount, the garage elected to remove the vehicle's engine and transmission and then towed the vehicle to the residence of James Halbman, Sr., the father of the plaintiff minor. Lemke was asked several times to remove the vehicle from the senior Halbman's home, but he declined to do so, claiming he was under no legal obligation to remove it. During the period when the vehicle was at the garage and then subsequently at the home of the plaintiff's father, it was subjected to vandalism, making it unsalvageable.

Halbman initiated this action seeking the return of the \$1,100 he had paid toward the purchase of the vehicle, and Lemke counterclaimed for \$150, the amount still owing on the contract. Based upon the uncontroverted facts, the trial court granted judgment in favor of Halbman, concluding that when a minor disaffirms a contract for the purchase of an item, he need only offer to return the property remaining in his hands without making restitution for any use or depreciation. In the order granting judgment, the trial court also allowed interest to the plaintiff dating from the disaffirmance of the contract. On postjudgment motions, the court amended its order for judgment to allow interest to the plaintiff from the date of the original order for judgment, July 26, 1978.

Lemke appealed to the court of appeals, and Halbman cross-appealed from the disallowance of prejudgment interest. The appellate court affirmed the trial court with respect to the

question of restitution for depreciation, but reversed on the question of prejudgment interest, remanding the cause for reimposition of interest dating from the date of disaffirmance. The question of prejudgment interest is not before us on this review.

II.

The sole issue before us is whether a minor, having disaffirmed a contract for the purchase of an item which is not a necessity and having tendered the property back to the vendor, must make restitution to the vendor for damage to the property prior to the disaffirmance. Lemke argues that he should be entitled to recover for the damage to the vehicle up to the time of disaffirmance, which he claims equals the amount of the repair bill.

Neither party challenges the absolute right of a minor to disaffirm a contract for the purchase of items which are not necessities. That right, variously known as the doctrine of incapacity or the “infancy doctrine,” is one of the oldest and most venerable of our common law traditions. Although the origins of the doctrine are somewhat obscure, it is generally recognized that its purpose is the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace. Thus it is settled law in this state that a contract of a minor for items which are not necessities is void or voidable at the minor’s option.

Once there has been a disaffirmance, however, as in this case between a minor vendee and an adult vendor, unresolved problems arise regarding the rights and responsibilities of the parties relative to the disposition of the consideration exchanged on the contract. As a general rule a minor who disaffirms a contract is entitled to recover all consideration he has conferred incident to the transaction. In return the minor is expected to restore as much of the consideration as, at the time of disaffirmance, remains in the minor’s possession. The minor’s right to disaffirm is not contingent upon the return of the property, however, as disaffirmance is permitted even where such return cannot be made.

The return of property remaining in the hands of the minor is not the issue presented here. In this case we have a situation where the property cannot be returned to the vendor in its entirety because it has been damaged and therefore diminished in value, and the vendor seeks to recover the depreciation. Although this court has been cognizant of this issue on previous occasions, we have not heretofore resolved it.

The law regarding the rights and responsibilities of the parties relative to the consideration exchanged on a disaffirmed contract is characterized by confusion, inconsistency, and a

general lack of uniformity as jurisdictions attempt to reach a fair application of the infancy doctrine in today's marketplace.

In *Olson [v. Veum]*, 197 Wis. 342 (1928),] a minor, with his brother, an adult, purchased farm implements and materials, paying by signing notes payable at a future date. Prior to the maturity of the first note, the brothers ceased their joint farming business, and the minor abandoned his interest in the material purchased by leaving it with his brother. The vendor initiated an action against the minor to recover on the note, and the minor (who had by then reached majority) disaffirmed. The trial court ordered judgment for the plaintiff on the note, finding there had been insufficient disaffirmance to sustain the plea of infancy. This court reversed, holding that the contract of a minor for the purchase of items which are not necessities may be disaffirmed even when the minor cannot make restitution. Lemke calls our attention to the following language in that decision:

To sustain the judgment below is to overlook the substantial distinction between a mere denial by an infant of contract liability where the other party is seeking to enforce it and those cases where he who was the minor not only disaffirms such contract but seeks the aid of the court to restore to him that with which he has parted at the making of the contract. In the one case he is using his infancy merely as a shield, in the other also as a sword.

From this Lemke infers that when a minor, as a plaintiff, seeks to disaffirm a contract and recover his consideration, different rules should apply than if the minor is defending against an action on the contract by the other party. This theory is not without some support among scholars....

Halbman argues in response that, while the "sword-shield" dichotomy may apply where the minor has misrepresented his age to induce the contract, that did not occur here and he may avoid the contract without making restitution notwithstanding his ability to do so.

A minor, as we have stated, is under an enforceable duty to return to the vendor, upon disaffirmance, as much of the consideration as remains in his possession. When the contract is disaffirmed, title to that part of the purchased property which is retained by the minor revests in the vendor; it no longer belongs to the minor. The rationale for the rule is plain: a minor who disaffirms a purchase and recovers his purchase price should not also be permitted to profit by retaining the property purchased. The infancy doctrine is designed to protect the minor, sometimes at the expense of an innocent vendor, but it is not to be used to bilk merchants out of property as well as proceeds of the sale. Consequently, it is clear that, when

the minor no longer possesses the property which was the subject matter of the contract, the rule requiring the return of property does not apply.¹ The minor will not be required to give up what he does not have. We do not agree with Lemke and the court of appeals' dissent that *Olson* requires a minor to make restitution for loss or damage to the property if he is capable of doing so.

Here Lemke seeks restitution of the value of the depreciation by virtue of the damage to the vehicle prior to disaffirmance. Such a recovery would require Halbman to return more than that remaining in his possession. It seeks compensatory value for that which he cannot return. Where there is misrepresentation by a minor or willful destruction of property, the vendor may be able to recover damages in tort. But absent these factors, as in the present case, we believe that to require a disaffirming minor to make restitution for diminished value is, in effect, to bind the minor to a part of the obligation which by law he is privileged to avoid.

The cases upon which the petitioner relies for the proposition that a disaffirming minor must make restitution for loss and depreciation serve to illustrate some of the ways other jurisdictions have approached this problem of balancing the needs of minors against the rights of innocent merchants. In *Barber v. Gross*, 74 S.D. 254 (1952), the South Dakota Supreme Court held that a minor could disaffirm a contract as a defense to an action by the merchant to enforce the contract but that the minor was obligated by a South Dakota statute, upon sufficient proof of loss by the plaintiff, to make restitution for depreciation.... *Scalone v. Talley Motors, Inc.*, 158 N.Y.S.2d 615, 3 App.Div.2d 674 (1957), and *Rose v. Sheehan Buick, Inc.*, 204 So.2d 903 (Fla.App.1967), represent the proposition that a disaffirming minor must do equity in the form of restitution for loss or depreciation of the property returned. Because these cases would at some point force the minor to bear the cost of the very improvidence from which the infancy doctrine is supposed to protect him, we cannot follow them.

Modifications of the rules governing the capacity of infants to contract are best left to the legislature. Until such changes are forthcoming, however, we hold that, absent misrepresentation or tortious damage to the property, a minor who disaffirms a contract for the purchase of an item which is not a necessity may recover his purchase price without liability for use, depreciation, damage, or other diminution in value.

The decision of the court of appeals is affirmed.

¹ Although we are not presented with the question here, we recognize there is considerable disagreement among the authorities on whether a minor who disposes of the property should be made to restore the vendor with something in its stead.

Dodson v. Shrader

824 S.W.2d 545 (Supreme Court of Tennessee, 1992)

O'BRIEN, Justice.

This is an action to disaffirm the contract of a minor for the purchase of a pick-up truck and for a refund of the purchase price. The issue is whether the minor is entitled to a full refund of the money he paid or whether the seller is entitled to a setoff for the decrease in value of the pick-up truck while it was in the possession of the minor.

In early April of 1987, Joseph Eugene Dodson, then 16 years of age, purchased a used 1984 pick-up truck from Burns and Mary Shrader. The Shraders owned and operated Shrader's Auto Sales in Columbia, Tennessee. Dodson paid \$4,900 in cash for the truck. At the time of the purchase there was no inquiry by the Shraders, and no misrepresentation by Mr. Dodson, concerning his minority. However, Mr. Shrader did testify that at the time he believed Mr. Dodson to be 18 or 19 years of age.

In December 1987, nine (9) months after the date of purchase, the truck began to develop mechanical problems. A mechanic diagnosed the problem as a burnt valve, but could not be certain without inspecting the valves inside the engine. Mr. Dodson did not want, or did not have the money, to effect these repairs. He continued to drive the truck despite the mechanical problems. One month later, in January, the truck's engine "blew up" and the truck became inoperable.

Mr. Dodson parked the vehicle in the front yard at his parents home where he lived. He contacted the Shraders to rescind the purchase of the truck and requested a full refund. The Shraders refused to accept the tender of the truck or to give Mr. Dodson the refund requested.

Mr. Dodson then filed an action in general sessions court seeking to rescind the contract and recover the amount paid for the truck. [During the litigation] the truck, while parked in Dodson's front yard, was struck on the left front fender by a hit-and-run driver.... according to Shrader, the truck [now] worth only \$500 due to the damage to the engine and the left front fender.

[The court summarizes the common law and some of the caselaw, noting that under those approaches, the minor can disaffirm the contract and receive the purchase price without accounting for the minor's use of the good purchased or its depreciation.]

There is, however, a modern trend among the states, either by judicial action or by statute, in the approach to the problem of balancing the rights of minors against those of innocent

merchants. As a result ... minority rules have developed which allow the other party to a contract with a minor to refund less than the full consideration paid in the event of rescission....

We are impressed by the statement made by the Arizona Appeals Court in *Valencia v. White*, supra, citing the Court of Appeals of Ohio in *Haydcoy Pontiac Inc. v. Lee*, 19 Ohio App.2d 217 (1969):

At a time when we see young persons between 18 and 21 years of age demanding and assuming more responsibilities in their daily lives; when we see such persons emancipated, married, and raising families; when we see such persons charged with the responsibility for committing crimes; when we see such persons being sued in tort claims for acts of negligence; when we see such persons subject to military service; when we see such persons engaged in business and acting in almost all other respects as an adult, it seems timely to re-examine the case law pertaining to contractual rights and responsibilities of infants to see if the law as pronounced and applied by the courts should be redefined.

We state the rule to be followed hereafter, in reference to a contract of a minor, to be where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article purchased, that he ought not to be permitted to recover the amount actually paid, without allowing the vender of the goods reasonable compensation for the use of, depreciation, and willful or negligent damage to the article purchased, while in his hands. If there has been any fraud or imposition on the part of the seller or if the contract is unfair, or any unfair advantage has been taken of the minor inducing him to make the purchase, then the rule does not apply. Whether there has been such an overreaching on the part of the seller, and the fair market value of the property returned, would always, in any case, be a question for the trier of fact. This rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to a business person who has dealt with such minor in good faith.

This rule is best adapted to modern conditions under which minors are permitted to, and do in fact, transact a great deal of business for themselves, long before they have reached the age of legal majority. Many young people work and earn money and collect it and spend it oftentimes without any oversight or restriction. The law does not question their right to buy

if they have the money to pay for their purchases. It seems intolerably burdensome for everyone concerned if merchants and business people cannot deal with them safely, in a fair and reasonable way. Further, it does not appear consistent with practice of proper moral influence upon young people, tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them, and using them until they are worn out and destroyed, go back and compel the vendor to return to them what they have paid upon the purchase price. Such a doctrine can only lead to the corruption of principles and encourage young people in habits of trickery and dishonesty....

The case is remanded to the trial court for further proceedings in accordance with this judgment.

REID, C.J. and DROWOTA, DAUGHTREY and ANDERSON, JJ., concur.

Notes and Questions

1. The law of infancy needs to balance several conflicting interests, in particular, the interests of minors, who, by their status, might deserve protection when dealing with older and typically more mature and sophisticated adults, and the interests of the adults who often enter fair contracts and take no advantage of the minor. The prevailing approach, presented in *Halbman*, and the minority approach, presented in *Dodson*, balance those interests differently. Which of them makes more sense to you? Which of them is more efficient? Which is more equitable?
2. It goes without saying that some minors are incredibly smart and sophisticated, while some adults are unintelligible and gullible. Did you notice that neither *Halbman* nor *Dodson* addressed this matter at all? We do not know if either young Halbman or young Dodson were well educated, mature, or experienced. This is typical of the law of infancy. The law is triggered by the status of the minor as a minor. Many laws outside of contract law concerning a person's age—for example, those dealing with the eligibility for a driver's license or to be the President of the United States—are similarly not tied to the individual's actual maturity.

Zooming out, this is a classic example of a strict rule, which is triggered automatically once a certain criterion is met. Other legal norms are promulgated as flexible standards, which require more careful consideration of nuanced facts. The duty of good faith is probably the most famous standard in contract law. Obviously, some legal norms are

promulgated as a mix of rules and standards (the decision in *Dodson* might arguably create one such norm. Do you see why?). How should lawmakers decide whether to use a rule or a standard? Here is one way to think about this choice:

First, the choice between rules and standards affects costs: Rules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct. Second, when individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act.

Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Can you apply those considerations to the law of infancy as reflected in *Halbrman* and *Dodson*?

3. While the law of infancy protects young parties automatically until they reach a certain age, that age has changed over time. The common law considered individuals to be infants until their 21st birthday. States, however, by statutes lowered that age, and in most states, infancy ends when an individual reaches 18. *See also* Restatement (Second) of Contracts § 14 (stating 18 as the default age of maturity). In most states, that change followed the Twenty-sixth Amendment to the United States Constitution, which in 1971 lowered the voting age to 18. That change was driven, to a large degree, by the military draft during the Vietnam War. A common slogan of proponents of lowering the voting age was “old enough to fight, old enough to vote.” Does the lower age of infancy make the rule of *Halbrman* or *Dodson* more attractive?
4. The courts in *Halbrman* and *Dodson* noted that the minors in question did not misrepresent their age. What would the result be if they did? Specifically, can minors who misrepresented themselves as adults disaffirm contracts they accepted? The authorities are split. Some states, like Massachusetts, consider this fact irrelevant and allow even a lying minor to disaffirm the contract. Some states, like Ohio, preserve the minor’s right to disaffirm the contract but allow the other party to seek damages in tort. Finally, some states, like Mississippi, hold the deceitful minor estopped from disaffirming the contract.

The courts in *Halbrman* and *Dodson* noted that the contract in question was not for necessities. The next case addresses that issue in greater detail.

Webster Street Partnership, Ltd. v. Sheridan

220 Neb. 9, 368 N.W.2d 439 (Supreme Court of Nebraska, 1985)

KRIVOSHA, Chief Justice.

Webster Street is a partnership owning real estate in Omaha, Nebraska. On September 18, 1982, Webster Street, through one of its agents, Norman Sargent, entered into a written lease with Sheridan and Wilwerding for a second floor apartment at 3007 Webster Street. The lease provided that Sheridan and Wilwerding would pay to Webster Street by way of monthly rental the sum of \$250 due on the first day of each month until August 15, 1983. The lease also required the payment of a security deposit in the amount of \$150....

The evidence conclusively establishes that at the time the lease was executed both tenants were minors and, further, that Webster Street knew that fact. At the time the lease was entered into, Sheridan was 18 and did not become 19 [the age of maturity under Nebraska contract law at the time] until November 5, 1982. Wilwerding was 17 at the time the lease was executed and never gained his majority during any time relevant to this case.

The tenants paid the \$150 security deposit, \$100 rent for the remaining portion of September 1982, and \$250 rent for October 1982. They did not pay the rent for the month of November 1982, and on November 5 Sargent advised Wilwerding that unless the rent was paid immediately, both boys would be required to vacate the premises. The tenants both testified that, being unable to pay the rent, they moved from the premises on November 12.

In a letter dated January 7, 1983, Webster Street's attorney made written demand upon the tenants for damages in the amount of \$630.94. On January 12, 1983, the tenants' attorney denied any liability, refused to pay any portion of the amount demanded, stated that neither tenant was of legal age at the time the lease was executed, and demanded return of \$150 security deposit.

Webster Street thereafter commenced suit against the tenants and sought judgment in the amount of \$630.94 [that amount represents, among others, November and December rent, the cost of cleaning up and repairing the apartment, and \$150 as "re-rental fees" minus the \$150 security deposit.]

To this petition the tenants filed an answer alleging that they were minors at the time they signed the lease, that the lease was therefore voidable, and that the rental property did not

constitute a necessary for which they were otherwise liable. In addition, Sheridan cross-petitioned for the return of the security deposit, and Wilwerding filed a cross-petition seeking the return of all moneys paid to Webster Street. Following trial, the municipal court of the city of Omaha found in favor of Webster Street and against both tenants in the amount of \$630.94.

The tenants appealed to the district court for Douglas County. The district court found that the tenants had vacated the premises on November 12, 1982, and therefore were only liable for the 12 days in which they actually occupied the apartment and did not pay rent. The district court also permitted Webster Street to recover \$46.79 for cleanup and repairs. The tenants, however, were given credit for their \$150 security deposit, resulting in an order that Webster Street was indebted to the tenants in the amount of \$3.25.

Webster Street [appealed, arguing] that the district court erred in failing to find that Sheridan had ratified the lease within a reasonable time after obtaining majority, and was therefore responsible for the lease, and that the minors had become emancipated and were therefore liable, even though Wilwerding had not reached majority. Webster Street is simply wrong in both matters.

As a general rule, an infant does not have the capacity to bind himself absolutely by contract. The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others. The policy of the law is to discourage adults from contracting with an infant; they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts. As stated in *Curtice Co. v. Kent*, 89 Neb. 496, 500 (1911): “The result seems hardly just to the [adult], but persons dealing with infants do so at their peril. The law is plain as to their disability to contract, and safety lies in refusing to transact business with them.”

However, the privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it is well established that an infant is liable for the value of necessities furnished him. An infant’s liability for necessities is based not upon his actual contract to pay for them but upon a contract implied by law, or, in other words, a quasi-contract.

Just what are necessities, however, has no exact definition. The term is flexible and varies according to the facts of each individual case. In *Cobbey v. Buchanan*, 48 Neb. 391, 397 (1896), we said: “The meaning of the term ‘necessaries’ cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case.” A number of factors must be considered

before a court can conclude whether a particular product or service is a necessary. As stated in *Schoenung v. Gallet*, 206 Wis. 52, 54 (1931):

“The term ‘necessaries,’ as used in the law relating to the liability of infants therefor, is a relative term, somewhat flexible, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant, as well as upon his own fortune and that of his parents. The particular infant must have an actual need for the articles furnished; not for mere ornament or pleasure. The articles must be useful and suitable, but they are not necessities merely because useful or beneficial. Concerning the general character of the things furnished, to be necessities the articles must supply the infant’s personal needs, either those of his body or those of his mind. However, the term ‘necessaries’ is not confined to merely such things as are required for a bare subsistence. There is no positive rule by means of which it may be determined what are or what are not necessities, for what may be considered necessary for one infant may not be necessities for another infant whose state is different as to rank, social position, fortune, health, or other circumstances, the question being one to be determined from the particular facts and circumstances of each case.”

This appears to be the law as it is generally followed throughout the country.

In *Ballinger v. Craig*, 95 Ohio App. 545 (1953), the defendants were husband and wife and were 19 years of age at the time they purchased a house trailer.... However, prior to the purchase of the trailer, the defendants were living with the parents of the husband. The Court of Appeals for the State of Ohio held that under the facts presented the trailer was not a necessary. The court stated:

“To enable an infant to contract for articles as necessities, he must have been in actual need of them, and obliged to procure them for himself. They are not necessities as to him, however necessary they may be in their nature, if he was already supplied with sufficient articles of the kind, or if he had a parent or guardian who was able and willing to supply them. The burden of proof is on the plaintiff to show that the infant was destitute of the articles, and had no way of procuring them except by his own contract.”

In 42 Am.Jur.2d Infants § 67 at 68–69 (1969), the author notes:

Thus, articles are not necessities for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessities.

The undisputed testimony is that [in this case] both tenants were living away from home, apparently with the understanding that they could return home at any time.

It would therefore appear that in the present case neither Sheridan nor Wilwerding was in need of shelter but, rather, had chosen to voluntarily leave home, with the understanding that they could return whenever they desired. One may at first blush believe that such a rule is unfair. Yet, on further consideration, the wisdom of the rule is apparent. If, indeed, landlords may not contract with minors, except at their peril, they may refuse to do so. In that event, minors who voluntarily leave home but who are free to return will be compelled to return to their parents' home—a result which is desirable. We therefore find that both the municipal court and the district court erred in finding that the apartment, under the facts in this case, was a necessary.

Having therefore concluded that the apartment was not a necessary, the question of whether Sheridan and Wilwerding were emancipated is of no significance. The effect of emancipation is only relevant with regard to necessities. If the minors were not emancipated, then their parents would be liable for necessities provided to the minors....

If, on the other hand, it was determined that the minors were emancipated and the apartment was a necessary, then the minors would be liable. But where, as here, we determine that the apartment was not a necessary, then neither the parents nor the infants are liable and the question of emancipation is of no moment.

Because the rental of the apartment was not a necessary, the minors had the right to avoid the contract, either during their minority or within a reasonable time after reaching their majority. Disaffirmance by an infant completely puts an end to the contract's existence, both as to him and as to the adult with whom he contracted. Because the parties then stand as if no contract had ever existed, the infant can recover payments made to the adult, and the adult is entitled to the return of whatever was received by the infant.

The record shows that Pat Wilwerding clearly disaffirmed the contract during his minority. Moreover, the record supports the view that when the agent for Webster Street ordered the minors out for failure to pay rent and they vacated the premises, Sheridan likewise disaffirmed the contract. The record indicates that Sheridan reached majority on November 5. To suggest

that a lapse of 7 days was not disaffirmance within a reasonable time would be foolish. Once disaffirmed, the contract became void; therefore, no contract existed between the parties, and the minors were entitled to recover all of the moneys which they paid and to be relieved of any further obligation under the contract. The judgment of the district court for Douglas County, Nebraska, is therefore reversed and the cause remanded with directions to vacate the judgment in favor of Webster Street and to enter a judgment in favor of Matthew Sheridan and Pat Wilwerding in the amount of \$500, representing September rent in the amount of \$100, October rent in the amount of \$250, and the security deposit in the amount of \$150.

Reversed and remanded with directions.

Notes and Questions

1. *Webster* deals with the rule of necessities. A somewhat common but inaccurate articulation of the rule suggests that the minor may not disaffirm a contract over necessities. In fact, as *Webster* clarifies, the necessities rule allows the adult who provides a minor's necessities to recover their value under the doctrine of unjust enrichment (also known as quasi-contracts).
2. The necessity rule is designed to give greater assurances to the adult parties and thus encourage them to provide minors' necessities. How should that rationale impact the scope of the necessity rule? What are the advantages and disadvantages of interpreting the term necessity narrowly or broadly?
3. Courts often struggle to clearly define what is a necessity. Most of them, like *Webster*, closely scrutinize the facts and the exact situation of the minor to determine if the contract involves necessities or not. What is the risk of such an approach? What burden does it place on the adult party?
4. Upon reaching maturity, a minor can affirm (or disaffirm) a contract. Once a contract is affirmed, it ceases to be voidable. It is well established that upon maturity, a contract can be affirmed explicitly or implicitly, by an action or even by refraining from acting. Indeed, a contract must be disaffirmed within a reasonable time of reaching maturity, or else it is considered affirmed. How did Sheridan disaffirm the contract in *Webster*?
5. Minors may be considered emancipated. All states have statutes concerning emancipation, which vary from one to another. Depending on the jurisdiction, marriage status, economic self-sufficiency, military service, and other factors can lead

to emancipation. The emancipation can be full or partial, implied, or the result of a court order. However, as the court in *Webster* clarified, as a matter of contract law, the impact of emancipation is quite limited.

6. The previous cases in this section apply the law of infancy to sale of goods contracts. *Webster* applies it to a lease agreement. Should the nature of the contract make a difference? Isn't the result of a law of infancy much harsher for the adult party when it comes to leases or service agreements? What should adult lessors and service providers do to protect themselves better?
7. Statutes in many states identify certain types of contracts that minors cannot disaffirm. Common examples include contracts for student loans, contracts between athletes and their teams or between actors and producers, and more. Why do you think the law signaled out those contracts? Statutes can include additional limitations both as to the substance of minor contracts (e.g., child labor laws) or the procedures for entering them (e.g., requiring court preapproval of certain contracts as a condition for preventing the minor from later disaffirming them).
8. Can an adult party protect itself by requiring the minor's parents to be a party to the contract? That is a complicated question with split authorities. For example, in *Sharon v. City of Newton*, 437 Mass. 99 (2002), the Massachusetts Supreme Court held that parents could release the city from liability for their minor daughter's accident when signing her up for cheerleading practice. But the same year, in *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo.2002), the Colorado Supreme Court held that parents could not waive their son's claim for an accident that happened while skiing.

But maybe adult parties can still protect themselves by requiring the parents to agree to compensate them if their sons or daughters disaffirm the contract (those are known as indemnification provisions). In *Cooper*, the Colorado Supreme Court held that because the practical impact of such a provision is often to prevent the minor from disaffirming the contract, it is unenforceable as against public policy. In contrast, in *Berg v. Traylor*, 148 Cal. App. 4th 809 (2007), a California Court of Appeal held that while Craig Traylor—one of the child stars of the popular TV show *Malcolm in The Middle*—could disaffirm his contract with his agent and be exempted from paying her fees, his mother's promise to pay those fees is enforceable.

Which of those approaches makes more sense to you? Which of them better promotes the minor's best interests and those of society?

B. Mental Incapacity

The second main class of individuals who, under some circumstances, might enter only voidable contracts are the mentally ill. However, the law's approach to this group has changed over time, as the following case explains.

Sparrow v. Demonico

461 Mass. 322, 960 N.E.2d 296 (Supreme Judicial Court of Massachusetts, 2012)

DUFFLY, Justice.

A family dispute over ownership of what had been the family home in Woburn prompted Frances M. Sparrow to file a complaint in the Superior Court against her sister, Susan A. Demonico, and Susan's husband, David D. Demonico. Prior to trial, the parties resolved their differences by a settlement agreement reached during voluntary mediation. When Sparrow sought an order enforcing the agreement, a Superior Court judge denied her motion, concluding in essence that, due to mental impairment, Susan lacked the capacity to contract at the time of agreement. Sparrow appealed and, after initially vacating the order denying enforcement and remanding the case for findings of fact, the Appeals Court reversed the judge's order and remanded the case for entry of an order enforcing the settlement agreement.

We granted further appellate review to consider whether a party can establish that she lacked the capacity to contract, thus making the contract voidable by her, in the absence of evidence that she suffered from a medically diagnosed, long-standing mental illness or defect. We conclude that our evolving standard of contractual incapacity does not in all cases require proof that a party's claimed mental illness or defect was of some significant duration or that it is permanent, progressive, or degenerative; but, without medical evidence or expert testimony that the mental condition interfered with the party's understanding of the transaction, or her ability to act reasonably in relation to it, the evidence will not be sufficient to support a conclusion of incapacity. Because the evidence was insufficient to support a determination of incapacity in this case, we vacate the motion judge's order and remand for entry of an order enforcing the settlement agreement.

Background. Sparrow's complaint ... alleged that Sparrow was entitled to a one-half interest in the Woburn property, consistent with the wishes of her (and Susan's) now-deceased mother... Susan, who resided in the Woburn property at the time of the mediation, and David, who had been separated from Susan for several years and was no longer residing with her, asserted that they were the sole owners of the property, as reflected in a deed, and denied that Sparrow had any interest in it. Shortly before what was scheduled to be a final pretrial conference, the parties

sought to achieve a settlement through voluntary mediation and the matter was removed from the trial list.

The parties and the attorneys who were representing them in the Superior Court proceeding participated in mediation on October 19, 2006. Sparrow contends that the case was settled during this mediation by an agreement that the Demonicos would sell the property and pay Sparrow \$100,000 from the sale proceeds. When Sparrow sought an order enforcing the agreement, alleging that the Demonicos “reneged on their obligations under it,” the Demonicos claimed that the agreement was unenforceable because Susan had, in their view, experienced a mental breakdown during the mediation and thus lacked the capacity to authorize settlement. At an evidentiary hearing on the motion, David and Susan were the only witnesses and no exhibits were admitted.... The motion judge denied Sparrow’s motion on the basis that “the purported agreement may have been the product of an emotionally overwrought state of mind on the part of Susan Demonico.”⁶ The case proceeded to trial by jury before a different judge, who, at the close of evidence, allowed the Demonicos’ motion for a directed verdict on all counts. Sparrow appealed from the judgment and the denial of her motion to enforce the mediated settlement agreement.

The Appeals Court concluded ... that the motion judge’s determination that Susan may have been emotionally overwrought was not grounds to avoid the contract ... On remand, the motion judge issued written findings and an order denying Sparrow’s motion to enforce the settlement agreement based on his determination that Susan “was mentally incapacitated on the day of the mediation,” and thus that “she was not able to understand in a reasonable manner the nature and consequences of what was happening and did not have an ability to comprehend the transaction or its significance and consequences.”

Sparrow again appealed and a different panel of the Appeals Court ... reversed, concluding that although “the evidence supported a finding that Susan was extremely upset and mentally distressed during—and by—the mediation ... it does not support a finding that she was mentally incapacitated to the extent required by our cases.” The court noted that decisions that have concluded contracts were void due to incapacity have done so only where medical

⁶ No party has raised any question as to the effect of the order on David. David has made no claim that he suffered from any incapacity or that the terms of the agreement are unreasonable. It is not at all clear from the evidence that an agreement void as to Susan because of her incapacity would also be void as to David. The practical consequences of such an order might depend on the nature of the title in which the property is held or whether Susan and David obtain a judgment of divorce. Deciding as we do, these questions need not detain us.

evidence demonstrated a permanent, progressive, degenerative or long-term illness “that has been diagnosed by a mental health professional.”

Findings of fact. We summarize the motion judge’s subsidiary findings of fact, which we accept as not clearly erroneous, and include additional details from evidence that the judge implicitly credited.

On the date of the scheduled mediation, Susan drove from her home to David’s residence. From there, David drove them to the location of the mediation session because, in David’s view, Susan was not capable of driving to the mediation. The mediation began at approximately 9 a.m. and ended at 3 p.m. The judge, crediting David’s testimony, found:

“Susan was having a breakdown that day, according to David, and was slurring her words, although she had not had any alcoholic beverages on that day. She became less coherent throughout the day, was crying and out of control.... They left the mediation before it was over as Susan could not handle it.”

The judge noted Susan’s testimony that she had been taking a medication, Zoloft, prior to the mediation, but that she had stopped taking the medication at some point before the mediation, and that she cried much of the day; he specifically credited Susan’s testimony that she “was out of control emotionally during the mediation” and found also that “she was not thinking rationally” on that day.⁷

As noted, both sides were represented by counsel throughout the mediation. At some point before they departed from the mediation session, the Demonicos authorized their attorney to

⁷ The Appeals Court’s unpublished memorandum and order sets forth succinctly what was not included in the evidence:

“There was no evidence—nor were there any findings—that Susan was suffering from a diagnosed mental illness, either on the day of the mediation or at any other time. Although she had taken a medication, Zoloft, at some time in the past, there was no evidence that she was taking any medication on the day of the mediation or that she should have been taking medication. Nor was there any evidence as to the effects (if any) of taking or not taking Zoloft. There was no medical testimony, nor was there any other expert testimony as to Susan’s mental condition. There was no evidence that Susan’s mental agitation was of any significant duration, let alone that it was permanent, progressive, or degenerative. Equally important, there was no evidence that Susan suffered any mental incapacity outside of the very limited context of the mediation. There was no evidence to suggest that she had a mental incapacity that affected any other aspect of her life, her daily living, or her decision-making.”

execute a settlement agreement on their behalf. According to the terms of a written agreement titled, “Memorandum of Settlement,” which was signed by Sparrow, her attorney, and the Demonicos’s attorney, and witnessed by the mediator, the Demonicos agreed to pay Sparrow “the settlement amount of \$100,000” from the proceeds of the sale of the property, which would occur “as soon as practicable,” and in any event within a specified timeframe. The agreement also set forth other affirmative requirements regarding the marketing and sale of the property.

Discussion. A settlement agreement is a contract and its enforceability is determined by applying general contract law. It has been long established that a contract is voidable by a person who, due to mental illness or defect, lacked the capacity to contract at the time of entering into the agreement. The burden is on the party seeking to void the contract to establish that the person was incapacitated at the time of the transaction.

a. *Standard for determining contractual incapacity.* As Justice Holmes observed, it is a question of fact whether a person was competent to enter into a transaction—that is, whether the person suffered from “insanity” or “was of unsound mind, and incapable of understanding and deciding upon the terms of the contract.” In *Reed v. Mattapan Deposit & Trust Co.*, 198 Mass. 306, 314 (1908), we described this inquiry as the “true test” of mental incapacity:

“But while great mental weakness of the individual may exist without being accompanied by an entire loss of reason, and mental incapacity in one case is not necessarily so in another, in such an inquiry the true test is, was the party whose contract it is sought to avoid in such a state of insanity at the time as to render him incapable of transacting the business. When this fact is established the contract is voidable by the lunatic or his representatives, and it is no defense under our decisions that the other party acted fairly and without knowledge of his unsoundness or of any circumstances which ought to have put him upon inquiry.”

We applied this test, also known as the “cognitive test,” see *Ortelere v. Teachers’ Retirement Bd. of the City of N.Y.*, 303 N.Y.S.2d 362 (1969), without significant modification for fifty years thereafter.

Over time, however, the traditional test for contractual incapacity, both in Massachusetts, and in other jurisdictions, see, e.g., *Ortelere, supra*, evolved to incorporate an increased understanding of the nature of mental illness in its various forms. Based on this understanding, we adopted a second, alternative test for incapacity.

In *Krasner v. Berk*, [366 Mass. 464 (1974),] we recognized that there may be circumstances when, although a party claiming incapacity has some, or sufficient, understanding of the nature and consequences of the transaction, the contract would still be voidable where, “by reason of mental illness or defect, [the person] is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition,” citing *Ortelere*. This modern test—also described as an “affective” or “volitional” test—recognizes that competence can be lost, not only through cognitive disorders, but through affective disorders that encompass motivation or exercise of will. See *Ortelere*, quoting Note, Mental Illness and the Law of Contracts, 57 Mich. L.R. 1020, 1036 (1959) (recommending “that a complete test for contractual incapacity should provide protection to those persons whose contracts are merely uncontrolled reactions to their mental illness” as well to those who could not understand nature and consequences of their actions). See also *Gore v. Gadd*, 268 Or. 527, 528–529 (1974) (under affective test, person such as one who is manic-depressive psychotic, although aware of nature and consequences of conduct, may still be considered incompetent because mental illness “impel[s person] to act irrationally” and such person is “incapable of making a rational judgment in the execution of the transaction”).

Under this modern, affective test, “[w]here a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.” *Krasner v. Berk*. Also relevant to the inquiry in these circumstances is whether the party claiming mental incapacity was represented by independent, competent counsel.

b. *Evidence of contractual incapacity*. We begin by observing that the evidence required to support a finding of incapacity to contract, whether considered under the traditional or modern standard, need not in all cases demonstrate that a party suffers from a mental illness or defect that is permanent, degenerative, progressive, or of significant duration. Although such incapacity has historically been established by evidence of a long-standing mental illness, nothing in our jurisprudence requires such evidence. The inquiry as to the capacity to contract focuses on a party’s understanding or conduct only at the time of the disputed transaction. Based on the evolving understanding of mental illness, we do not preclude the possibility that a party could establish an incapacity to contract without proof of a mental condition that is permanent, degenerative, progressive, or long standing.

The Demonicos contend that this is such a case; that the evidence established Susan’s incapacity without showing a permanent, degenerative, progressive, or long-standing mental illness. They point to evidence that Susan’s asserted mental impairment arose and was limited to the period of the mediation session, and argue that this evidence was sufficient to support

a conclusion of incapacity, despite the lack of medical evidence or expert testimony as to the nature of Susan's mental impairment and its effect on her decision-making ability.

We have not previously addressed whether medical evidence is required to establish an incapacity to contract, and the *Demonicos* have not directed our attention to case law in other jurisdictions that would support their contention. In our prior decisions concerning the issue of incapacity to contract, however, evidence of mental illness or defect has been presented consistently through medical evidence, including the testimony of physicians and mental health providers or experts, in addition to lay testimony. Moreover, in other contexts, we have held that a lay witness is not competent to give an opinion as to mental condition. Expanding on this analysis, we conclude that medical evidence is necessary to establish that a person lacked the capacity to contract due to the existence of a mental condition.

Where the issue is the capacity to contract, we have looked to medical providers or experts to explain whether, and to what extent, a person's mental condition has affected the ability to understand the nature of the transaction and its consequences, or to explain why, despite the intellectual and cognitive ability to understand, the person is unable to act reasonably in making the decision....

Here, there was lay evidence, credited by the judge, that Susan's speech was "slurr[ed]," that she was in a state of uncontrollable crying, and that she had experienced an inability to focus or "think rationally" throughout the day of the mediation. Susan testified also that she had recently discontinued taking the prescribed medication Zoloft. However, she presented no medical evidence regarding a diagnosis that would have required her to take the medication, or the effect, if any, that ceasing to take the medication would have had on her medical or mental condition. There was also no evidence that Susan's condition at the mediation was related to or caused by her discontinuing the medication.

...there was no expert or medical testimony to explain the effect of Susan's experiences or behavior on her ability to understand the agreement, to appreciate what was happening, or to comprehend the reasonableness of the settlement terms or the consequences to her of authorizing the settlement. Without such medical evidence, there was no basis to conclude that Susan lacked the capacity to contract.

The evidence did not support a conclusion that, under the traditional test for incapacity, Susan was incapable of understanding the nature and quality of the transaction, or of grasping its significance. Indeed, based on Susan's testimony, she understood at the time that she was participating in a mediation to discuss settlement of the lawsuit; she was aware that the subject

of the mediation was to resolve the dispute regarding the family home in Woburn; she participated in the mediation and listened to the arguments of counsel; and she “couldn’t believe how things [were] turning out.”

It is apparent from Susan’s testimony that, even if she suffered from a transient mental defect, or “breakdown” as the judge concluded, she had at least some understanding of the nature of the transaction and was aware of its consequences. Under the modern test to establish Susan’s incapacity, the evidence was similarly insufficient. There was no evidence that the settlement agreement was unreasonable, or that a reasonably competent person would not have entered into it.¹⁵

Conclusion. Because the evidence does not support a conclusion that Susan lacked the mental capacity to authorize settlement on the day of the mediation, it was error to deny Sparrow’s motion to enforce the agreement. The order denying the motion to enforce the mediated settlement agreement is vacated. The case is remanded to the Superior Court for entry of an order that the settlement agreement be enforced.

Notes and Questions

1. The traditional test for mental incapacity, also known as the cognitive test, sets a rather high threshold. This approach was criticized in *Ortelere*—a 1969 decision of the New York Court of Appeals, which the *Sparrow* court relied upon—as representing the psychological understanding of the nineteenth century. The modern approach, known as the affective test, sets a different standard—one that is typically easier to meet. Make sure you understand the differences between those two tests. Modern courts apply both tests, meaning that meeting any of those standards can render the contract voidable.
2. Notice that while meeting the cognitive test renders the contract voidable, the affective test also requires that “the other party has reason to know of [the defendant’s] condition.” The *Ortelere* court explained this rule:

The avoidance of duties under an agreement entered into by those who have done so by reason of mental illness, but who have understanding,

¹⁵ As stated, there was no evidence as to the current market value of the property or whether any mortgages or other encumbrances would affect the reasonableness of the \$100,000 settlement amount ... nor was there evidence that otherwise reasonable settlement terms were unreasonable in light of Susan’s particular circumstances. There was also no evidence that Sparrow was, or should have been, aware of Susan’s condition. Finally, there is no indication that Susan was not represented by independent, competent counsel in connection with the settlement agreement.

depends on balancing competing policy considerations. There must be stability in contractual relations and protection of the expectations of parties who bargain in good faith. On the other hand, it is also desirable to protect persons who may understand the nature of the transaction but who, due to mental illness, cannot control their conduct. Hence, there should be relief only if the other party knew or was put on notice as to the contractor's mental illness.

Ortelere, 303 N.Y.S.2d at 369.

3. The Restatement also uses the two tests for mental incapacity, although it adds additional ways to find a contract, even with a party who meets the cognitive test, enforceable:
 - (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
 - (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
 - (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
 - (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

Restatement (Second) of Contracts § 15.

4. Examine how the *Sparrow* court applied the tests, and especially the affective test. Did it follow the Restatement? For example, what role does the transaction's reasonableness play in the Restatement and in *Sparrow*? *Sparrow* also considered the role of the defendants' lawyer during the negotiation. Which of those nuanced approaches makes more sense?
5. *Sparrow*, like *Ortelere* and Section 15 of the Restatement, deal with individuals who suffered from a mental illness but were not formally declared as suffering from such

deficiency prior to entering a contract. However, the rule is different when a person's mental state makes them subject to guardianship (following a procedure established by state statutes and typically requires a court order). The Restatement, for example, suggests that "a person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect," Restatement (Second) of Contracts § 13, meaning that such agreements are automatically void. For example, in *Kenai Chrysler Center, Inc. v. Denison*, 167 P.3d 1240 (Alaska 2007), the car dealer sold a car to a young adult under guardianship, but later refused the guardian's demand to void the deal, take the car back, and return the purchase price. The Alaska Supreme Court sided with the guardian, holding the contract void and deciding that the dealer is not entitled to restitution because the guardianship provides constructive notice to everyone concerning the state of the individual under guardianship. Is it practical for the dealership to actually inquire whether every car buyer is under guardianship? If not, is this rule justified?

6. The rule regarding those who enter contracts while intoxicated is similar, although not identical, to the rule regarding those suffering from mental incapacity:
 - (1) A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication
 - (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
 - (b) he is unable to act in a reasonable manner in relation to the transaction.

Restatement (Second) of Contracts § 16. Compare this rule to the one in Section 15 of the Restatement. What can explain the differences?

7. Like minors, the mentally ill and the intoxicated may disaffirm or affirm the contract once they are no longer incapacitated. For example, those who entered a voidable contract while under the influence of alcohol may disaffirm or affirm the contract once they sober up. As is the case with minors, affirming or disaffirming a contract may be expressed or implied, with a period of prolonged inaction typically indicating an affirmation of the agreement.