

AMENDED IN ASSEMBLY JULY 6, 1995

AMENDED IN SENATE MAY 23, 1995

AMENDED IN SENATE APRIL 19, 1995

**SENATE BILL**

**No. 730**

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**Introduced by Senator Mello**

February 22, 1995

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An act to amend Section 39 of the Civil Code, and to amend Sections 1801, 3201, 3204, and 3208 of, and to add Sections 810, 811, 812, 813, *814*, and 1881 to, the Probate Code, relating to capacity.

LEGISLATIVE COUNSEL'S DIGEST

SB 730, as amended, Mello. Capacity.

(1) Existing law provides that a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission.

This bill would provide that a rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of rescission if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence.

(2) Existing law provides that a conservator of the person may be appointed for a person who is unable to properly provide for his or her personal needs for physical health, food, clothing, or shelter, except as otherwise provided. Existing law provides that a conservator of the estate may be appointed for a person who is unable to manage his or her own

financial resources or resist fraud or undue influence, except as otherwise provided.

This bill would provide that the standard of proof for the appointment of a conservator shall be clear and convincing evidence.

(3) Existing law provides that the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

This bill would provide that except as otherwise provided by law, a person ~~is not competent~~ *lacks the capacity* to make a decision unless he or she has specified abilities; and that a determination that a person is of unsound mind or lacks the capacity to *make a decision or* do a certain act, including making medical decisions, shall be supported by evidence of a deficit in at least one of prescribed mental functions, but only if the deficit by itself or in combination with one or more other deficits significantly impairs the person's ability to understand and appreciate the consequence *of* his or her actions with regard to the type of act or decision in question. The bill would also specify that the mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act, and that a person has the capacity to give informed consent to proposed medical treatment if he or she has specified abilities.

(4) Existing law requires a court, if it determines that there is no form of medical treatment for which a conservatee has the capacity to give an informed consent, to adjudge that the conservatee lacks the capacity to give informed consent for medical treatment and, by order, to give the conservator of the person specified powers.

This bill would provide that a conservatee shall be deemed unable to give this consent if, for all medical treatments, the conservatee is unable to respond knowingly and intelligently to queries about any form of medical treatment or is unable to participate in a treatment decision by means of a rational thought process. It would require the court, when making this determination, to (A) determine that the conservatee is unable to understand and appreciate prescribed medical



treatment information and (B) determine that one or more of the conservatee's mental functions is seriously impaired and there is a link between the deficit and the conservatee's inability to give informed consent, as specified.

(5) Under existing law, if an adult who does not have a conservator of the person requires medical treatment for an existing or continuing problem and the person is unable to give informed consent, a court, upon petition, may authorize the medical treatment and authorize the petitioner to consent to the medical treatment. Existing law requires the petition to state prescribed information about the person.

This bill would revise and recast this provision to authorize a petition to be filed to determine that the person lacks the capacity to give informed consent, as specified, or to determine that the person lacks the capacity to give informed consent and to authorize a designated person to give consent to the treatment. This bill would require the petition to include additional information. The bill would also specify that the law authorizing medical treatment for an adult without a conservator shall not be construed to supersede or impair the right of any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any such person be required to submit to medical testing of any kind pursuant to a determination of competency.

(6) This bill would provide that it shall be known and may be cited as the Due Process in Competence Determinations Act.

(7) This bill would provide that it would not apply to proceedings under the Welfare and Institutions Code.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 39 of the Civil Code is amended  
2 to read:

3 39. (a) A conveyance or other contract of a person of  
4 unsound mind, but not entirely without understanding,  
5 made before the incapacity of the person has been  
6 judicially determined, is subject to rescission, as provided



1 in Chapter 2 (commencing with Section 1688) of Title 5  
2 of Part 2 of Division 3.

3 (b) A rebuttable presumption affecting the burden of  
4 proof that a person is of unsound mind shall exist for  
5 purposes of this section if the person is substantially  
6 unable to manage his or her own financial resources or  
7 resist fraud or undue influence. Substantial inability may  
8 not be proved solely by isolated incidents of negligence  
9 or improvidence.

10 SEC. 2. Section 810 is added to the Probate Code, to  
11 read:

12 810. ~~(a)~~—The Legislature finds and declares the  
13 following:

14 ~~(1)~~—

15 (a) A person ~~may have~~ *who has* a mental or physical  
16 disorder ~~and may~~ still be capable of contracting,  
17 conveying, marrying, making medical decisions,  
18 executing wills or trusts, and performing other actions.

19 ~~(2)~~—

20 (b) A judicial determination that a person is totally  
21 without understanding, or is of unsound mind, or suffers  
22 from one or more mental deficits so substantial that,  
23 under the circumstances, the person should be deemed  
24 to lack the legal capacity to perform a specific act, should  
25 be based on evidence of a deficit in one or more of the  
26 person's mental functions rather than on a diagnosis of a  
27 person's mental or physical disorder.

28 ~~(b) The Legislature does not intend by enacting this~~  
29 ~~act to increase or decrease the burdens of documentation~~  
30 ~~on, or the potential liability of, physicians who, outside the~~  
31 ~~judicial context, determine the capacity of patients to~~  
32 ~~make medical decisions. This act is intended to apply only~~  
33 ~~to the evidence that is presented to, and the findings that~~  
34 ~~are made by, a court; it is not intended to increase or~~  
35 ~~decrease the number or kinds of cases in which a judicial~~  
36 ~~determination of incapacity is required.~~

37 SEC. 3. Section 811 is added to the Probate Code, to  
38 read:

39 811. Except where otherwise provided by law,  
40 *including, but not limited to, Section 813 and the statutory*



1 *and decisional law of testamentary capacity as in effect on*  
2 *January 1, 1995, a person is ~~not competent~~ lacks the*  
3 *capacity to make a decision unless the person has the*  
4 *ability to communicate verbally, or by any other means,*  
5 *the decision, and to understand and appreciate, to the*  
6 *extent relevant, all of the following:*

7 (a) The rights, duties, and responsibilities created by  
8 or affected by the decision.

9 (b) The probable consequences for the decisionmaker  
10 and, *where appropriate*, the persons affected by the  
11 decision.

12 (c) The significant risks, benefits, and reasonable  
13 alternatives involved in the decision.

14 ~~SEC. 3.5.—~~

15 *SEC. 4.* Section 812 is added to the Probate Code, to  
16 read:

17 812. (a) A determination that a person is of unsound  
18 mind or lacks the capacity to *make a decision or* do a  
19 certain act, including, but not limited to, the incapacity  
20 to contract, to make a conveyance, to marry, to make  
21 medical decisions, to vote, or to execute wills or trusts,  
22 shall be supported by evidence of a deficit in at least one  
23 of the following mental functions, subject to subdivision  
24 (b):

25 (1) Alertness and attention, including, but not limited  
26 to, the following:

27 (A) Level of arousal or consciousness.

28 (B) Orientation to time, place, person, and situation.

29 (C) Ability to attend and concentrate.

30 (2) Information processing, including, but not limited  
31 to, the following:

32 (A) Short- and long-term memory, including  
33 immediate recall.

34 (B) Ability to understand or communicate with  
35 others, either verbally or otherwise.

36 (C) Recognition of *familiar* objects and familiar  
37 persons.

38 (D) Ability to understand and appreciate quantities.

39 (E) Ability to reason using abstract concepts.



1 (F) Ability to plan, organize, and carry out actions in  
2 one's own rational self-interest.

3 (G) Ability to reason logically.

4 (3) Thought processes. Deficits in these functions may  
5 be demonstrated by the presence of the following:

6 (A) Severely disorganized thinking.

7 (B) Hallucinations.

8 (C) Delusions.

9 (D) Uncontrollable, repetitive, or intrusive thoughts.

10 (4) Ability to modulate mood and affect. Deficits in  
11 this ability may be demonstrated by the presence of a  
12 pervasive and persistent *or recurrent* state of euphoria,  
13 anger, anxiety, fear, panic, depression, hopelessness or  
14 despair, helplessness, apathy or indifference, which is  
15 inappropriate in degree to the individual's  
16 circumstances.

17 (b) A deficit in the mental functions listed above may  
18 be considered only if the deficit, by itself or in  
19 combination with one or more other mental function  
20 deficits, significantly impairs the person's ability to  
21 understand and appreciate the consequences of his or her  
22 actions with regard to the type of act or decision in  
23 question.

24 (c) In determining whether a person suffers from a  
25 deficit in mental function so substantial that the person  
26 lacks the capacity to do a certain act, the court may take  
27 into consideration the frequency, severity, and duration  
28 of periods of impairment.

29 (d) The mere diagnosis of a mental or physical  
30 disorder shall not be sufficient in and of itself to support  
31 a determination that a person is of unsound mind or lacks  
32 the capacity to do a certain act.

33 *(e) This part applies only to the evidence that is*  
34 *presented to, and the findings that are made by, a court*  
35 *determining the capacity of a person to do a certain act,*  
36 *including, but not limited to, making medical decisions.*  
37 *Nothing in this part shall affect the decisionmaking*  
38 *process set forth in Section 1418.8 of the Health and Safety*  
39 *Code, nor increase or decrease the burdens of*  
40 *documentation on, or potential liability of, physicians and*



1 *surgeons who, outside the judicial context, determine the*  
2 *capacity of patients to make a medical decision.*

3 ~~SEC. 3.7.—~~

4 *SEC. 5.* Section 813 is added to the Probate Code, to  
5 read:

6 813. A person has the capacity to give informed  
7 consent to a proposed medical treatment if the person is  
8 able to do all of the following:

9 (a) Respond knowingly and intelligently to queries  
10 about that medical treatment.

11 (b) Participate in that treatment decision by means of  
12 a rational thought process.

13 (c) Understand ~~and appreciate~~ all of the following  
14 items of minimum basic medical treatment information  
15 with respect to that treatment:

16 (1) The nature and seriousness of the illness, disorder,  
17 or defect that the person has.

18 (2) The nature of the medical treatment that is being  
19 recommended by the person's health care providers.

20 (3) The probable degree and duration of any benefits  
21 and risks of any medical intervention that is being  
22 recommended by the person's health care providers, and  
23 the consequences of lack of treatment.

24 (4) The nature, risks, and benefits of any reasonable  
25 alternatives.

26 ~~SEC. 4.—~~

27 *SEC. 6.* Section 814 is added to the Probate Code, to  
28 read:

29 *814. A person who has the capacity to give informed*  
30 *consent to a proposed medical treatment also has the*  
31 *capacity to refuse consent to that treatment.*

32 *SEC. 7.* Section 1801 of the Probate Code is amended  
33 to read:

34 1801. Subject to Section 1800.3:

35 (a) A conservator of the person may be appointed for  
36 a person who is unable to provide properly for his or her  
37 personal needs for physical health, food, clothing, or  
38 shelter, except as provided for the person as described in  
39 subdivision (b) or (c) of Section 1828.5.



1 (b) A conservator of the estate may be appointed for  
2 a person who is substantially unable to manage his or her  
3 own financial resources or resist fraud or undue  
4 influence, except as provided for that person as described  
5 in subdivision (b) or (c) of Section 1828.5. Substantial  
6 inability may not be proved solely by isolated incidents of  
7 negligence or improvidence.

8 (c) A conservator of the person and estate may be  
9 appointed for a person described in subdivisions (a) and  
10 (b).

11 (d) A limited conservator of the person or of the  
12 estate, or both, may be appointed for a developmentally  
13 disabled adult. A limited conservatorship may be utilized  
14 only as necessary to promote and protect the well-being  
15 of the individual, shall be designed to encourage the  
16 development of maximum self-reliance and  
17 independence of the individual, and shall be ordered only  
18 to the extent necessitated by the individual's proven  
19 mental and adaptive limitations. The conservatee of the  
20 limited conservator shall not be presumed to be  
21 incompetent and shall retain all legal and civil rights  
22 except those which by court order have been designated  
23 as legal disabilities and have been specifically granted to  
24 the limited conservator. The intent of the Legislature, as  
25 expressed in Section 4501 of the Welfare and Institutions  
26 Code, that developmentally disabled citizens of this state  
27 receive services resulting in more independent,  
28 productive, and normal lives is the underlying mandate  
29 of this division in its application to adults alleged to be  
30 developmentally disabled.

31 (e) The standard of proof for the appointment of a  
32 conservator pursuant to this section shall be clear and  
33 convincing evidence.

34 ~~SEC. 5.—~~

35 *SEC. 8.* Section 1881 is added to the Probate Code, to  
36 read:

37 1881. (a) A conservatee shall be deemed unable to  
38 give informed consent to any form of medical treatment  
39 pursuant to Section 1880 if, for all medical treatments, the  
40 conservatee is unable to respond knowingly and



1 intelligently to queries about medical treatment or is  
2 unable to participate in a treatment decision by means of  
3 a rational thought process.

4 (b) In order for a court to determine that a  
5 conservatee is unable to respond knowingly and  
6 intelligently to queries about his or her medical  
7 treatment or is unable to participate in treatment  
8 decisions by means of a rational thought process, a court  
9 shall do both of the following:

10 (1) Determine that, for all medical treatments, the  
11 conservatee is unable to understand and appreciate at  
12 least one of the following items of minimum basic medical  
13 treatment information:

14 (A) The nature and seriousness of any illness, disorder,  
15 or defect that the ~~person~~ *conservatee* has or may develop.

16 (B) The nature of any medical treatment that is being  
17 or may be recommended by the ~~person's~~ *conservatee's*  
18 health care providers.

19 (C) The probable degree and duration of any benefits  
20 and risks of any medical intervention that is being or may  
21 be recommended by the ~~person's~~ *conservatee's* health  
22 care providers, and the consequences of lack of  
23 treatment.

24 (D) The nature, risks, and benefits of any reasonable  
25 alternatives.

26 (2) Determine that one or more of the mental  
27 functions of the conservatee described in subdivision (a)  
28 of Section 812 is impaired and that there is a link between  
29 the deficit or deficits and the conservatee's inability to  
30 give informed consent.

31 (c) A deficit in the mental functions listed in  
32 subdivision (a) of Section 812 may be considered only if  
33 the deficit by itself, or in combination with one or more  
34 other mental function deficits, significantly impairs the  
35 ~~person's~~ *conservatee's* ability to understand and  
36 appreciate the consequences of his or her decisions  
37 regarding medical care.

38 (d) In determining whether a ~~person's~~ *conservatee's*  
39 mental functioning is so severely impaired that the  
40 ~~person~~ *conservatee* lacks the capacity to give informed



1 consent to any form of medical treatment, the court may  
2 take into consideration the frequency, severity, and  
3 duration of periods of impairment.

4 (e) In the interest of minimizing unnecessary expense  
5 to the parties to a proceeding, paragraph (2) of  
6 subdivision (b) shall not apply to a petition pursuant to  
7 Section 1880 wherein the ~~person conservatee, after notice~~  
8 ~~by the court of his or her right to object~~, does not object  
9 to the proposed finding of incapacity, or waives any  
10 objections. ~~thereto, so long as the person has been~~  
11 ~~interviewed by a probate court investigator as provided~~  
12 ~~for in Section 1826, prior to the time at which the petition~~  
13 ~~is filed.~~

14 ~~SEC. 6.—~~

15 *SEC. 9.* Section 3201 of the Probate Code is amended  
16 to read:

17 3201. (a) A petition may be filed to determine that a  
18 patient has the capacity to give informed consent to a  
19 specified medical treatment for an existing or continuing  
20 medical condition.

21 (b) A petition may be filed to determine that a patient  
22 lacks the capacity to give informed consent to a specified  
23 medical treatment for an existing or continuing medical  
24 condition, and further for an order authorizing a  
25 designated person to give consent to such treatment on  
26 behalf of the patient.

27 (c) One proceeding may be brought under this part  
28 under both subdivisions (a) and (b).

29 (d) In determining whether a person's mental  
30 functioning is so severely impaired that the person lacks  
31 the capacity to give informed consent to any form of  
32 medical treatment, the court may take into consideration  
33 the frequency, severity and duration of periods of  
34 impairment.

35 (e) Nothing in this part shall supersede the right that  
36 any person may have under existing law to make medical  
37 decisions on behalf of a patient, *or affect the decision*  
38 *making process of a long-term health care facility, as*  
39 *defined in subdivision (b) of Section 1418 of the Health*  
40 *and Safety Code.*



1 (f) This chapter is permissive and cumulative for the  
2 relief to which it applies.

3 (g) Nothing in this part shall be construed to  
4 supersede or impair the right of any individual to choose  
5 ~~treatment by spiritual means in accordance with the~~  
6 ~~tenets and practice of that individual's established~~  
7 ~~religious tradition in lieu of medical treatment, nor shall~~  
8 *treatment by spiritual means in lieu of medical*  
9 *treatment, nor shall* any person choosing treatment by  
10 spiritual means, *in accordance with the tenets and*  
11 *practices of that individual's established religious*  
12 *tradition*, be required to submit to medical testing of any  
13 kind pursuant to a determination of competency.

14 ~~SEC. 7.—~~

15 *SEC. 10.* Section 3204 of the Probate Code is amended  
16 to read:

17 3204. The petition shall state, or set forth by medical  
18 declaration attached thereto, all of the following so far as  
19 is known to the petitioner at the time the petition is filed:

20 (a) The nature of the medical condition of the patient  
21 which requires treatment.

22 (b) The recommended course of medical treatment  
23 which is considered to be medically appropriate.

24 (c) The threat to the health of the patient if  
25 authorization for the recommended course of treatment  
26 is delayed or denied by the court.

27 (d) The predictable or probable outcome of the  
28 recommended course of treatment.

29 (e) The medically available alternatives, if any, to the  
30 course of treatment recommended.

31 (f) The efforts made to obtain an informed consent  
32 from the patient.

33 (g) If the petition is filed by a person on behalf of a  
34 medical facility, the name of the person to be designated  
35 to give consent to the recommended course of treatment  
36 on behalf of the patient.

37 (h) The deficit or deficits in the patient's mental  
38 functions listed in subdivision (a) of Section 812 which are  
39 impaired, and identifying a link between the deficit or  
40 deficits and the patient's inability to respond knowingly



1 and intelligently to queries about the recommended  
2 medical treatment or inability to participate in a  
3 treatment decision about the recommended medical  
4 treatment by means of a rational thought process.

5 ~~SEC. 8.~~

6 *SEC. 11.* Section 3208 of the Probate Code is amended  
7 to read:

8 3208. (a) The court may make an order authorizing  
9 the recommended course of medical treatment of the  
10 patient and designating a person to give consent to the  
11 recommended course of medical treatment on behalf of  
12 the patient if the court determines from the evidence all  
13 of the following:

14 (1) The existing or continuing medical condition of  
15 the patient requires the recommended course of medical  
16 treatment.

17 (2) If untreated, there is a probability that the  
18 condition will become life-endangering or result in a  
19 serious threat to the physical or mental health of the  
20 patient.

21 (3) The patient is unable to give an informed consent  
22 to the recommended course of treatment.

23 (b) If the patient has the capacity to give informed  
24 consent to the recommended course of medical  
25 treatment, the court shall so find in its order.

26 (c) If the court finds that the patient has the capacity  
27 to give informed consent to the recommended course of  
28 medical treatment, but that the patient refuses consent,  
29 the court shall not make an order authorizing the course  
30 of recommended medical treatment or designating a  
31 person to give consent to such treatment. If an order has  
32 been made authorizing the recommended course of  
33 medical treatment and designating a person to give  
34 consent to that treatment, the order shall be revoked if  
35 the court determines that the patient has recovered the  
36 capacity to give informed consent to the recommended  
37 course of medical treatment. Until revoked or modified,  
38 the order is effective authorization for the course of  
39 medical treatment.



1 (d) In a proceeding under this part, where the court  
2 has determined that the patient has the capacity to give  
3 informed consent, the court shall, if requested, determine  
4 whether the patient has accepted or refused the  
5 recommended course of treatment, and whether a  
6 patient's consent to the recommended course of  
7 treatment is an informed consent.

8 ~~SEC. 9.—~~

9 *SEC. 12.* This act shall be known and may be cited as  
10 the Due Process in Competence Determinations Act.

11 ~~SEC. 10.—~~

12 *SEC. 13.* This act shall not apply to proceedings under  
13 the Welfare and Institutions Code.

