

AMENDED IN ASSEMBLY AUGUST 31, 1995

AMENDED IN ASSEMBLY JULY 18, 1995

AMENDED IN ASSEMBLY JULY 6, 1995

AMENDED IN SENATE MAY 23, 1995

AMENDED IN SENATE APRIL 19, 1995

SENATE BILL

No. 730

Introduced by Senator Mello

February 22, 1995

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 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 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:



1 39. (a) A conveyance or other contract of a person of
2 unsound mind, but not entirely without understanding,
3 made before the incapacity of the person has been
4 judicially determined, is subject to rescission, as provided
5 in Chapter 2 (commencing with Section 1688) of Title 5
6 of Part 2 of Division 3.

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

14 SEC. 2. Section 810 is added to the Probate Code, to
15 read:

16 810. The Legislature finds and declares the following:

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

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

29 SEC. 3. Section 811 is added to the Probate Code, to
30 read:

31 811. Except where otherwise provided by law,
32 including, but not limited to, Section 813 and the statutory
33 and decisional law of testamentary capacity as in effect on
34 January 1, 1995, a person lacks the capacity to make a
35 decision unless the person has the ability to communicate
36 verbally, or by any other means, the decision, and to
37 understand and appreciate, to the extent relevant, all of
38 the following:

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



1 (b) The probable consequences for the decisionmaker
2 and, where appropriate, the persons affected by the
3 decision.

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

6 SEC. 4. Section 812 is added to the Probate Code, to
7 read:

8 812. (a) A determination that a person is of unsound
9 mind or lacks the capacity to make a decision or do a
10 certain act, including, but not limited to, the incapacity
11 to contract, to make a conveyance, to marry, to make
12 medical decisions, to vote, or to execute wills or trusts,
13 shall be supported by evidence of a deficit in at least one
14 of the following mental functions, subject to subdivision
15 (b):

16 (1) Alertness and attention, including, but not limited
17 to, the following:

- 18 (A) Level of arousal or consciousness.
- 19 (B) Orientation to time, place, person, and situation.
- 20 (C) Ability to attend and concentrate.

21 (2) Information processing, including, but not limited
22 to, the following:

- 23 (A) Short- and long-term memory, including
24 immediate recall.
- 25 (B) Ability to understand or communicate with
26 others, either verbally or otherwise.
- 27 (C) Recognition of familiar objects and familiar
28 persons.
- 29 (D) Ability to understand and appreciate quantities.
- 30 (E) Ability to reason using abstract concepts.
- 31 (F) Ability to plan, organize, and carry out actions in
32 one's own rational self-interest.
- 33 (G) Ability to reason logically.

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

- 36 (A) Severely disorganized thinking.
- 37 (B) Hallucinations.
- 38 (C) Delusions.
- 39 (D) Uncontrollable, repetitive, or intrusive thoughts.



1 (4) Ability to modulate mood and affect. Deficits in
2 this ability may be demonstrated by the presence of a
3 pervasive and persistent or recurrent state of euphoria,
4 anger, anxiety, fear, panic, depression, hopelessness or
5 despair, helplessness, apathy or indifference, which is
6 inappropriate in degree to the individual's
7 circumstances.

8 (b) A deficit in the mental functions listed above may
9 be considered only if the deficit, by itself or in
10 combination with one or more other mental function
11 deficits, significantly impairs the person's ability to
12 understand and appreciate the consequences of his or her
13 actions with regard to the type of act or decision in
14 question.

15 (c) In determining whether a person suffers from a
16 deficit in mental function so substantial that the person
17 lacks the capacity to do a certain act, the court may take
18 into consideration the frequency, severity, and duration
19 of periods of impairment.

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

24 (e) This part applies only to the evidence that is
25 presented to, and the findings that are made by, a court
26 determining the capacity of a person to do a certain act
27 *or make a decision*, including, but not limited to, making
28 medical decisions. Nothing in this part shall affect the
29 decisionmaking process set forth in Section 1418.8 of the
30 Health and Safety Code, nor increase or decrease the
31 burdens of documentation on, or potential liability of,
32 physicians and surgeons who, outside the judicial context,
33 determine the capacity of patients to make a medical
34 decision.

35 SEC. 5. Section 813 is added to the Probate Code, to
36 read:

37 813. A person has the capacity to give informed
38 consent to a proposed medical treatment if the person is
39 able to do all of the following:



1 (a) Respond knowingly and intelligently to queries
2 about that medical treatment.

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

5 (c) Understand all of the following items of minimum
6 basic medical treatment information with respect to that
7 treatment:

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

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

12 (3) The probable degree and duration of any benefits
13 and risks of any medical intervention that is being
14 recommended by the person's health care providers, and
15 the consequences of lack of treatment.

16 (4) The nature, risks, and benefits of any reasonable
17 alternatives.

18 SEC. 6. Section 814 is added to the Probate Code, to
19 read:

20 814. A person who has the capacity to give informed
21 consent to a proposed medical treatment also has the
22 capacity to refuse consent to that treatment.

23 SEC. 7. Section 1801 of the Probate Code is amended
24 to read:

25 1801. Subject to Section 1800.3:

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

31 (b) A conservator of the estate may be appointed for
32 a person who is substantially unable to manage his or her
33 own financial resources or resist fraud or undue
34 influence, except as provided for that person as described
35 in subdivision (b) or (c) of Section 1828.5. Substantial
36 inability may not be proved solely by isolated incidents of
37 negligence or improvidence.

38 (c) A conservator of the person and estate may be
39 appointed for a person described in subdivisions (a) and
40 (b).



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

21 (e) The standard of proof for the appointment of a
22 conservator pursuant to this section shall be clear and
23 convincing evidence.

24 SEC. 8. Section 1881 is added to the Probate Code, to
25 read:

26 1881. (a) A conservatee shall be deemed unable to
27 give informed consent to any form of medical treatment
28 pursuant to Section 1880 if, for all medical treatments, the
29 conservatee is unable to respond knowingly and
30 intelligently to queries about medical treatment or is
31 unable to participate in a treatment decision by means of
32 a rational thought process.

33 (b) In order for a court to determine that a
34 conservatee is unable to respond knowingly and
35 intelligently to queries about his or her medical
36 treatment or is unable to participate in treatment
37 decisions by means of a rational thought process, a court
38 shall do both of the following:

39 (1) Determine that, for all medical treatments, the
40 conservatee is unable to understand at least one of the



1 following items of minimum basic medical treatment
2 information:

3 (A) The nature and seriousness of any illness, disorder,
4 or defect that the conservatee has or may develop.

5 (B) The nature of any medical treatment that is being
6 or may be recommended by the conservatee's health care
7 providers.

8 (C) The probable degree and duration of any benefits
9 and risks of any medical intervention that is being or may
10 be recommended by the conservatee's health care
11 providers, and the consequences of lack of treatment.

12 (D) The nature, risks, and benefits of any reasonable
13 alternatives.

14 (2) Determine that one or more of the mental
15 functions of the conservatee described in subdivision (a)
16 of Section 812 is impaired and that there is a link between
17 the deficit or deficits and the conservatee's inability to
18 give informed consent.

19 (c) A deficit in the mental functions listed in
20 subdivision (a) of Section 812 may be considered only if
21 the deficit by itself, or in combination with one or more
22 other mental function deficits, significantly impairs the
23 conservatee's ability to understand the consequences of
24 his or her decisions regarding medical care.

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

31 (e) In the interest of minimizing unnecessary expense
32 to the parties to a proceeding, paragraph (2) of
33 subdivision (b) shall not apply to a petition pursuant to
34 Section 1880 wherein the conservatee, after notice by the
35 court of his or her right to object *which, at least, shall*
36 *include an interview by a court investigator pursuant to*
37 *Section 1826 prior to the time at which the petition is*
38 *filed*, does not object to the proposed finding of
39 incapacity, or waives any objections.



1 SEC. 9. Section 3201 of the Probate Code is amended
2 to read:

3 3201. (a) A petition may be filed to determine that a
4 patient has the capacity to give informed consent to a
5 specified medical treatment for an existing or continuing
6 medical condition.

7 (b) A petition may be filed to determine that a patient
8 lacks the capacity to give informed consent to a specified
9 medical treatment for an existing or continuing medical
10 condition, and further for an order authorizing a
11 designated person to give consent to such treatment on
12 behalf of the patient.

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

15 (d) In determining whether a person's mental
16 functioning is so severely impaired that the person lacks
17 the capacity to give informed consent to any form of
18 medical treatment, the court may take into consideration
19 the frequency, severity and duration of periods of
20 impairment.

21 (e) Nothing in this part shall supersede the right that
22 any person may have under existing law to make medical
23 decisions on behalf of a patient, or affect the decision
24 making process of a long-term health care facility, as
25 defined in subdivision (b) of Section 1418 of the Health
26 and Safety Code.

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

29 (g) Nothing in this part shall be construed to
30 supersede or impair the right of any individual to choose
31 treatment by spiritual means in lieu of medical
32 treatment, nor shall any person choosing treatment by
33 spiritual means, in accordance with the tenets and
34 practices of that individual's established religious
35 tradition, be required to submit to medical testing of any
36 kind pursuant to a determination of competency.

37 SEC. 10. Section 3204 of the Probate Code is amended
38 to read:



1 3204. The petition shall state, or set forth by medical
2 declaration attached thereto, all of the following so far as
3 is known to the petitioner at the time the petition is filed:

4 (a) The nature of the medical condition of the patient
5 which requires treatment.

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

8 (c) The threat to the health of the patient if
9 authorization for the recommended course of treatment
10 is delayed or denied by the court.

11 (d) The predictable or probable outcome of the
12 recommended course of treatment.

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

15 (f) The efforts made to obtain an informed consent
16 from the patient.

17 (g) If the petition is filed by a person on behalf of a
18 medical facility, the name of the person to be designated
19 to give consent to the recommended course of treatment
20 on behalf of the patient.

21 (h) The deficit or deficits in the patient's mental
22 functions listed in subdivision (a) of Section 812 which are
23 impaired, and identifying a link between the deficit or
24 deficits and the patient's inability to respond knowingly
25 and intelligently to queries about the recommended
26 medical treatment or inability to participate in a
27 treatment decision about the recommended medical
28 treatment by means of a rational thought process.

29 SEC. 11. Section 3208 of the Probate Code is amended
30 to read:

31 3208. (a) The court may make an order authorizing
32 the recommended course of medical treatment of the
33 patient and designating a person to give consent to the
34 recommended course of medical treatment on behalf of
35 the patient if the court determines from the evidence all
36 of the following:

37 (1) The existing or continuing medical condition of
38 the patient requires the recommended course of medical
39 treatment.



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

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

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

10 (c) If the court finds that the patient has the capacity
11 to give informed consent to the recommended course of
12 medical treatment, but that the patient refuses consent,
13 the court shall not make an order authorizing the course
14 of recommended medical treatment or designating a
15 person to give consent to such treatment. If an order has
16 been made authorizing the recommended course of
17 medical treatment and designating a person to give
18 consent to that treatment, the order shall be revoked if
19 the court determines that the patient has recovered the
20 capacity to give informed consent to the recommended
21 course of medical treatment. Until revoked or modified,
22 the order is effective authorization for the course of
23 medical treatment.

24 (d) In a proceeding under this part, where the court
25 has determined that the patient has the capacity to give
26 informed consent, the court shall, if requested, determine
27 whether the patient has accepted or refused the
28 recommended course of treatment, and whether a
29 patient's consent to the recommended course of
30 treatment is an informed consent.

31 SEC. 12. This act shall be known and may be cited as
32 the Due Process in Competence Determinations Act.

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

O

