

## State Laws Relevant to Capacity Assessments

Several state laws are relevant to the assessment of capacities and abilities of individuals who are targeted in probate conservatorship proceedings. These laws are listed and summarized below.

A capacity assessment expert must be aware of the legal criteria for each particular area of capacity in question. For example, whether an individual has the mental capacity to enter into a contract is a legal determination and therefore is a mixed question of law and fact. (*In re Estate of Sexton* (1926) 199 Cal. 759, 770.) A declarant, including a physician, cannot give his or her opinion as to an individual's capacity to enter into a contract without having knowledge of the legal criteria of capacity. (*Id.* at p. 769.)

### Lanterman Act Rights

Welfare and Institutions Code Section 4502 declares that people with developmental disabilities have the same constitutional rights as all other citizens and residents of California. In addition to rights that have a foundation in the state and federal constitutions, Section 4502 declares that people with developmental disabilities have “a right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.”

**Comment:** Since capacity assessments will be used as evidence to curtail statutory and constitutional rights, they should not be biased, they must utilize scientifically valid procedures, they must comply with the requirements of the Americans with Disabilities Act and corresponding state laws prohibiting discrimination on the basis of disability, and opinions regarding incapacity in any area must be supported by clear and convincing evidence. Although the Lanterman Act rights only apply to adults with developmental disabilities, the same requirements would apply to capacity assessment of other adults as a matter of due process since the constitutional rights of these adults would also be curtailed by an order of conservatorship.

### Constitutional Considerations

Capacity assessments are used as evidence to curtail fundamental constitutional rights. As a result, the due process clause of the California Constitution would require that factual findings of incapacity be supported by clear and convincing evidence.

Giving a conservator authority to restrict a conservatee's place of residence implicates constitutional rights of travel and association. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944.) Where, as in the case under review, a probate court restricts the right of an *adult* to make his or her own educational decisions, constitutional issues can be raised. The right to make medical decisions is constitutionally protected. (*People v. Petty* (2013) 213 Cal.App.4th 1410.) So is the right to marry. (*Obergefell v. Hodges* (2015) 135 S.Ct. 2584, 2600.) The right to contract is constitutionally guaranteed by Article I, Section 1 of the California Constitution. (*People v. Davenport* (1937) 21 Cal.App.2d 292, 296.) Constitutional rights are also implicated by orders restricting the sexual choices of conservatees. (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 9-10; *Lawrence v. Texas* (2003) 539 U.S. 558.) The right to a public education is a fundamental right under the California Constitution. (*Steffes v.*

*California Interscholastic Federation* (1986) 176 Cal.App.3d 739, 746.) Restrictions on living arrangements may also violate the right of privacy under the California Constitution. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123.)

## **Disability Rights Statutes**

Government Code Section 11135 incorporates Title II of the Americans with Disabilities Act into state law. It requires state-funded agencies, organizations, and individuals to provide accommodations to persons with known disabilities that may interfere with participation in the service being provided.

Civil Code Section 51, known as the Unruh Civil Rights Act, prohibits privately-paid service providers from discriminating on the basis of disability. This would apply to capacity assessment professionals who are not court-appointed and who are not paid with government funds.

**Comment:** Capacity assessment professionals who are court appointed or paid by government funds for the assessment must comply with Section 11135. Those experts who are privately retained must comply with Civil Code Section 51. Both types of professionals must provide accommodations to assist the individual to have effective communications and meaningful participation in the assessment process.

## **Presumption**

Probate Code Section 810 declares “there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.”

**Comment:** A capacity assessment professional should begin the evaluation process with a presumption that the individual has the capacity to make all decisions in a responsible manner. The evaluation process **should not start with a bias against capacity**.

## **Standard of Proof**

Probate Code Section 1801(e) states that the standard of proof for appointment of a conservator shall be by **clear and convincing evidence**.

**Comment:** The essential facts necessary to appointing a conservator are those specified above. Conservator of person requires a showing, by clear and convincing evidence, of the inability to provide properly for personal needs. Conservator of the estate requires a showing, by clear and convincing evidence, of substantial inability to manage financial resources.

The “clear and convincing evidence” test requires a finding of high probability, based on evidence that is so clear as to leave **no substantial doubt**. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

**Comment:** A capacity assessment professional must be able to say, with high probability, that he or she has no substantial doubt that a person lacks capacity in each specific area under review.

## Appointment of Capacity Experts

Evidence Code Section 730 states: "When it appears to the court, at anytime before or during the trial of an action, that expert evidence is or maybe required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as maybe ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or maybe required. The court may fix the compensation for such services, if any, rendered by any person appointed under this section, in addition to any services as a witness, at such amount as seems reasonable to the court."

The costs of medical experts appointed to assist counsel representing a proposed conservatee would be paid for by the county. (Evidence Code Section 731; Conservatorship of Scharles (1991) 233 Cal. App.3d 1336, 1341)

**Comment:** Attorneys for proposed conservatees can and should ask for the appointment of an expert to assist the attorney in evaluating the capacities of the client and to help counsel determine if there are less restrictive alternatives to a conservatorship that are viable. Appointed counsel should ask the court in advance for permission to retain an expert if counsel wants reimbursement for the costs. (Conservatorship of Ben C. (2006) 137 Cal.App.4th 689)

## Qualifications of Expert Witness

Evidence Code Section 720 states that a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

**Comment:** Professionals who conduct capacity assessments and submit reports to the court or testify in a conservatorship hearing must have sufficient education and experience to qualify as an expert on the disabilities of the person in question and how those disabilities limits the individual's functional capacity to care for their personal or financial needs and decision-making abilities in those areas.

## Court Investigator

Probate Code Section 1826 requires a court investigator to issue a report to the court indicating, among other things, whether the proposed conservatee has "**mental function deficits**" that would interfere with his or her **ability to understand the consequences** of actions taken in connection with functions described in Section 1801(a) [properly providing for personal needs] or (1801(b) [unable to manage financial resources or resist undue influence].

**Comment:** This statute suggests that a capacity assessment should also focus on mental function deficits that interfere with an individual's ability to under the consequences of actions taken in connection with personal needs and financial resources.

## General Conservatorships

Probate Code Section 1801(a) authorizes a superior court judge to appoint a conservator of the person for any adult “who is **unable to provide properly** for his or her **personal needs for physical health, food, clothing, or shelter.**” Subdivision (b) authorizes appointment of a conservator of the estate “for a person who is substantially unable to **manage his or her own financial resources** or resist fraud or undue influence.” Subdivision (c) authorizes a conservator of the person and estate to be appointed for anyone who meets the criteria of both subdivision (a) and (b). However, neither form of conservatorship may be ordered “unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.” (Prob. Code § 1800.3, subd. (b).)

**Comment:** Conservatorship of the person focuses on an individual’s ability to provide for certain specific personal needs. Conservatorship of the estate focuses on a person’s substantial inability to manage his or her finances or resist undue influence. These are the criteria that should guide any assessment of capacity to make decisions in these areas of daily living. Capacity assessment must also consider the viability of less intrusive means to protect the individual in these areas.

## Limited Conservatorships

The same findings must be made by the court before a petition can be granted. Prior to establishing a limited conservatorship of the person, the court must find that the proposed limited conservatee is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. For a limited conservatorship of the estate, a finding must be made that the individual is substantially unable to manage his or her own financial resources or resist fraud or undue influence. As for a general conservatorship, the court must make an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

However, there is a difference between general and limited conservatorships in terms the retention of rights. Probate Code Section 2351.5 states that a limited conservatee retains rights in several areas of decision-making unless the petitioner seeks those powers and the court expressly grants such a request when an order granting the petition is entered. These powers include access to confidential records and papers of the conservatee, as well as the authority to make decisions regarding residence, marriage, contracts, medical care, education, sexual relations, and social contacts.

**Comment:** This statutory presumption of the retention of certain rights suggests that a capacity assessment professional should be extra careful in evaluating the functional ability of someone with a developmental disability to make decisions in these areas of personal living.

## DDS Conservatorships

Health and Safety Code Section 416.8 states that whenever the court is considering appointing the director of the Department of Developmental Services to act as a conservator of the person of a regional center client, the regional center shall conduct a complete evaluation of the client. This shall include “a current diagnosis of his physical condition prepared under the direction of a licensed medical practitioner and a report of his current mental condition and social adjustment prepared by a licensed and qualified social worker or psychologist.”

**Comment:** In a normal limited conservatorship proceeding when someone other than the DDS director is the potential conservator, the Welfare and Institutions Code Section 4646.5 requires an evaluation by a “qualified individual.” While the statute does not define that term, Section 416.8 is relevant to fill this definitional void since it provides some specificity about who the Legislature considers qualified to evaluate the client’s mental condition and social adjustment.

### **Focus on Functioning Rather Than Diagnosis**

Probate Code Section 810 declares “A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.” It also states: “A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.”

**Comment:** A capacity assessment professional should base his or her opinions on **evidence of mental functioning**, not the fact that an individual has been diagnosis of a mental or physical disorder.”

### **Evidentiary Requirements**

Probate Code Section 811 states: (a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a **deficit in at least one of the following mental functions**, subject to subdivision (b), and **evidence of a correlation between the deficit or deficits and the decision or acts in question**:

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

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

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

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

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

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

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

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

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

(d) 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.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision-making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

### **Ability to Communicate**

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- (a) The rights, duties, and responsibilities created by, or affected by the decision.
- (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision

### **Medical Capacity**

Probate Code Section 813 states:

(a) For purposes of a judicial determination, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do all of the following:

- (1) Respond knowingly and intelligently to queries about that medical treatment.
- (2) Participate in that treatment decision by means of a rational thought process.
- (3) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:

- (A) The nature and seriousness of the illness, disorder, or defect that the person has.
- (B) The nature of the medical treatment that is being recommended by the person's health care providers.
- (C) The probable degree and duration of any benefits and risks of any medical intervention that is being recommended by the person's health care providers, and the consequences of lack of treatment.
- (D) The nature, risks, and benefits of any reasonable alternatives.

(b) A person who has the capacity to give informed consent to a proposed medical treatment also has the capacity to refuse consent to that treatment.

## **Medical Capacity Declarations**

Medical capacity declarations are only required by state law in three situations: (1) medical inability to attend hearings (Prob. Code Sec. 1825(b)); (2) the ability to give informed consent to medical treatment (Prob. Code Sec. 1890); and (3) and whether the proposed conservatee has dementia (Prob. Code. Sec. 2356.5(f)(3). Otherwise, unless a local court rule says otherwise, medical capacity declarations are not required to show incapacity in any other area of decision-making. Since most court-appointed attorneys do not seek appointment of an expert to assess capacity in these other areas, court determinations are based primarily on facts alleged by lay witnesses offered by petitioners who are seeking a conservatorship.

## **Penal Code**

In criminal prosecutions where consent is an issue, "consent is defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (Penal Code section 261.6; *People v. Gonzalez* (1995) 33 Cal.App.4th 1440.)

According to CALJIC 1.23.1, in order to have capacity to give legal consent, a person "must possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person."

The determination of whether a complaining witness had "sufficient mental capacity" at the time of the alleged incidents is a question for the trier of fact. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 85 Cal.Rptr.2d 474, 490.) Such issue is not within the common experience of most jury members, so expert testimony would be admissible per Evidence Code section 801. (*People v. Lewis* (1977) 75 Cal.App.3d 513, 518-519, cited with approval in *People v. Torres* (1995) 33 Cal.App.4th 37, 46.)

**Comment:** These criteria are used in a criminal prosecution to make an after-the-fact determination of whether the alleged victim had capacity to consent to sex on a particular occasion with a particular person. These criteria are probably not be appropriate for advance determinations in a conservatorship proceeding as to whether a proposed conservatee totally lacks the capacity to consent to sex with anyone under any circumstances.