

Capacity in Conservatorships

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Capacity as a Spectrum

- ❑ Imagine an Arc, from the lower left of this powerpoint to the lower right.
- ❑ On the left, an individual has full capacity-no memory issues, no function issues;
- ❑ On the right, no ability to reason, make decisions, act independently.
- ❑ Most people are to the left or in the middle

Capacity as a Spectrum

- ❑ As we move further to the right, the individual may have capacity to do some things and not others.
- ❑ To evaluate capacity it is necessary to figure out where an individual is on the capacity spectrum, what they can do, and what they no longer have the ability to do.

Presumptions in the Law

- California's Due Process in Competence Determinations Act (Probate Code Sections 810-813)

Presumptions in the Law

- Prob C 810: three parts:
 - 1. Rebuttable presumption that all persons have capacity to make decisions and be responsible for their actions.
 - 2. A person with mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, doing estate planning, and performing other actions.

Presumptions in the Law

□ Prob C 810: three parts:

- 3. A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from deficits that the person should be deemed to lack capacity should be based on a deficit in one or more mental functions rather than a diagnosis of a person's mental or physical disorder.

Presumptions in the Law

- ❑ (Side Note: My first conservatorship, autumn 1984; Patient CC was at Idylwood Convalescent in the secure facility; the Doctor's declaration:
- ❑ "CC is brain dead and cannot make decisions.")

Presumptions in the Law

- Impact of the law (effective 1996):
 - A capacity determination has to be based on functional effect; a dementia patient might well have capacity to make some decisions
 - Documentary support for an adjudication of incapacity more precise:

Presumptions in the Law

- Impact of the law (effective 1996):
 - To make a finding of incapacity there has to be evidence of a deficit in one mental function area:
 - Alertness and attention
 - Information processing
 - Thought processes
 - Ability to modulate mood and affect
 - AND a consequent impairment in the person's ability to understand and appreciate the consequences of their actions (Prob C Sec 811)

Presumptions in the Law

- Impact of the law (effective 1996):
 - A subtle shift of the presumption:
 - Prob C Sec. 812 holds that a person lacks capacity unless they can communicate the decision and understand
 - Rights, duties, and responsibilities created or affected by the decision
 - Consequences for the decisionmaker and others affected by the decision
 - Risks, benefits, and reasonable alternatives

Presumptions in the Law

- ❑ Impact of the law (effective 1996):
 - Medical decision making (Prob C Sec 813): A person has capacity if:
 - ❑ They can respond knowingly and intelligently to questions about that treatment
 - ❑ Can participate in the decision by means of a rational thought process
 - ❑ Understand the following items of information:

Presumptions in the Law

- Impact of the law (effective 1996):
 - The nature and seriousness of the illness
 - The nature of the medical treatment being recommended
 - Probable degree and duration of any benefits and risks recommended, and consequences of lack of treatment
 - Nature, risks, and benefits of reasonable alternatives

Presumptions in the Law

- ❑ So a person is presumed to have capacity UNLESS there is a mental deficit AND a consequent impairment caused by the deficit
- ❑ BUT a person does not have capacity UNLESS they can meet the 812 and 813 tests

Capacity Declarations

- ❑ For years we worked with the original cap dec based on the Prob C 811 format: evaluate for mental deficit and claim relationship between deficit and ability to give informed consent for medical treatment (JC Form 335).

Capacity Declarations

- (Santa Clara County early on adopted an add on form to be used when a conservatorship of the estate was sought.)

Capacity Declarations

- Cap dec changes: Prob C Sec 2356.5 went into effect in 1998, dealing with conservatees who suffered major cognitive disorder. In 2004 the Judicial Council added 335A, as an add on, using the evaluation portion of GC 335 to show a connection between cognitive deficits and consequent need for secure placement or use of dementia meds.

Capacity Declarations

- ❑ Cap dec changes: The 2025 version of the cap dec (attached) provides much more depth about the conservatee but at the cost of confusing the practitioners with the detail required.
- ❑ The form otherwise provides a comprehensive guide to the mental functioning of a proposed conservatee

Capacity Declarations

- ❑ And includes findings related to a person's ability to perform ADLs.
- ❑ Pages 5-6 of the form permit the practitioner to make findings about a person's capacity to make medical decisions concerning a specific treatment (Prob Code 2357); medical capacity in general (Prob Code 2355); and need for secure placement and "dementia" meds (Prob Code 2356.5).

Capacity Declarations

- ❑ Part 335A—a four page add on— focuses on ability to perform ADLs and IADLs. It does not provide a place for the practitioner to make findings that would support a conservatorship of the estate—and the detail required for this form greatly exceeds what a proposed conservatee’s practitioner can gather from a medical examination.

The Legislature and Conservatee Autonomy

- The reform package of 2006 added Prob C Section 2113: "A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties. . . ."

The Legislature and Conservatee Autonomy

- In 2007 Prob C Sec. 1800.3 was amended to add “a conservatorship . . . shall not be granted ... 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.”

The Legislature and Conservatee Autonomy

- AB 1194 (Stats 2021) modified the scope of the court investigator's inquiry during the review process to ask the reviewer to determine whether the original criteria in Sec. 1801 are still met, and thus determine whether the conservatorship is still the least restrictive alternative (Prob C Sec 1851)

The Legislature and Conservatee Autonomy

- AB 1663 (Stats 2022) expanded the power of a conservatee to nominate their conservator and modified the provisions relating to termination of the conservatorship to emphasize the need for the court to find that a conservatorship, if continued, must meet the least restrictive criteria (Prob C section 1363).

Effect of Conservatorship on Capacity

- ❑ Appointment of a conservator of the estate terminates conservatee's ability to manage their estate. Prob C 1870, 1872)
- ❑ Conservatee cannot contract, incur debt, buy, sell or convey property, make gifts, delegate powers, and waive rights

Effect of Conservatorship on Capacity

- ❑ How does this fit with the “least restrictive means” doctrine?
- ❑ There can be transactions that a conservatee demonstrates capacity for—modest gift giving; ability to handle small transactions
- ❑ Sections 1873-1874 permit modification of original order to permit conservatee to carry out some transactions.

Effect of Conservatorship on Capacity

- ❑ So an order under 1874 can enlarge conservatee's capacity—but does not diminish conservator's authority!
- ❑ Role of CI: Prob C Sec 1851(a)(2)- Investigator can recommend modification of original order to reduce or expand powers of conservator and provide more autonomy to conservatee.

Effect of Conservatorship on Capacity

- ❑ Rights the conservatee retains (Prob Code Sec. 1871):
 - Right to control an allowance
 - Right to control wages or salary
 - Right to make a will
 - Right to enter into transactions to extent reasonable to provide the necessities of life to conservatee and family
 - Personal rights (Prob Code Sec 2351)

Effect of Conservatorship on Capacity

- Personal rights include:
 - Right to receive visitors
 - Right to receive telephone calls
 - Right to receive personal mail
 - (These rights can be specifically limited by court order.)

Effect of Conservatorship on Capacity

- Right to make a will is conditioned on conservatee's meeting testamentary capacity tests in Prob Code Sec 6100-6100.5:
 - Understand the testamentary act
 - Understand nature and situation of the individual's property
 - Understand and remember the individual's relations to relatives and those whose interests are affected by the will
 - Not be subject to hallucinations or delusions that affect the gifts made

Effect of Conservatorship on Capacity

- After Anderson v. Hunt (2011), issue of amending conservatee's trust comes up. Anderson held that simple trust amendments require only testamentary not contractual capacity.
- [Best practice is to have estate documents approved by court under substituted judgment.]

Effect of Conservatorship on Capacity

- Right to choose counsel:
 - Before appointment: Proposed conservatee deemed to have capacity and can contract with an attorney.
 - If proposed conservatee does not have counsel, court must appoint counsel (Prob Code Section 1471(a) and must appoint counsel chosen by proposed conservatee (Prob Code Section 1471(c)).
 - Counsel's role: represent express wishes of the conservatee

Effect of Conservatorship on Capacity

- Right to choose counsel:
 - Choice of counsel not restricted to counsel on county's approved list
 - BUT court may remove counsel if counsel adjudged not capable of zealous representation of conservatee

Effect of Conservatorship on Capacity

- Right to choose counsel:
 - After appointment: Presumably the appointed counsel will continue; Prob Code Sec. 1471(a) requires that counsel represent the conservatee in proceedings to: appoint a conservator; transfer a conservatorship; terminate the conservatorship; remove the conservator; seek finding about capacity of conservatee; and seek order authorizing removal of temporary conservatee from residence
 - Note that there is no duty for attorney to represent conservatee in an accounting

Effect of Conservatorship on Capacity

- Right to give informed consent for medical treatment:
 - The Probate Code's starting point is: a conservatee has the right to give informed consent for their medical treatment. Prob Code Sec 2354(a). The conservator may also consent, but the conservator's consent is not necessary.

Effect of Conservatorship on Capacity

- Right to give informed consent for medical treatment:
 - Exceptions:
 - Emergency treatment: Conservator can require that conservatee receive medical treatment (Prob Code Sec 2354(c))
 - Single-procedure treatment under Prob Code Sec 2357, where conservatee unable to give consent
 - When conservatee adjudged unable to give medical consent under Prob Code 2355
 - And when practitioner insists that conservator consent even when conservatee has consented

Effect of Conservatorship on Capacity

- Capacity to consent to end of life option
 - Health and Safety Code Secs 443 et seq.
 - Individual must have capacity to make medical decisions
 - Conservator cannot play any role in the process
 - A conservator who has exclusive medical authority should seek instructions under Prob Code Sec. 2359 should the conservatee seek to exercise this option

Effect of Conservatorship on Capacity

- Capacity to marry, to dissolve marriage:
 - The capacity to marry or form a RDP is presumed (Prob Code Sec 1900).
 - Family Code Sec 301 simply states: two unmarried persons over age 18 and not otherwise disqualified are capable of consenting to and consummating marriage.
 - Prob Code Sec 1901 permits the conservator, the conservatee, any relative or friend of the conservatee, or any interested party to petition for an order determining capacity of the conservatee.

Effect of Conservatorship on Capacity

- Capacity to marry, to dissolve marriage:
 - Annulment: Family Code Sec. 2210(c) authorizes annulment if it is determined that a party was “of unsound mind” at the time of the marriage, unless subsequently “the party of unsound mind, coming to reason, freely cohabited with the other as his or her spouse”
 - “unsound mind” would be determined under Prob Code Sec 810(c).

Effect of Conservatorship on Capacity

- Capacity to marry, to dissolve marriage:
 - An action to dissolve the marriage should be brought only at the initiative of the conservatee, per case law
 - As to the capacity required to seek a dissolution, the standard per Marriage of Greenway (2013), 217 Cal.App.4th 628, should be the same low threshold as the standard to marry.

Effect of Conservatorship on Capacity

- Capacity to vote:
 - Modification of the Elections code in 2015 established a new standard for determining capacity to vote
 - Capacity is presumed; but if a court finds by clear and convincing evidence that a person cannot with reasonable accommodations communicate a desire to vote, that person should be disqualified from voting. Elections Code Sec. 2208.

Effect of Conservatorship on Capacity

- Basic sources used:
- Chapter 11, CEB California Conservatorship Practice: Issues of Legal Capacity of Conservatorship
- CEB Action Guide: Capacity and Undue Influence: Assessing, Challenging, and Defending
- “When Capacity becomes a Catch-22: Defining Your Clients’ Due Process Rights after Herren,” Trusts and Estates Quarterly, 32, issue 1 (2026)