STATE OF CALIFORNIA--HEALTH AND WELFARE AGENCY

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April 19, 1996

DMH INFORMATION NOTICE NO.: 96-04

TO: LOCAL MENTAL HEALTH DIRECTORS
LOCAL MENTAL HEALTH ADMINISTRATORS
LOCAL MENTAL HEALTH PROGRAM CHIEFS
COUNTY ADMINISTRATIVE OFFICERS
CHAIRPERSONS, LOCAL MENTAL HEALTH BOARDS

SUBJECT: PROBATE CODE, CIVIL CODE, AND BUSINESS AND PROFESSIONS CODE REVISIONS AFFECTING INDIVIDUALS WITH MENTAL DISABILITIES

This Notice provides information regarding a number of, but not all of the statutory changes to the California Civil Code, the California Business and Professions Code and the Probate Code enacted in the 1995 legislative session which affect individuals with a mental disability.

Chapter 730, Statutes of 1995 (AB 1266, Kaloogin) specifies: 1) grounds for attorney discipline when violations occur regarding dual compensation and donative transfers within management of an estate of a conservatee; 2) timelines for giving notice regarding a hearing for reconsideration of a temporary guardianship; 3) the manner in which wills can be made by a guardian or conservator, compensation and compensation of costs incurred during the time he or she served as the guardian or conservator; and 4) the grounds for removal of a trustee (who may or may not be the guardian or conservator of an estate) and the definition of a disqualified person.

Chapter 842, Statutes of 1995 (SB 730, Mello) which is to be known as the DUE PROCESS IN COMPETENCE DETERMINATIONS ACT, specifies: 1) the standard of proof for the appointment of a conservator shall be clear and convincing evidence; 2) except as specified in statute, a person lacks the capacity to make a decision and that the determination of lack of capacity must be supported by evidence of a deficit in at least one of the prescribed mental functions and that deficit by itself or in combination with one or more other 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; 3) a conservatee would be deemed unable to give 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; and 4) revises the

procedure authorizing a petition to be filed to determine that a person without a conservator lacks the capacity to give informed consent as specified and to authorize a designated person to give consent to treatment.

Although the provisions would not apply to proceedings under the Welfare and Institutions Code, mental health professionals will most likely be involved with the judicial process in determining a person's mental functioning, not a specific diagnosis, and thus his or her legal capacity to perform a specific act.

Enclosed are the two bills with the new language either underlined or enclosed in brackets. An "^ " indicates a place where nonsubstantive words have been deleted. If you have any questions, you should consult with your county counsel. You may also call Mozell Zarit at (916) 654-2644.

Sincerely,

for STEPHEN W. MAYBERG, Ph.D.
Director

Enclosures

cc: California Mental Health Planning Council
Chief, Technical Assistance and Training

Senate Bill No. 730

CHAPTER 842

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.

[Approved by Governor October 12, 1995. Filed with Secretary of State October 13, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

SB 730, 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.

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

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

39. (a) 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, as provided in Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3.

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

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

810. The Legislature finds and declares the following:

(a) 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.

(b) 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.

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

811. Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity as in effect on January 1, 1995, 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 decisionmaker and, where appropriate, the persons affected by the decision.

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

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

812. (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 vote, or to execute wills or trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b):

(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, which 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 decisionmaking 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, physicians and surgeons who, outside the judicial context, determine the capacity of patients to make a medical decision.
SEC. 5. Section 813 is added to the Probate Code, to read:

813. 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:
(a) Respond knowingly and intelligently to queries about that medical treatment.
(b) Participate in that treatment decision by means of a rational thought process.
(c) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:
(1) The nature and seriousness of the illness, disorder, or defect that the person has.
(2) The nature of the medical treatment that is being recommended by the person's health care providers.
(3) 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.
(4) The nature, risks, and benefits of any reasonable alternatives.
SEC. 6. Section 814 is added to the Probate Code, to read:
814. 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.
SEC. 7. Section 1801 of the Probate Code is amended to read:
1801. Subject to Section 1800.3:
(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.
(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.
(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).
(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section

4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

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

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

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

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

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

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

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

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

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

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

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

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

(e) In the interest of minimizing unnecessary expense to the parties to a proceeding, paragraph (2) of subdivision (b) shall not

apply to a petition pursuant to Section 1880 wherein the conservatee, after notice by the court of his or her right to object which, at least, shall include an interview by a court investigator pursuant to Section 1826 prior to the time at which the petition is filed, does not object to the proposed finding of incapacity, or waives any objections.

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

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

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

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

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

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

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

(g) Nothing in this part shall 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 person choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of competency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) If the court finds that the patient has the capacity to give informed consent to the recommended course of medical treatment, but that the patient refuses consent, the court shall not make an order authorizing the course of recommended medical treatment or designating a person to give consent to such treatment. If an order has been made authorizing the recommended course of medical treatment and designating a person to give consent to that treatment, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization for the course of medical treatment.

(d) In a proceeding under this part, where the court has determined that the patient has the capacity to give informed consent, the court shall, if requested, determine whether the patient has accepted or refused the recommended course of treatment, and

whether a patient's consent to the recommended course of treatment is an informed consent.

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

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

O

Assembly Bill No. 1466

CHAPTER 730

An act to amend Section 6103.6 of the Business and Professions Code, and to amend Sections 1208, 2250, 2580, 6100, 6100.5, 15642, 15687, 21306, 21350, 21351, 21353, and 21355 of, and to add Sections 2640.1, 2646, 21350.5, and 21356 to, the Probate Code, relating to trusts and wills.

[Approved by Governor October 9, 1995. Filed with Secretary of State October 10, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1466, Kaloogian. Trusts and wills.

(1) Under existing law, a violation of specified provisions of law regarding dual compensation and donative transfers are grounds for attorney discipline if the violation occurs on or after January 1, 1994.

This bill would make a violation of these provisions grounds for attorney discipline only if the attorney knew or should have known of the facts leading to the violation.

(2) Existing law prescribes requirements for giving notice to a trust or trustee and notice of a hearing for reconsideration of a temporary guardianship.

This bill would revise these requirements, as specified.

(3) Existing law authorizes a conservator to petition a court for an order authorizing or requiring the conservator to take a proposed action to benefit the conservatee or the estate, to minimize taxes or expenses of administration of the estate, or to provide gifts, as specified. Existing law provides for the compensation of a guardian, conservator, and attorney under guardianship or conservatorship proceedings.

This bill would permit a conservator to make a will for the conservatee if the conservator has petitioned for and been granted that authority. The bill would provide that, in proceedings for compensation, the court shall only determine fees that are payable from the estate of the ward or conservatee.

The bill would, if a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, but not before a specified time, authorize that person and that person's attorney to petition the court for an order fixing and allowing compensation and costs, as specified.

(4) Existing law provides for the removal of a trustee on the basis of specified grounds, the enforceability of a no-contest clause, for the compensation of a trustee who is an attorney, and for the invalidation of donative transfers.

This bill would among other things, revise the grounds for removal of a trustee and the definition of a disqualified person, as specified.

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

SECTION 1. Section 6103.6 of the Business and Professions Code is amended to read:

6103.6. Violation of Section 15687 of the Probate Code, or of Part 3.5 (commencing with Section 21350) of Division 11 of the Probate Code, shall be grounds for discipline, if the attorney knew or should have known of the facts leading to the violation. This section shall only apply to violations that occur on or after January 1, 1994.

SEC. 2. Section 1208 of the Probate Code is amended to read:

1208. (a) Except as provided in subdivision (b), if notice is required to be given to a trust or trustee, notice to trust beneficiaries is not required.

(b) Subject to subdivision (c), where the personal representative and the trustee are the same person, or where no trustee has been appointed, notice shall be given to (1) each person to whom income or principal would be required or authorized in the trustee's discretion to be currently distributed if the trust were in effect, or (2) if there are no such persons, to each person who, under the terms of the trust, would be entitled to any distribution if the trust were terminated at the time the notice is required to be given.

(c) Notice to trust beneficiaries is not required under subdivision (b) where the trust has more than one trustee and notice is given to a cotrustee who is not a personal representative.

SEC. 3. Section 2250 of the Probate Code is amended to read:

2250. (a) On or after the filing of a petition for appointment of a guardian or conservator, any person entitled to petition for appointment of the guardian or conservator may file a petition for appointment of:

(1) A temporary guardian of the person or estate or both.

(2) A temporary conservator of the person or estate or both.

(b) The petition shall state facts which establish good cause for appointment of the temporary guardian or temporary conservator. The court, upon such petition or other showing as it may require, may appoint a temporary guardian of the person or estate or both, or a temporary conservator of the person or estate or both, to serve pending the final determination of the court upon the petition for the appointment of the guardian or conservator.

(c) Unless the court for good cause otherwise orders, not less than five days before the appointment of the temporary guardian or temporary conservator, notice of the proposed appointment shall be personally delivered to the proposed ward if 12 years of age or older or to the proposed conservatee, to the parent or parents if the proposed ward is a minor, and to any person having a valid visitation

order with the proposed ward that was effective at the time of the filing of the petition. In a proceeding for temporary guardianship of the person, evidence that a custodial parent has died or become incapacitated and that the petitioner is the nominee of the custodial parent may constitute good cause for the court to order that this notice not be delivered.

(d) If a temporary guardianship is granted ex parte and the hearing on the general guardianship petition is not to be held within 30 days of the granting of the temporary guardianship, the court shall set a hearing within 30 days to reconsider the temporary guardianship. Notice of the hearing for reconsideration of the temporary guardianship shall be provided pursuant to Section 1511, except that the court may for good cause shorten time for notice of the hearing.

(e) Visitation orders with the proposed ward granted prior to the filing of a petition for temporary guardianship shall remain in effect, unless for good cause the court orders otherwise.

(f) One petition may request the appointment of a guardian or conservator and also the appointment of a temporary guardian or conservator or these appointments may be requested in separate petitions.

(g) If the court suspends powers of the guardian or conservator under Section 2334 or 2654 or under any other provision of this division, the court may appoint a temporary guardian or conservator to exercise those powers until the powers are restored to the guardian or conservator or a new guardian or conservator is appointed.

(h) If for any reason a vacancy occurs in the office of guardian or conservator, the court, on a petition filed under subdivision (a) or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the guardian or conservator until a new guardian or conservator is appointed.

SEC. 4. Section 2580 of the Probate Code is amended to read:

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. A special needs trust for money paid pursuant to a compromise or judgment for a conservatee may be established only under Chapter 4 (commencing with Section 3600) of Part 8, and not under this article.

(6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.

(7) Exercising options of the conservatee to purchase or exchange securities or other property.

(8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(9) Exercising the right of the conservatee to elect to take under or against a will.

(10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

(11) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

(13) Making a will.

SEC. 5. Section 2640.1 is added to the Probate Code, to read:

2640.1. (a) If a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, but not before the expiration of 90 days

from the issuance of letters, the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order to allow (1) any compensation or costs requested in the petition the court determines is just and reasonable to the person who petitioned for the appointment of a conservator but was not appointed, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith, and (2) any compensation or costs requested in the petition the court determines is just and reasonable to the attorney for that person, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith. The compensation and costs so allowed shall thereupon be charged to the estate of the conservatee. If a conservator of the estate is not appointed, but a conservator of the person is appointed, the compensation and costs so allowed shall be ordered by the court to be paid from property belonging to the conservatee, whether held outright, in trust, or otherwise.

(d) It is the intent of the Legislature for this section to have retroactive effect.

SEC. 6. Section 2646 is added to the Probate Code, to read:

2646. In proceedings under this chapter, the court shall only determine fees that are payable from the estate of the ward or conservatee and not limit fees payable from other sources.

SEC. 7. Section 6100 of the Probate Code is amended to read:

6100. (a) An individual 18 or more years of age who is of sound mind may make a will.

(b) A conservator may make a will for the conservatee if the conservator has been so authorized by a court order pursuant to Section 2580. Nothing in this section shall impair the right of a conservatee who is mentally competent to make a will from revoking or amending a will made by the conservator or making a new and inconsistent will.

SEC. 8. Section 6100.5 of the Probate Code is amended to read:

6100.5. (a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

(b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

(c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.

SEC. 9. Section 15642 of the Probate Code is amended to read:

15642. (a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) Where the trustee's compensation is excessive under the circumstances.

(6) Where the sole trustee is a person described in subdivision (a) of Section 21350, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

(A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

(B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)
_____ and have counseled my client,
(name of instrument)
_____, fully and privately on the nature and
(name of client)
legal effect of the designation as trustee of _____
(name of trustee)

contained in such instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and such intent is not the product of fraud, menace, duress, or undue influence.

_____ _____"
(Name of Attorney) (Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(C) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(7) For other good cause.

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.

SEC. 10. Section 15687 of the Probate Code is amended to read:

15687. (a) Notwithstanding any provision of a trust to the contrary, a trustee who is an attorney may receive only (1) the trustee's compensation provided in the trust or otherwise provided in this article or (2) compensation for legal services performed for the trustee, unless the trustee obtains approval for the right to dual compensation as provided in subdivision (d).

(b) No parent, child, sibling, or spouse of a person who is a trustee, and no law partnership or corporation whose partner, shareholder, or employee is serving as a trustee shall receive any compensation for legal services performed for the trustee unless the trustee waives trustee compensation or unless the trustee obtains approval for the right to dual compensation as provided in subdivision (d).

(c) This section shall not apply if the trustee is related by blood or marriage to, or is a cohabitant with, the settlor.

(d) After full disclosure of the nature of the compensation and relationship of the trustee to all persons receiving compensation under this section, the trustee may obtain approval for dual compensation by either of the following:

(1) An order pursuant to paragraph (21) of subdivision (b) of Section 17200.

(2) Giving 30 days' advance written notice to the persons entitled to notice under Section 17203. Within that 30-day period, any person entitled to notice may object to the proposed action by written notice to the trustee or by filing a petition pursuant to paragraph (21) of subdivision (b) of Section 17200. If the trustee receives this objection during that 30-day period and if the trustee wishes dual compensation, the trustee shall file a petition for approval pursuant to paragraph (21) of subdivision (b) of Section 17200.

(e) Any waiver of the requirements of this section is against public policy and shall be void.

(f) This section applies to services rendered on or after January 1, 1994.

SEC. 11. Section 21306 of the Probate Code is amended to read:

21306. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to one or more of the following grounds:

(a) Forgery.

(b) Revocation.

(c) An action to establish the invalidity of any transfer described in Section 21350.

(d) A petition to remove a trustee under paragraph (6) of subdivision (b) of Section 15642.

SEC. 12. Section 21350 of the Probate Code is amended to read:

21350. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of any such law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of a person who is described in paragraph (1).

(b) For purposes of this section, "a person who is related by blood or marriage" to a person means all of the following:

(1) The person's spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and 6408 shall be applicable.

SEC. 13. Section 21350.5 is added to the Probate Code, to read:

21350.5. For purposes of this part, "disqualified person" means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

SEC. 14. Section 21351 of the Probate Code is amended to read:

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, or is a cohabitant with, the transferee or the person who drafted the instrument. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature of his or her intended transfer and (2) signs and delivers to the transferor and the drafter a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____, on the nature of the transfer, or
(name of client)

transfers, of property to _____
(name of potentially disqualified person)

contained in such instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in such instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because such transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____ _____."
(Name of Attorney) (Date)

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, excluding the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(A) Any instrument executed by a person who was not a resident of this state at the time the instrument was executed.

(B) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(C) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the seventh degree.

SEC. 15. Section 21353 of the Probate Code is amended to read:

21353. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue, but only to the extent that the value of the transfer exceeds the intestate interest of the disqualified person.

SEC. 16. Section 21355 of the Probate Code is amended to read:

21355. This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

SEC. 17. Section 21356 is added to the Probate Code, to read:

21356. An action to establish the invalidity of any transfer described in Section 21350 can only be commenced within the periods prescribed in this section as follows:

(a) In case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made.

(b) In case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

O

Assembly Bill No. 1466

CHAPTER 730

An act to amend Section 6103.6 of the Business and Professions Code, and to amend Sections 1208, 2250, 2580, 6100, 6100.5, 15642, 15687, 21306, 21350, 21351, 21353, and 21355 of, and to add Sections 2640.1, 2646, 21350.5, and 21356 to, the Probate Code, relating to trusts and wills.

[Approved by Governor October 9, 1995. Filed with Secretary of State October 10, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1466, Kaloogian. Trusts and wills.

(1) Under existing law, a violation of specified provisions of law regarding dual compensation and donative transfers are grounds for attorney discipline if the violation occurs on or after January 1, 1994.

This bill would make a violation of these provisions grounds for attorney discipline only if the attorney knew or should have known of the facts leading to the violation.

(2) Existing law prescribes requirements for giving notice to a trust or trustee and notice of a hearing for reconsideration of a temporary guardianship.

This bill would revise these requirements, as specified.

(3) Existing law authorizes a conservator to petition a court for an order authorizing or requiring the conservator to take a proposed action to benefit the conservatee or the estate, to minimize taxes or expenses of administration of the estate, or to provide gifts, as specified. Existing law provides for the compensation of a guardian, conservator, and attorney under guardianship or conservatorship proceedings.

This bill would permit a conservator to make a will for the conservatee if the conservator has petitioned for and been granted that authority. The bill would provide that, in proceedings for compensation, the court shall only determine fees that are payable from the estate of the ward or conservatee.

The bill would, if a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, but not before a specified time, authorize that person and that person's attorney to petition the court for an order fixing and allowing compensation and costs, as specified.

(4) Existing law provides for the removal of a trustee on the basis of specified grounds, the enforceability of a no-contest clause, for the compensation of a trustee who is an attorney, and for the invalidation of donative transfers.

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.

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

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

39. (a) 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, as provided in Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3.

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

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

810. The Legislature finds and declares the following:

(a) 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.

(b) 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.

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

811. Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity as in effect on January 1, 1995, 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 decisionmaker and, where appropriate, the persons affected by the decision.

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

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

812. (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 vote, or to execute wills or trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b):

(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, which 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 decisionmaking 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, physicians and surgeons who, outside the judicial context, determine the capacity of patients to make a medical decision.
SEC. 5. Section 813 is added to the Probate Code, to read:

813. 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:
(a) Respond knowingly and intelligently to queries about that medical treatment.
(b) Participate in that treatment decision by means of a rational thought process.
(c) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:
(1) The nature and seriousness of the illness, disorder, or defect that the person has.
(2) The nature of the medical treatment that is being recommended by the person's health care providers.
(3) 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.
(4) The nature, risks, and benefits of any reasonable alternatives.
SEC. 6. Section 814 is added to the Probate Code, to read:
814. 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.
SEC. 7. Section 1801 of the Probate Code is amended to read:
1801. Subject to Section 1800.3:
(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.
(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.
(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).
(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section

4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

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

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

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

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

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

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

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

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

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

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

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

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

(e) In the interest of minimizing unnecessary expense to the parties to a proceeding, paragraph (2) of subdivision (b) shall not

apply to a petition pursuant to Section 1880 wherein the conservatee, after notice by the court of his or her right to object which, at least, shall include an interview by a court investigator pursuant to Section 1826 prior to the time at which the petition is filed, does not object to the proposed finding of incapacity, or waives any objections.

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

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

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

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

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

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

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

(g) Nothing in this part shall 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 person choosing treatment by spiritual means, in accordance with the tenets and practices of that individual's established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of competency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) If the court finds that the patient has the capacity to give informed consent to the recommended course of medical treatment, but that the patient refuses consent, the court shall not make an order authorizing the course of recommended medical treatment or designating a person to give consent to such treatment. If an order has been made authorizing the recommended course of medical treatment and designating a person to give consent to that treatment, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization for the course of medical treatment.

(d) In a proceeding under this part, where the court has determined that the patient has the capacity to give informed consent, the court shall, if requested, determine whether the patient has accepted or refused the recommended course of treatment, and

whether a patient's consent to the recommended course of treatment is an informed consent.

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

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

O

Senate Bill No. 730

CHAPTER 842

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.

[Approved by Governor October 12, 1995. Filed with Secretary of State October 13, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

SB 730, 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

This bill would among other things, revise the grounds for removal of a trustee and the definition of a disqualified person, as specified.

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

SECTION 1. Section 6103.6 of the Business and Professions Code is amended to read:

6103.6. Violation of Section 15687 of the Probate Code, or of Part 3.5 (commencing with Section 21350) of Division 11 of the Probate Code, shall be grounds for discipline, if the attorney knew or should have known of the facts leading to the violation. This section shall only apply to violations that occur on or after January 1, 1994.

SEC. 2. Section 1208 of the Probate Code is amended to read:

1208. (a) Except as provided in subdivision (b), if notice is required to be given to a trust or trustee, notice to trust beneficiaries is not required.

(b) Subject to subdivision (c), where the personal representative and the trustee are the same person, or where no trustee has been appointed, notice shall be given to (1) each person to whom income or principal would be required or authorized in the trustee's discretion to be currently distributed if the trust were in effect, or (2) if there are no such persons, to each person who, under the terms of the trust, would be entitled to any distribution if the trust were terminated at the time the notice is required to be given.

(c) Notice to trust beneficiaries is not required under subdivision (b) where the trust has more than one trustee and notice is given to a cotrustee who is not a personal representative.

SEC. 3. Section 2250 of the Probate Code is amended to read:

2250. (a) On or after the filing of a petition for appointment of a guardian or conservator, any person entitled to petition for appointment of the guardian or conservator may file a petition for appointment of:

(1) A temporary guardian of the person or estate or both.

(2) A temporary conservator of the person or estate or both.

(b) The petition shall state facts which establish good cause for appointment of the temporary guardian or temporary conservator. The court, upon such petition or other showing as it may require, may appoint a temporary guardian of the person or estate or both, or a temporary conservator of the person or estate or both, to serve pending the final determination of the court upon the petition for the appointment of the guardian or conservator.

(c) Unless the court for good cause otherwise orders, not less than five days before the appointment of the temporary guardian or temporary conservator, notice of the proposed appointment shall be personally delivered to the proposed ward if 12 years of age or older or to the proposed conservatee, to the parent or parents if the proposed ward is a minor, and to any person having a valid visitation

order with the proposed ward that was effective at the time of the filing of the petition. In a proceeding for temporary guardianship of the person, evidence that a custodial parent has died or become incapacitated and that the petitioner is the nominee of the custodial parent may constitute good cause for the court to order that this notice not be delivered.

(d) If a temporary guardianship is granted ex parte and the hearing on the general guardianship petition is not to be held within 30 days of the granting of the temporary guardianship, the court shall set a hearing within 30 days to reconsider the temporary guardianship. Notice of the hearing for reconsideration of the temporary guardianship shall be provided pursuant to Section 1511, except that the court may for good cause shorten time for notice of the hearing.

(e) Visitation orders with the proposed ward granted prior to the filing of a petition for temporary guardianship shall remain in effect, unless for good cause the court orders otherwise.

(f) One petition may request the appointment of a guardian or conservator and also the appointment of a temporary guardian or conservator or these appointments may be requested in separate petitions.

(g) If the court suspends powers of the guardian or conservator under Section 2334 or 2654 or under any other provision of this division, the court may appoint a temporary guardian or conservator to exercise those powers until the powers are restored to the guardian or conservator or a new guardian or conservator is appointed.

(h) If for any reason a vacancy occurs in the office of guardian or conservator, the court, on a petition filed under subdivision (a) or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the guardian or conservator until a new guardian or conservator is appointed.

SEC. 4. Section 2580 of the Probate Code is amended to read:

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. A special needs trust for money paid pursuant to a compromise or judgment for a conservatee may be established only under Chapter 4 (commencing with Section 3600) of Part 8, and not under this article.

(6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.

(7) Exercising options of the conservatee to purchase or exchange securities or other property.

(8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(9) Exercising the right of the conservatee to elect to take under or against a will.

(10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

(11) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

(13) Making a will.

SEC. 5. Section 2640.1 is added to the Probate Code, to read:

2640.1. (a) If a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, but not before the expiration of 90 days

from the issuance of letters, the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order to allow (1) any compensation or costs requested in the petition the court determines is just and reasonable to the person who petitioned for the appointment of a conservator but was not appointed, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith, and (2) any compensation or costs requested in the petition the court determines is just and reasonable to the attorney for that person, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith. The compensation and costs so allowed shall thereupon be charged to the estate of the conservatee. If a conservator of the estate is not appointed, but a conservator of the person is appointed, the compensation and costs so allowed shall be ordered by the court to be paid from property belonging to the conservatee, whether held outright, in trust, or otherwise.

(d) It is the intent of the Legislature for this section to have retroactive effect.

SEC. 6. Section 2646 is added to the Probate Code, to read:

2646. In proceedings under this chapter, the court shall only determine fees that are payable from the estate of the ward or conservatee and not limit fees payable from other sources.

SEC. 7. Section 6100 of the Probate Code is amended to read:

6100. (a) An individual 18 or more years of age who is of sound mind may make a will.

(b) A conservator may make a will for the conservatee if the conservator has been so authorized by a court order pursuant to Section 2580. Nothing in this section shall impair the right of a conservatee who is mentally competent to make a will from revoking or amending a will made by the conservator or making a new and inconsistent will.

SEC. 8. Section 6100.5 of the Probate Code is amended to read:

6100.5. (a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

(b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

(c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.

SEC. 9. Section 15642 of the Probate Code is amended to read:

15642. (a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) Where the trustee's compensation is excessive under the circumstances.

(6) Where the sole trustee is a person described in subdivision (a) of Section 21350, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

(A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

(B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)
_____ and have counseled my client,
(name of instrument)
_____, fully and privately on the nature and
(name of client)
legal effect of the designation as trustee of _____
(name of trustee)

contained in such instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and such intent is not the product of fraud, menace, duress, or undue influence.

_____ _____
(Name of Attorney) (Date)"

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(C) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(7) For other good cause.

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.

SEC. 10. Section 15687 of the Probate Code is amended to read:

15687. (a) Notwithstanding any provision of a trust to the contrary, a trustee who is an attorney may receive only (1) the trustee's compensation provided in the trust or otherwise provided in this article or (2) compensation for legal services performed for the trustee, unless the trustee obtains approval for the right to dual compensation as provided in subdivision (d).

(b) No parent, child, sibling, or spouse of a person who is a trustee, and no law partnership or corporation whose partner, shareholder, or employee is serving as a trustee shall receive any compensation for legal services performed for the trustee unless the trustee waives trustee compensation or unless the trustee obtains approval for the right to dual compensation as provided in subdivision (d).

(c) This section shall not apply if the trustee is related by blood or marriage to, or is a cohabitant with, the settlor.

(d) After full disclosure of the nature of the compensation and relationship of the trustee to all persons receiving compensation under this section, the trustee may obtain approval for dual compensation by either of the following:

(1) An order pursuant to paragraph (21) of subdivision (b) of Section 17200.

(2) Giving 30 days' advance written notice to the persons entitled to notice under Section 17203. Within that 30-day period, any person entitled to notice may object to the proposed action by written notice to the trustee or by filing a petition pursuant to paragraph (21) of subdivision (b) of Section 17200. If the trustee receives this objection during that 30-day period and if the trustee wishes dual compensation, the trustee shall file a petition for approval pursuant to paragraph (21) of subdivision (b) of Section 17200.

(e) Any waiver of the requirements of this section is against public policy and shall be void.

(f) This section applies to services rendered on or after January 1, 1994.

SEC. 11. Section 21306 of the Probate Code is amended to read:

21306. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to one or more of the following grounds:

(a) Forgery.

(b) Revocation.

(c) An action to establish the invalidity of any transfer described in Section 21350.

(d) A petition to remove a trustee under paragraph (6) of subdivision (b) of Section 15642.

SEC. 12. Section 21350 of the Probate Code is amended to read:

21350. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of any such law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of a person who is described in paragraph (1).

(b) For purposes of this section, "a person who is related by blood or marriage" to a person means all of the following:

(1) The person's spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and 6408 shall be applicable.

SEC. 13. Section 21350.5 is added to the Probate Code, to read:

21350.5. For purposes of this part, "disqualified person" means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

SEC. 14. Section 21351 of the Probate Code is amended to read:

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, or is a cohabitant with, the transferee or the person who drafted the instrument. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature of his or her intended transfer and (2) signs and delivers to the transferor and the drafter a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____, on the nature of the transfer, or
(name of client)

transfers, of property to _____
(name of potentially disqualified person)

contained in such instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in such instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because such transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____ _____"
(Name of Attorney) (Date)

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, excluding the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(A) Any instrument executed by a person who was not a resident of this state at the time the instrument was executed.

(B) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(C) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the seventh degree.

SEC. 15. Section 21353 of the Probate Code is amended to read:

21353. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue, but only to the extent that the value of the transfer exceeds the intestate interest of the disqualified person.

SEC. 16. Section 21355 of the Probate Code is amended to read:

21355. This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

SEC. 17. Section 21356 is added to the Probate Code, to read:

21356. An action to establish the invalidity of any transfer described in Section 21350 can only be commenced within the periods prescribed in this section as follows:

(a) In case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made.

(b) In case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

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