STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

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October 17, 1996

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MENTAL HEALTH
Program Support Branch

DMH INFORMATION NOTICE NO.: 96-11

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 REVISIONS AFFECTING THE DETERMINATION OF CAPACITY TO MAKE DECISIONS, CHAPTER 178, STATUTES OF 1996 (SENATE BILL 1650)

REFERENCE: DMH INFORMATION NOTICE NO.: 96-04

This notice provides information regarding a change to the Probate Code that affects the statutory requirements for a legal determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act. This determination is a legal finding and does not necessarily equate with a clinical diagnosis.

Chapter 178, Statutes of 1996 (Senate Bill 1650, Mello) provides that in determining whether an individual is of unsound mind or lacks the capacity to make a decision or do a certain act, there must be supportive evidence of a deficit in at least one of the mental functions specified. A deficit in the mental functions specified may be considered only if the deficit by itself, or in combination with one or more other mental function deficits, significantly impair 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. The diagnosis of a mental or physical disorder does not in itself mean that a person is of unsound mind or lacks the capacity to make a decision or do a certain act. In order to establish capacity, a person must be able to communicate orally, or by any other means that he or she understands and appreciates specified aspects of the decision for which the capacity to give informed consent is being determined.

Enclosed is a copy of the new law with the new language underlined. If you have any questions, you should consult with your county counsel. You may also call Mozell Zarit at (916) 327-9310.

Sincerely,

STEPHEN W. MAYBERG, Ph.D.
Director

Enclosure

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

Senate Bill No. 1650

CHAPTER 178

An act to amend Sections 813, 1881, 3201, and 3204 of, to add a heading for Part 17 (commencing with Section 810) to Division 2 of, to repeal Section 814 of, and to repeal and add Sections 811 and 812 of, the Probate Code, relating to legal mental capacity.

[Approved by Governor July 16, 1996. Filed with Secretary of State July 17, 1996.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1650, Mello. Capacity.

Existing law provides that a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act must be supported by evidence of a deficit in certain mental functions, as specified. Existing law also provides that a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do certain specified things.

This bill would revise and recast these and other related provisions, and make related technical changes.

Existing law provides that if a court determines that there is no form of medical treatment for which a conservatee has the capacity to give an informed consent, the court shall, on petition of the conservator, give the conservator the power to require the conservatee to receive the treatment. Existing law requires an interview by a court investigator of the conservatee prior to the time the petition for an order is filed, in order to notify the conservatee that he or she has the right to object to the order.

This bill would instead require the interview to occur prior to the hearing on the petition.

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

SECTION 1. A heading is added for Part 17 (commencing with Section 810) to Division 2 of the Probate Code, to read:

PART 17. LEGAL MENTAL CAPACITY

SEC. 2. Section 811 of the Probate Code is repealed.

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

811. (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. 4. Section 812 of the Probate Code is repealed.

SEC. 5. Section 812 is added to the Probate Code, to read:

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

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

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

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

SEC. 6. Section 813 of the Probate Code is amended to read:

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

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

(2) Participate in that treatment decision by means of a rational thought process.

(3) Understand all of the following items of minimum basic medical treatment information with respect to that treatment:

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

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

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

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

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

SEC. 7. Section 814 of the Probate Code is repealed.

SEC. 8. Section 1881 of the Probate Code is amended 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 811 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 811 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 hearing on the petition, 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 decisionmaking process of a long-term health care facility, as defined in subdivision (b) of Section 1418.8 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 811 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.

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