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A CONSOLIDATED LEGAL CAPACITY STANDARD

I. INTRODUCTION

Consider an adult of questionable mental capacity. Perhaps that person has a history of psychiatric problems or he just has an air about him which creates suspicion and discomfort in others. If he walked into your office today, would you be able to advise him whether his mental capacity would prevent him from buying or selling a home, voting, marrying, writing a will, acting as a trustee, receiving government supplemental income, or retaining custody of his minor children? Your advice would have to turn on the definition of legal capacity.

The California code contains over fifty statutes that directly address mental incapacity. Unfortunately, most of these statutes incorporate disparate definitions of mental incapacity, set different parameters on normal behavior, and make confusing cross-references. This lack of cohesion in the law confuses many legal and non-legal professionals who must decipher the statutes in order to advise those of uncertain mental acuity. Cautious counselors may steer such individuals away from entering into contracts, writing wills, marrying, or holding public office.¹ This caution may ultimately thwart the alleged incompetent's attempt at independence.

This comment examines California mental health legislation and the impact this maze of statutes has on a person's ability to lead a normal life. It discusses the weaknesses in the California statutes which address the mental competence required for the conveyance of property,² commercial activity,³ and the exercise of such fundamental rights as voting.⁴ Moreover, this comment studies the difficulties inherent in defining mental incompetence, a task which is aggravated by the differing purposes that underlie laws dealing with alleged

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1. See generally *In re Lingenfelter's Estate*, 38 Cal. 2d 571, 581-84, 241 P.2d 990, 996-98 (1952); CAL. BUS. & PROF. CODE § 6007 (West 1974 & Supp. 1987); CAL. CIV. CODE § 39 (West 1982).

2. See generally CAL. CIV. CODE § 39 (West 1982); *Id.* at § 40; CAL. PROB. CODE § 6111 (West 1977 & Supp. 1987).

3. See generally CAL. CIV. CODE §§ 2355, 2356 (West 1985); *Id.* at § 41.

4. See generally CAL. ELEC. CODE §§ 707.5-707.8 (West 1977 Supp. 1987); CAL. CIV. CODE § 232 (West 1982 & Supp. 1987).

incompetents.⁵

Finally, this comment proposes the consolidation of the current law into a single statute. Many of the existing code sections contain workable definitions of legal incapacity. Placing these statutes in one location would alleviate confusion and thereby enable relatives, attorneys, and other professionals to more accurately advise on matters of legal capacity. The proposed California Consolidated Legal Capacity Standard not only unifies the existing definitions of legal capacity, but it makes them more flexible.

II. BACKGROUND

The current status of California's legislation that addresses legal incompetence is often misunderstood by alleged incompetents and their family, employers, psychiatrists, social workers, counselors, physicians, and attorneys. Although medical and social work professionals have made great progress in understanding and treating mental illness, statutory and common law have failed to keep pace and establish a working definition of legal incapacity.⁶ This uncertainty in the law frustrates those who attempt to help the mentally ill and frequently complicates alleged incompetents' life-styles.⁷

A. *Definitions of Mental Incompetence*

The legal competence of an individual is measured against varying definitions of mental capacity. Examples of these definitions are offered by the statutory provisions and cases set forth below.

1. *California Welfare and Institutions Code*

California Welfare and Institutions Code section 4512 refers to

5. ASCH, *MENTAL DISABILITY IN CIVIL PRACTICE* 9 (1973).

6. The law has not been too successful in securing the help of medicine in formulating workable rules. The increasing knowledge of causation and treatment of mental disabilities has not resulted in more effective assimilation into law. . . . Vague, misleading, and anachronistic terms describing various disabilities have permeated the statutory material in the field, exacerbating the confusion.

Id.

7. An alleged incompetent is an individual whose behavior or record of participation in the mental health system (state mental institutions, community mental health centers, hospital psychiatric wards, visits with a psychiatrist, etc.) casts doubt upon his mental, and therefore legal, capacity. He is not currently committed to a state mental institution, nor necessarily an adjudicated incompetent, or conservatee. See, e.g., *Lingenfelter's Estate*, 38 Cal. 2d at 581-84, 241 P.2d at 996-98.

mental incapacities in terms of "developmental disabilities."⁸ This term includes mental retardation, cerebral palsy, epilepsy, and autism, but excludes handicaps that are solely physical. Sections 5000-5999 of the Welfare and Institutions Code, or the Lanterman-Petris-Short Act (LPS Act), also sets standards for capacity, but in the context of regulating conservatorships⁹ and social services. In determining capacity, the LPS Act focuses on "grave disabilities," which it defines as an inability to provide for basic needs such as food, clothing, and shelter, or incompetence as defined by Penal Code section 1370 coupled with charges of a serious felony and an inability to either understand or assist in legal proceedings.¹⁰ Unlike Welfare and Institutions Code section 4512, however, the LPS Act does not deem a person "gravely disabled" solely because that person is mentally retarded.¹¹

8. CAL. WELF. & INST. CODE § 4512(a) (West 1984 & Supp. 1987) states:

(a) "Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

Id.

9. CAL. WELF. & INST. CODE §§ 5000-5563 (West 1984 & Supp. 1987).

A conservator is one who takes care of the conservatee by making purchases, contracts, decisions and, often, by coordinating other day-to-day activities. A conservatorship is established by court decree and is terminated by order of the court or by the death of the conservatee. *See* CAL. PROB. CODE §§ 1800, 1860 (West 1981).

10. CAL. PENAL CODE § 1370 (West 1982 & Supp. 1987) (dealing with the appointment of a conservator after the granting of a decree of incompetence to stand trial).

11. CAL. WELF. & INST. CODE § 5008 (West 1984 & Supp. 1987) states:

Definitions: Unless the context otherwise requires, the following definitions shall govern the construction of this part. . . .

(h) "gravely disabled" means: (1) A condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter; or

(2) A condition in which a person has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:

(i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.

(ii) The indictment or information has not been dismissed.

(iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of his defense in a rational manner. . . . "[G]ravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his basic personal needs for food, clothing,

The LPS Act also refers to "mentally disordered persons,"¹² the definition of which is commonly found in case law.¹³ However, in defining "mentally disabled persons," courts often refer to an Administrative Code section that has been repealed. The courts' references to an outdated source causes confusion. Before its repeal, that statute defined a mental disorder as the mental illnesses listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), a manual used by mental health professionals.¹⁴

2. *California Probate Code*

The Probate Code uses the more subjective term of "unsound mind" to describe mental incapacity.¹⁵ In discussing the validity of wills, the Probate Code states that only individuals who are of sound mind may execute a will.¹⁶ Courts have construed "unsound mind" to mean either insanity of such broad character as to establish mental incapacity generally, or a specific and narrower form of insanity under which the testator is the victim of hallucinations or delusions which directly affect the testamentary act.¹⁷

or shelter. The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone. . . .

Id.

12. WELF. & INST. CODE § 5001(a) (West 1984 & Supp. 1987) states: "The provisions of this part shall be construed to promote the legislative intent as follows: (a) To end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to eliminate legal disabilities. . . ." *Id.*

13. *See, e.g.*, Conservatorship of Chambers, 71 Cal. App. 3d 277, 282 n.5, 139 Cal. Rptr. 357, 361 n.5 (1977). This proposition is still cited in decisions about conservatorships. *See, e.g.*, *In Re Gondolfo*, 36 Cal. 3d 889, 897, 686 P.2d 669, 673, 206 Cal. Rptr. 149, 153 (1984).

14. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III].

The table of contents of the DSM-III lists the following Diagnostic Categories: Disorders usually first evident infancy, childhood, or adolescence; organic mental disorders; substance use disorders; achizophrenic disorders; paranoid disorders; psychotic disorders; not elsewhere classified affective disorders; anxiety disorders; somatoform disorders; dissociative disorders; psychosexual disorders; factitious disorders; disorders; of impulse control not elsewhere classified; adjustment disorders; psychological factors affecting physical condition; personality disorders. *Id.*

15. CAL. PROB. CODE § 6100 (West 1981 & Supp. 1987).

16. *Id.* *See also* CAL. PROB. CODE § 20 (West 1981) (providing that every person of sound mind, over the age of 18 years, may dispose of his or her separate property, real and personal, by will).

17. *See* Estate of Martin, 270 Cal. App. 2d 506, 509, 75 Cal. Rptr. 911, 912 (1969) (wherein an elderly man eliminated his son from his will because of a delusion that the son was planning to put him in a mental institution to get all of his money.). *See also* *Lingenfelter's Estate*, 38 Cal. 2d at 581-84, 241 P.2d at 996-97 (stating that testamentary

3. *Judicial Interpretations of Incompetence*

Courts most often address mental incompetence in cases involving conservatorships. Under the Welfare and Institutions Code, a court may establish a conservatorship for anyone who it deems to be gravely disabled as the result of a mental disorder or chronic alcoholism.¹⁸ However, in establishing conservatorships, courts also look to the Health and Safety Code. Under that statute, the court may appoint the Director of Developmental Services as conservator of any developmentally disabled person who is eligible for a regional or state mental institution.¹⁹

Courts also turn to the Probate Code.²⁰ Under that code, a court may establish a "conservatorship over the person" for an individual who is unable to care for himself. A "conservatorship over the estate" may also be created when someone is susceptible to fraud or is substantially unable to manage his finances.²¹

capacity cannot be destroyed by showing a few isolated acts, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act).

18. See CAL. WELF. & INST. CODE § 5350 (West 1984 & Supp. 1987).

19. CAL. HEALTH & SAFETY CODE § 416 (West 1979) states:

The Director of Developmental Services may be appointed as either guardian or conservator of the person and estate, or person or estate of any developmentally disabled person, who is either of the following:

- (1) Eligible for the services of a regional center;
- (2) A patient in any state hospital, and who was admitted or committed to such hospital from a county served by a regional center. . . .

Id.

20. CAL. PROB. CODE § 1801(a) (West 1981 & Supp. 1987) states:

(a) A conservator of the person may be appointed for the person who is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter, except as provided for such person as described in subdivision (d) [limited conservatorship].

(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 such person described in subdivision (d) [limited conservatorship]. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

Id.

21. CAL. CIV. PROC. CODE § 372 (West 1973 & Supp. 1987) states:

When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, such person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court. . . .

The guardian or conservator . . . shall have power . . . to compromise [the action or proceeding], . . . to agree to the order or judgment . . . or release or discharge any claim . . . of the ward or conservatee. . . . Where reference is made in this section to "incompetent person," such reference shall be deemed to include "a person for whom a conservator may be appointed."

Id. See also CAL. PROB. CODE §§ 3600, 3603 (West 1981) (covering compromise judgments

4. *Academic Definitions of Mental Incapacity*

Apart from statutory terminology, scholars generally define mental incapacity as an abnormal inability to understand. Scholars characterize insanity as a "condition of mind which is so impaired in function, or so deranged, as to induce a deviation from normal conduct in the person so afflicted."²² Scholars also define insanity as derangement or distraction.²³ The definition of an insane person may be as broad as to include someone who is unable to understand and deal with the ordinary affairs of life.²⁴

One writer, in attempting to define incapacity, states:

A reasonable test for the purpose of determining whether a mental infirmity operates to render a person incapable of binding himself absolutely by contract is whether his mind has been so affected as to render him unable to understand the nature and consequences of his acts or the character of the transaction in question.²⁵

B. *Legal Result of Incapacity*

Suspected mental incapacity casts doubt on the validity of each transaction conducted by an alleged incompetent. The power to convey property through a will,²⁶ the power of appointment,²⁷ and the

for "minors or incompetent persons").

22. ASCH, *supra* note 5, at 10.

23. *Id.* at 9.

24. *Id.* at 8, 9 (citing *Lewis v. Lewis*, 199 S.C. 490, 20 S.E.2d 107 (1942)).

25. *Id.* at 10.

26. CAL. PROB. CODE § 6111 (West 1987) states:

(a) A will that does not comply with Section 6110 [dealing with formal wills] is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the hand writing of the testator. (b) If a holographic will does not contain a statement as to the date of its execution and:

(2) If it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity.

Id. See also CAL. EVID. CODE § 870 (West 1966 & Supp. 1987) (stating that an intimate acquaintance and a subscribing witness are persons who may give an opinion about a testator's sanity at the time of execution of a formal will); CAL. PROB. CODE § 6100; *Id.* at § 6112(e); CAL. EVID. CODE § 701 (West 1966 & Supp. 1987).

27. CAL. CIV. CODE § 1382.1 (West 1982) states: "A power of appointment can be created only by a donor having the capacity to transfer the interest in property to which the power relates. . . ." *Id.* at § 1384.1 states: "(a) A power of appointment can be exercised only by a donee having the capacity to transfer the interest in property to which the power relates. . . ." *Id.*

power to execute contracts²⁸ require varying degrees of mental competence.

The power to convey real property requires a standard of competence deemed the "sound mind."²⁹ An individual suspected of being insane should generally not attempt to convey a deed, as a deed under which the defendant claims title is voidable on the ground that the grantor is insane.³⁰

Mental incapacity may also restrict the ability of an individual to act as a trustee,³¹ an agent or employee,³² a business partner,³³ a public official,³⁴ a school teacher,³⁵ and an attorney.³⁶ Moreover, mental incapacity jeopardizes an individual's right to drive and to

28. CAL. CIV. CODE § 1556 (West 1982), enacted in 1872, states that: "All persons are capable of contracting, except . . . persons of unsound mind. . . ." *Id.*

CAL. PROB. CODE § 3012(b) (West 1981 & Supp. 1987) goes one step further and states:

- (b) A spouse lacks legal capacity to: (1) Manage and control including the legal capacity to dispose of, community property if substantially unable to do so;
- (2) Join in or consent to a transaction . . . if [the spouse has no] legal capacity for the particular transaction measured by principles of law otherwise applicable to the particular transaction.

Id. See also CAL. PROB. CODE § 1871 (West 1981 & Supp. 1987). CAL. PROB. CODE § 3145 (West 1981) states: "A court determination pursuant to this chapter that a spouse lacks legal capacity for the proposed transaction affects the legal capacity of the spouse for that transaction alone and has no effect on the legal capacity of the spouse for any other purpose." *Id.*

29. ASCH, *supra* note 5, at 479, 482 (citing *Elder v. Schumacher*, 18 Colo. 433, 440, 33 P. 175, 177 (1893)). Case law also holds that one who is unable to convey or contract may not avoid or affirm an attempted transfer of real property as long as he has a questionable mental condition. *Id.* at 483 (citing *Downham v. Holloway*, 158 Ind. 626, 64 N.E. 82 (1902)). That same person, however, may passively acquire title to property by adverse possession, or by a gift, if he is not under the restraint of a conservatorship. *Id.* at 462 (citing *Wiser v. Clinton*, 82 Conn. 148, 151, 72 A. 928, 929 (1909)).

30. CAL. CIV. CODE §§ 39, 40 (West 1982).

31. *Id.* at § 2281 (stating that the office of a trustee is vacated when a conservator or guardian is appointed over the trustee or his estate).

32. *Id.* at § 2355 (stating that an agency is terminated by the incapacity of the agent to act as such). See also *Id.* at § 2356 (stating that unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by the incapacity of the principal to contract).

33. CAL. CORP. CODE § 15032 (West 1977 & Supp. 1987) (stating that on application by or for a partner, the court shall decree a dissolution whenever a partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind).

34. CAL. GOV'T CODE § 1770 (West 1980 & Supp. 1987) (stating that an office becomes vacant before the expiration of a term when an adjudication is made pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident and that there is reasonable cause to believe that he will not be able to perform the duties for the remainder of his term).

35. CAL. EDUC. CODE § 44932 (West 1978 & Supp. 1987) (stating that no permanent employee shall be dismissed, except for cause, which includes incompetency and a physical or mental condition that renders the employee unfit to instruct or associate with children).

36. CAL. BUS. & PROF. CODE § 6007 (West 1974 & Supp. 1987).

vote.³⁷

Mental incapacity, however, will not relieve an individual of liability arising from negligence, although it may shield him from punitive damages.³⁸ Mental incompetence also affects an individual's fundamental rights such as the right to enter into marriage³⁹ and the right to have custody of one's children.⁴⁰

In addition to rendering an individual legally incompetent, mental incompetence may also hamper an individual's economic independence and self-sufficiency. For instance, state and federal benefits are available only once a mental incompetent is placed under a conservatorship or is designated as "disabled" under the Department of Social and Health Services' interpretation of the Social Security Act.⁴¹ In an unfortunate but frequently encountered "catch-22" situation, an alleged incompetent who attempts to apply for supplemental security income while independent of a conservator and who is subsequently deemed incapable of managing his own affairs, may be placed under a conservatorship. If the social security applicant is found to be capable of running his own life or has access to any other source of income, however small, public assistance is available.

C. Policy

Although the application of legislation threatens a mental incompetent's legal and economic independence, the intent behind such legislation is commendable. For instance, the aim of the LPS Act, the most thorough piece of legislation on mental health, is to end the inappropriate, indefinite, and involuntary commitment of mentally

37. See CAL. VEH. CODE § 12805(e) (West 1971 & Supp. 1987).

38. CAL. CIV. CODE § 41 (West 1982) states that "a person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." *Id.* But see Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law*, 50 GEO. WASH. L. REV. 17, 46 (1981) (proposing a negligence standard lower than that of the "reasonable man" for the mentally impaired who commit torts).

39. CAL. CIV. CODE § 4425 (West 1983 & Supp. 1987) (stating that a marriage is voidable and may be adjudged a nullity if either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband and wife); *Id.* at § 4201 (stating that no marriage license shall be granted when either of the applicants is insane); *Id.* at § 4506 (stating that a court may decree a dissolution of the marriage or legal separation on the grounds of incurable insanity).

40. CAL. CIV. CODE § 232 (West 1982 & Supp. 1987) (stating that persons under the age of 18 are entitled to be declared free from parental custody and control when their parents have been declared by a court to be developmentally disabled or mentally ill and incapable of supporting or controlling the child in a proper manner, or when their parents are mentally disabled and are likely to remain so in the foreseeable future).

41. CAL. WELF. & INST. CODE § 12050 (West 1985).

disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to eliminate legal disabilities.⁴²

The policy which underlies the Welfare and Institutions Code emphasizes making services available to the developmentally disabled community and helping the developmentally disabled to "approximate the pattern of everyday living available to the non-disabled."⁴³ The Welfare and Institutions Code also works to eliminate the presumption of incompetence that often arises when an individual has been treated for a mental disorder or placed under a conservatorship in the past.⁴⁴

California courts express a similar policy. For instance, in *Conservatorship of Roulet*,⁴⁵ the California Supreme Court emphasized the need for caution in dealing with incompetents, especially when establishing a conservatorship. The court states: "grave disability proceedings carry special threats to reputation. . . . It is implausible that a person labeled by the state as so totally ill could go about, after his release, seeking employment, applying to schools, or meeting old acquaintances with his reputation fully intact."⁴⁶ In *North Los Angeles County Regional Center v. Jarakian*,⁴⁷ another California court explains that the primary state interests in statutes that deal with the developmentally disabled lie in ensuring that the developmentally disabled lead independent, productive, and normal lives free of needless restrictions.⁴⁸

42. CAL. WELF. & INST. CODE § 5001(a) (West 1984 & Supp. 1987).

43. *Id.* at § 4501 (West 1984) (stating that persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the federal Constitution and laws and the constitution and laws of the State of California).

44. California Welfare and Institutions Code sections 5331, 5368 state: "A person who is no longer a conservatee shall not be presumed to be incompetent by virtue of his having been a conservatee under the provisions of this part." *Id.* California Welfare and Institutions Code section 5331 states: "No person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder or chronic alcoholism, regardless of whether such evaluation or treatment was voluntarily or involuntarily received." *Id.*

45. 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 424 (1979).

46. *Id.* at 229, 590 P.2d at 7, 152 Cal. Rptr. at 431.

47. 84 Cal. App. 3d 157, 148 Cal. Rptr. 296 (1978).

48. In discussing proceedings to commit an individual to the care of the state, the court explains the state interest in developmentally disabled persons:

A close examination of the statute pertaining to all classes of developmentally disabled persons reveals that there are two primary state interests underlying the statutory purpose, namely, (1) the state's responsibility for its developmentally disabled citizens, which includes the responsibility to see that such citizens lead as independent, productive, and normal lives as possible and that their individual integrity and liberty is respected and not needlessly restricted unnecessarily . . . and (2) protection of society and of developmentally disabled persons from harm resulting from those whose disability makes them dangerous. . . .

III. STATEMENT OF THE PROBLEM

As demonstrated above, an individual's mental health drastically affects that individual's legal and economic independence. The law, however, imposes obstacles to those who must rely on incapacity statutes when advising patients or clients.⁴⁹ The statutes that address capacity and, more specifically, those that define incapacity are especially troublesome to decipher. Those individuals whose mental capacity places them in the abyss between legal competence and incompetence live in an equally confusing and uncertain state of legal limbo. They are restricted from normal interaction with the community because neither they nor their advisers understand the statutes which affect mental capacity.

The consequences of this misunderstanding loom especially great given that individuals who are treated as incompetent for one purpose (such as for transferring property) are likely to be treated as incompetent for another, often unrelated, purpose (such as voting).⁵⁰ For instance, the current California Elections Code clearly states that those under a conservatorship or in a mental treatment facility are ineligible to register to vote.⁵¹ Incompetence also restricts an individual's ability to retain custody of a child.⁵²

Moreover, the label of "incompetent" affects transactions that occur before an individual was officially declared legally incompetent. For instance, in a Ninth Circuit Court of Appeals case regarding an alleged incompetent's joint bank account which was held with her nephew, the nephew had withdrawn money three days before the guardianship was established over his aunt.⁵³ The court refused

Id. at 164-65, 148 Cal. Rptr. at 300-01.

49. Examples of those who use the mental health statutes in their occupations include: attorneys, physicians, psychiatrists, psychologists, counselors, social workers, employers, clergy, and government agencies.

50. Feldman, *Competence, a Medicolegal Quagmire*, LEGAL ASPECTS OF MEDICAL PRACTICE, October, 1982, at 6. Discussing the use of capacity standards by physicians, the author states:

The issue of competence is not conclusively a medical, but frequently a judicial one. It depends upon legal elements. It is essential that physicians become more fully informed regarding the specific definitions which the courts utilize to determine competency. A psychiatrist can do an extensive mental evaluation including psychiatric interviews, perform neurological examinations, order various laboratory procedures, including electro-encephalograms and brain scans, and supervise the use of various psychometric instruments, yet not validly determine the ability of an individual to handle an estate or perform other acts.

Id.

51. See CAL. ELEC. CODE §§ 707.5-707.8 (West 1977 & Supp. 1987).

52. CAL. CIV. CODE § 232 (West 1982 & Supp. 1987).

53. Estate of Bettin, 543 F.2d 1269 (9th Cir. 1976).

to treat the money as a gift to the nephew, despite his aunt's acquiescence to the withdrawal, because the court deemed her incompetent to make a gift. Thus, conservatorship proceedings may reach into the past to invalidate transactions conducted by the conservatee.

Contracts made by the alleged incompetent prior to the conservatorship proceeding are also susceptible to rescission.⁵⁴ Employers and businesses thus are understandably unwilling to hire or sell to persons whose legal capacity is uncertain.

IV. PROPOSAL

Standards for the mental capacity required for legal transactions⁵⁵ should reflect the complexity and potential impact of the transaction in question.⁵⁶ The standard should also be flexible and should avoid labeling an individual "globally" incompetent.⁵⁷ Because physicians, social workers, counselors, and attorneys rely on the definition of legal capacity set forth by the proposed statute, it is critical that the definition be clear and thorough.⁵⁸

A. *Location of the New Statute*

A comprehensive standard for legal capacity should help practitioners answer mental competency questions quickly and accurately. For this reason, the standard for legal capacity would be placed within the California Civil Code. The Welfare and Institutions Code would be an inappropriate location, because the proposed statute would not necessarily apply to individuals who are on welfare or who are in institutions. The Health and Safety Code similarly would be inappropriate, as the proposed statute would not deal directly with public health, or with public safety in the criminal context.

B. *Impact of the Consolidated Legal Capacity Standard*

The proposed standard would prompt a clearer understanding of whether an individual has legal capacity and would thereby alleviate the doubts of those who wish to conduct business with someone

54. See CAL. CIV. CODE §§ 39-40 (West 1982). See generally *Id.* at §§ 1556-1557, 2355-2356 (West 1985).

55. VAN OMEREN, MENTAL ILLNESS AFFECTING MATRIMONIAL CONSENT 224 (The Catholic University of America Canon Law Studies No. 415, 1961).

56. J. Weisenstock, *Physicians' Confusion Demonstrated by Competency Requests*, 30 J. FOR. SCI. 37, 38 (Jan. 1985) (dealing with a summary of the results of a study on the requests for competency evaluations).

57. *Id.* at 38.

58. *Id.* at 41.

of questionable mental competence.⁵⁹ The proposed standard would also enable attorneys to more readily recognize potential incapacity. Finally, certainty in the standard for legal capacity would render an individual, his relatives, employers, and the community more certain of the parameters within which he can legally form relationships and be responsible for his actions.

C. *Text of the Proposed Statute*

The language of the proposed Consolidated Legal Capacity Standard is set forth below:

CONSOLIDATED LEGAL CAPACITY STANDARD

§ 6100 Short Title

This provision shall be known and may be cited as the CONSOLIDATED LEGAL CAPACITY STANDARD.

§ 6110 Legislative Intent

The legislative intent in the provisions of this part shall be:

(a) To consolidate previous sections of the California Code which deal with mental capacity in non-criminal situations.

(b) To enable legal practitioners, counselors, social workers, psychiatrists, physicians, clergy, government agency employees, employers, and relatives of an individual of questionable mental capacity to advise such individuals more accurately.

(c) To clarify the criteria for determining whether an alleged incompetent's actions are legally valid.

(d) To clarify the definition of legal capacity, to eliminate situations where overly cautious advisors, who have misunderstood previous statutes, direct an alleged incompetent's activities in an unnecessarily restrictive manner and hamper the individual's development of a normal, independent lifestyle.

§ 6110 Scope

This provision shall apply to non-criminal situations wherein the validity of the legal relationship or status is determined by the actor's mental capacity.

§ 6120 Use of This Provision

The parameters listed below are to be applied singly to the

59. S. ASCH, *supra* note 5, at 639 (stating that current statutes fail to set definite and clear standards for determining which of the personal rights of the mentally disabled should be restricted because of the disability).

characteristics demonstrated by the alleged incompetent, beginning with (a). If the characteristics fit the description of the parameter, the individual in question is not legally capable of validly acting in the way described within that parameter. The facts of each case may fit several parameters.

Because of the uniqueness of each individual and society's increased awareness of mental health problems, it would be counterproductive to include rigid definitions of mental states such as "unsound mind," or "dangerous to self." Professionals who use the Consolidated Legal Capacity Standard should rely on their own expertise, in corroboration with that of a mental health professional, to determine whether their client fits the definition.

§ 6130 Parameters of Legal Capacity

(a) If an individual is of unsound mind, or easily subject to coercion at the time of the act in question, he:

- (1) is not legally competent to write a will,⁶⁰ and
- (2) is not legally competent to vote.⁶¹

(b) If an individual does not understand the significance of legal obligations, he:

(1) is not legally competent to sign as a party to a contract;⁶²
and

- (2) is not legally competent to witness a will.⁶³

(c) If an individual is incapable of managing his own affairs, he:

- (1) is not legally competent to act as a partner,⁶⁴
- (2) is not legally competent to convey property,⁶⁵ and
- (3) shall be placed under a conservatorship over the estate.⁶⁶

(d) If an individual is incapable of living safely in freedom, even with the aid of others,⁶⁷ or is dangerous to himself, he:

60. See *Lingenfelter's Estate*, 38 Cal. 2d 571, 241 P.2d 990 (1952); *Estate of Martin*, 270 Cal. App. 2d 506, 75 Cal. Rptr. 911 (1969); CAL. PROB. CODE §§ 6100, 6111 (West 1981) (dealing with capacity to write a will).

61. See CAL. ELEC. CODE §§ 707.5-707.8, (West 1977 & Supp. 1987) (dealing with capacity to vote).

62. See CAL. CIV. CODE §§ 38, 39, 1556, 1557 (West 1982) (dealing with capacity to contract). See also ASCH, *supra* note 5, at 10.

63. See CAL. PROB. CODE § 6112(a) (West 1987); CAL. EVID. CODE § 701(b) (West 1985 & Supp. 1987) (dealing with disqualification of a witness).

64. See CAL. CORP. CODE § 15032(a) (West 1977 & Supp. 1987) (dealing with partnerships).

65. See CAL. CIV. CODE § 39 (West 1982) (dealing with conveyance of property).

66. See CAL. WELF. & INST. CODE § 5350 (West 1984 & Supp. 1987); CAL. PROB. CODE § 1801 (West 1981 & Supp. 1987); CAL. HEALTH & SAFETY CODE § 416 (West 1979) (dealing with conservatorships).

67. See *In re Conservatorship of Wilson*, 137 Cal. App. 3d 132, 135, 186 Cal. Rptr.

- (1) is not legally competent to enter into marriage,⁶⁸
 - (2) is not legally competent to have custody over his children,⁶⁹
- and
- (3) shall be placed under a conservatorship over the person.⁷⁰
- (e) If an individual is dangerous to others, he:
- (1) is not legally competent to retain parental rights,⁷¹
 - (2) shall be placed under civil commitment.⁷²

D. *Application of the Proposed Statute*

Before applying the Consolidated Legal Capacity Standard, a professional should be personally acquainted with the alleged incompetent. It is important to understand which relationship or act is being challenged for legal validity, the individual's history within the mental health system, and his current living status; whether he is independent, lives in a state-operated halfway house, depends on relatives, or is fully reliant on Federal Supplemental Security Income.

A suggested method for determining legal capacity using the Consolidated Legal Capacity Standard begins with a series of questions and answers between the professional and the alleged incompetent. Through hypothetical stories and visual aids, one will be able to recognize whether the individual is easily subject to coercion, understands the significance of the specific legal obligation in question, and is capable of living independently. If there are several professionals who currently advise the alleged incompetent, it is recommended that they consult with one another in making a determination about legal capacity.

A professional should formalize his determination about legal capacity in an "opinion letter," co-written with a mental health professional, so that the alleged incompetent will be fully informed of the relationships he is legally capable of creating, continuing, or changing. And, if challenged, the letter may serve as proof of his

748, 749 (1982).

68. See CAL. CIV. CODE §§ 4100, 4201, 4506, 4510 (West 1983 & Supp. 1987); CAL. PROB. CODE § 1900 (West 1985) (dealing with marriage).

69. See *In re R.S.*, 167 Cal. App. 3d 946, 965, 213 Cal. Rptr. 690, 701 (1985); CAL. CIV. CODE § 232 (West 1981 & Supp. 1987) (dealing with child custody).

70. See *Wilson*, 137 Cal. App. 3d 132, 186 Cal. Rptr. 748 (1982); CAL. WELF. & INST. CODE § 5350 (West 1974 & Supp. 1987); CAL. PROB. CODE § 1801 (West 1981 & Supp. 1987); CAL. HEALTH & SAFETY CODE § 416 (West 1979) (dealing with conservatorship over the person).

71. See CAL. CIV. CODE §§ 232-239 (West 1982 & Supp. 1987).

72. See CAL. WELF. & INST. CODE §§ 5150, 5200, 6500 (West 1984 & Supp. 1987) (dealing with civil commitment).

legal competence.

Most professionals are not trained in determining legal competence. Thus, effective use of the the proposed Legal Capacity Standard requires training. Seminars and publications should supplement the statute with case studies designed to illustrate competence and incompetence as defined by the Consolidated Legal Capacity Standard.

V. HYPOTHETICAL APPLICATION OF THE CONSOLIDATED LEGAL CAPACITY STANDARD

The Case of L:

In order to facilitate implementation of the Consolidated Legal Capacity Standard by professionals who deal with the question of legal capacity, a hypothetical example of the process is set forth below.

L's parents have asked their attorney whether their daughter can legally take the next step toward independence and sign a rental agreement for her own apartment, work part-time for XYZ printing company, and buy a television on an installment plan. The story of L, as gathered by her attorney through interviews with her and her parents and psychiatrist, is set out below.

L is a 24-year-old woman diagnosed as a schizophrenic with borderline retardation. She had an initial mental breakdown twelve years ago. She underwent special remedial schooling for seven years thereafter. She was medicated with the anti-psychotic drug H for 10 years, and now takes the drug P to control her symptoms. She visited her psychiatrist regularly for 10 years, then had a second breakdown which led to temporary hospitalization, and commitment to a minimum care state mental hospital facility for two years. Her third breakdown was caused by her unprovoked refusal to take the medication, subsequent violent reaction to the "cold turkey" withdrawal from the drug, and led to placement in the maximum treatment state mental hospital for two years. Her situation has now improved to the point where she is currently living in the state-operated out-patient group home. She is receiving minimal financial support from Federal Supplemental Security Income. The State provides the housing and therapy programs for the group home residents.

During his interview with L, the attorney asked her the following questions and received the following responses:

1. *Do you have a checking account?* No. *Savings account?* Yes.
2. *When your bank sends statements to you each month, does their balance match the one in your passbook?* Yes.

3. *How long have you had this savings account?* Five years.
4. *If you live in an apartment, you must pay rent every month. Do you know how you will do this?* I will withdraw the money and give it to the manager.
6. *If the stove in your apartment didn't work, what would you do? Fix it. What if your manager has promised to fix your front door that doesn't lock, but hasn't done anything for six months?* I don't know.
7. *How will you pay for your telephone and utilities at the apartment?* I don't need utilities, and I always pay every time I make a long distance telephone call.
8. *By the way, once you live there, whose apartment is it?* It is mine, all mine, and I can do whatever I want.
9. *If you worked at XYZ Printing Co., how would you get from your apartment to work? By bus. How much does that cost?* I will have a bus pass.
10. *Have you ever had a job before? Yes. Did you ever skip work?* No.
11. *If you didn't feel good and didn't like your job, what would you do? I wouldn't go. Then what would you do? I would go to the ocean. For how long? Until someone came to get me. Have you ever done this? No. What would you do about your job and apartment while you were at the ocean?* I don't know.
12. *If you worked at XYZ Printing Co., and were eating your lunch in the park one day, and a young man came up to you and asked where you worked, how much money is in the cash register at the end of the day, where you hid the money at night, and whether there was a burglar alarm in the store, would you tell him?* If he was nice.
13. *What if someone was trying to get you to sign a piece of paper so they could take your T.V. that you paid a lot of money to buy? If it is mine, no one else can have it! I won't let them take it.*
14. *Have you ever watched a very old man sign a piece of paper? Yes. How would you know if he understood what was on that piece of paper?* If he could read it.
15. *Have you ever voted in a public election? No. Do you know how to vote? Yes, at school they taught us how. How do you decide who to vote for? The one who says what I like. What if someone said that you have to vote for Mr. Y, and you wanted to vote for Mr. X? No one can make me do anything!*
16. *Have you ever hit someone? No. Have you ever beat up on someone? No. Have you ever slapped someone? Yes, Joe, because he was*

bugging me.

17. *Have you ever tried to commit suicide? No. Have you ever tried to burn down your room? No.*

18. *What would happen if you told someone a lie or answered a question in a way that you knew was wrong? I would never do that because that is sinning and I would go to hell!*

Based on the above information and that supplied by the psychiatrist (with L's permission), the attorney reached the following conclusions upon application of the case to the Consolidated Legal Capacity Standard.

Under parameter (a), it appears that L has a sound mind but may be subject to coercion under strong pressure. L would be able to write a will and vote. Under parameter (b), L understands to a limited extent the significance of legal obligations. She would have the capacity to purchase relatively small items like a T.V. and to rent an apartment with limited supervision by her parents. She is also capable of witnessing a will: the psychiatrist affirms this conclusion by saying that L has a very clear memory for important ceremonies. L appears marginally capable of managing her own affairs and meets the requirements of parameter (c).

L is competent to act as a passive limited partner and of receiving property. However, the sale or lease of her property to another would need to be done under supervision because of the high potential for strong coercion. Since L's estate at this point is quite simple, there is no need for a conservatorship over the estate at this time. Under parameter (d), L is definitely capable of living safely in freedom and is not dangerous to herself—as corroborated by her psychiatrist. Likewise, L is not dangerous to others and has no criminal record, so she does not fit under the prohibitions of parameter (e).

In response to the specific questions posed by L's parents to their attorney, L has legal capacity to buy a T.V., rent an apartment, and with some supervision, work in the printing store doing behind-the-scenes work with restricted access to the business's security information.

VI. CONCLUSION

The legality of an alleged incompetent's actions and relationships turn on the definition and parameters of legal capacity. Therefore, it is critical that those who provide guidance to individuals whose capacity is in question do so accurately. The California laws that address mental capacity render uncertain answers to the legality of commencing, continuing, or changing a relationship or transaction

involving one of questionable mental competence.

Consolidation of the current statutory and case law will clarify the parameters of legal competence and will thereby enable both legal and nonlegal advisors to offer more precise guidance to their clients. As a result, a more consistent treatment of alleged incompetents will be possible.

Eva S. Nixon