

# Mental Incapacity to Marry

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## I. Freedom to Marry versus the Responsibilities of Matrimony

Marriage is a fundamental right protected by the federal Constitution. The U.S. Supreme Court has termed marriage one of the "basic civil rights of man," fundamental to our very existence and survival.<sup>2</sup> However, to an experienced conservatorship attorney, the notion that people should be free to marry whomever they choose is a simplistic and misleading platitude. Indeed, the twin causes of freedom and the pursuit of happiness would be ill served by imposing the bounds of matrimony, including the duty of spousal support, on a person who was so falling down drunk or drugged during a marriage ceremony that he or she was unaware of where he and she was, or what he and she or anyone else said at the ceremony.<sup>3</sup> To put it another way, one side of the coin called decency announces that Americans are free to perform many acts, but the other side reminds us that competent people are responsible for the consequences of exercising that freedom.

As America grays, the proportion of our population suffering from age related dementias increases. A Congressional study entitled "Losing A Million Minds: Confronting the Tragedy of Alzheimer's Disease and Other Dementias"<sup>4</sup> stated:

Ten times as many people are affected now as were at the turn of the century. The number of people with severe dementias is expected to increase 60 percent by the year 2000. Unless cures or means of prevention are found for the common causes of dementia, 7.4 million Americans will be affected by the year 2040—five times as many as today.

With increasing frequency, we are being asked to address the question: When is a person's mental functioning so impaired that the person should or should not be held responsible for saying "I do?" Mentally impaired people have rights. When should we hearken to a mentally impaired person's tenaciously repeated demands, doing just what they say they want? When they are "merely seriously" impaired, should we try to forge a reasonable compromise between what they say they want and what seems reasonable? But when they are much more severely impaired, should we instead simply ignore and fail to follow their instructions? Or should we feed transitory fantasies by pretending to do what they want? Conservatorship law gives us little or no guidance in this area.

To illustrate the difficulty of the problem, assume that a person is suffering from a progressive neurological process such as multiple infarct dementia or Alzheimer's disease. At some advanced point in that person's progressive decline, it may become *obviously* inappropriate to give legal significance to what that person says. It may be right to treat the severely demented person's "I do" in a marriage ceremony as a mere "utterance" (i) which is the product of the disease process, and (ii) which has *no* legal significance, even though the severely demented person still *utters* words. The mere fact that the severely demented person's utterance ("I do") is compulsively repeated with tenacity does not transform the utterance into the expression of a competent person's wishes.

At the other extreme end of the spectrum of mental functioning, if the person's mental functioning is perfectly intact, our legal system properly treats the words "I do" as legally cognizable

expressions of a person's wishes. An individual has a right to have her expressions of her wishes given proper consideration. Our social contract is based on that perception. The due process clause of the Constitution safeguards that right. People are presumed to be of sound mind in the absence of contrary evidence.<sup>5</sup> But competent people also have a corresponding obligation to be responsible for the foreseeable consequences of those expressions. Unfortunately for lawyers, judges and the population at large, the statutory law does not provide much guidance in determining when impairments in a person's mental functioning are so great that the impairments have carried the person across the line into the state of incompetence to marry.

This article will analyze the statutory provisions governing the validity of marriages by persons whose mental function integrity is impaired. The statutory analysis is followed by an examination of appellate decisions sustaining a lower court finding of incapacity to marry. The authors attempt to dissect the text in which the appellate courts set forth the evidentiary bases for findings of incapacity. The discussion of that text is framed both in layman's terms and in the language of modern neuro-behavioral science.

## II. The Personal Nature of the Authority to Create a Marriage Relationship

A probate conservatee is presumed to have the capacity to marry,<sup>6</sup> even though a finding has been made that the conservatee is unable properly to provide for his personal needs for physical health, food, clothing, or shelter and is substantially unable to manage his own financial resources or to resist fraud or undue influence.<sup>7</sup> Probate Code § 1900 explicitly provides that the appointment of a conservator of the person or estate, or both, does not affect the capacity of the conservatee to marry.

One might well ask why we allow the duties of matrimony to be imposed on a person so gravely disabled as to need a conservator? Perhaps it is because we view the corresponding freedom to wed as a particularly fundamental right.<sup>8</sup> Our legal system's treatment of another fundamental right, the power to consent or refuse consent to medical treatment, is very similar. A probate conservator is denied the power to consent to a medical treatment over the objections of the conservatee unless a court has determined that the conservatee lacks the requisite mental legal capacity (*i.e.*, mental function integrity) to give informed consent to the specific medical treatment in question.

The law seems to take the position that the mere fact that a conservator has been appointed, albeit for good cause, does not mean that the conservatee should be deprived of all decision making authority. A conservator should be in place to protect persons whose mental function integrity falls beneath certain levels, but various impositions on a conservatee's liberties should be allowed only on a showing of specific good cause. Having a conservator in place makes it likely that the conservatee will get medical care and the other necessities of life, to the extent that the conservator needs to get involved in those things. Similarly, a conservator of the estate is in position and should protect the conservatee from being subjected to financial overreaching by the person whom the incompetent chooses to marry. These protections properly impose corresponding limits on the conservatee's freedoms, but the law guarantees the conservatee the least restrictive

arrangement practical under the circumstances.

Still, the presumption of the capacity to marry is subject to limits. Probate Code § 1901 tells the Probate Court that it "may by order determine whether the conservatee has the capacity to enter into a valid marriage."<sup>9</sup> When and on what basis, should the determination be made? The Probate Code does not provide the court with a single statutory guideline as to what constitutes the capacity to marry.

The absence of standards does not mean that there is no need for them. Courts should be and are empowered to void or annul marriages. Many a lawyer in probate or estate planning practice has been witness to the unpleasant sight of an unethical individual marrying a demented elderly person for the wealthy incompetent's assets, and, thereafter, abusing the declining incompetent physically and emotionally. The inappropriateness of the marriage is highlighted where the "marital" relationship is short lived. It is even more upsetting where the marriage defeats the incompetent person's lifelong and carefully prepared estate plan for the benefit of loving, and devoted family members who were recently alienated by the abusive new "spouse." The new "spouse" may demand spousal support during the incompetent's life. If the new "spouse" is a reasonably effective criminal or a drug addict, the estate can be reduced very quickly, if only by litigation fees and costs, after the spouses separate and the abuser seeks spousal support, or merely absconds. The abusive "spouse" may deprive the incompetent of medical care, or may see to it that the incompetent's medical care is provided by physicians lacking expertise in geriatric medicine or geropsychiatry. Once the incompetent dies from natural causes, it is too late for anyone to begin a lawsuit to annul the otherwise voidable marriage.

If the incompetent spouse does not make a new will providing a bequest to, or at least mentioning, the new love of his or her life, the "new spouse" may claim to be a pretermitted spouse when the incompetent spouse dies. As a "pretermitted spouse" (*i.e.*, a spouse for whom the law presumes the decedent inadvertently forgot to make a bequest) the "new spouse" may inherit a substantial portion of the estate.

### III. An Apparent Paradox in the Statutory Law

The Family Code gives us some guidance, but not much. Family Code § 2210 tells us that only people of "sound mind" may marry.<sup>10</sup> Family Code § 300 defines marriage as "a personal relation arising out of a civil contract between a man and a woman . . . [emphasis added]." However, § 300 cannot mean exactly what it seems to say. If it did, a person would be required to have sufficient mental function integrity to have the capacity to enter into "a civil contract" in order for there to arise "a personal relation[ship]" of marriage." The law cannot require that much mental function integrity, since Civil Code § 40 and Probate Code § 1872 tell us that a person for whom a conservator of the estate has been appointed *ipso facto* lacks the capacity to make a contract.<sup>11</sup> Does that mean that a conservatee cannot marry? Apparently not, because Probate Code § 1900 tells us that a conservatee is presumed to have the capacity to enter into marriage, which is "a personal relation arising out of a civil contract between a man and a woman. . . ."

If one were to reconcile this apparent contradiction, in the absence of case law, this circular statutory reasoning could lead to strange conclusions. The civil contract of marriage might appear to be a *special* contract requiring a *lesser* level of mental function integrity than the level of mental function integrity required for other contractual or "commercial" dealings.<sup>12</sup> The term of art "unsound mind" would mean something different in the personal

context of Family Code § 2210 from the comparatively commercial contexts of Civil Code § 39 and 40.

The term "unsound mind" in the context of the capacity to marry can also be compared to "unsound mind" in the *testamentary* context. The Family Code's "soundness of mind" to marry can reasonably be assumed to be a standard requiring more mental function integrity than Probate Code 6100.5 requires for testamentary capacity. After all, Probate Code 6100.5 on its face has no impact on the testator's life, and the policy of protecting an incompetent during his or her lifetime is understandably stronger than protecting his or her estate plan, even though this policy is perhaps short sighted. In a recent, and as yet unpublished, survey of the American College of Probate Judges,<sup>13</sup> most judges rated the statutorily defined standard for testamentary capacity as one of the lowest standards, and one *beneath* the capacity to marry.

Although these statutory policies seem logical in the abstract, in application, one finds some absurd results. For example, a purely statutory analysis would leave one considering the absurd possibility that a dying conservatee actually lacking testamentary capacity might be inveigled into a *valid* marriage contract with an artful and designing person, and that the "spouse" could then claim validly against the decedent's estate as a pretermitted spouse!

The foregoing hypothetical demonstrates that the policy of giving less protection to demented persons' estate plans than we give to their assets while the demented persons are yet living may be unwise. That policy can prove dangerous to the very physical health of the demented persons. It is a well known fact that there is a growing cottage industry of people who prey on dementing elders, who isolate the elders from others, who obtain favorable estate plans from the elders, who sometimes marry them, and who then allow the elder to neglect his or her health and to die from "natural causes."

That same policy of not strongly protecting the estate plan can conflict with the wishes that the demented person had before becoming demented. The *raison d'être* of many people is to leave an inheritance to their children. Many such people would be horrified to learn that some appellate decisions take the position that the testator has not been injured when a bogus marriage or undue influence disrupts an estate plan, and that *only* the disinherited beneficiaries have been injured.

Despite the foregoing criticisms, the appellate decisions discussed below demonstrate that the law is more rational than the a simplistic reading of the statutes might allow. But first, a comparative analysis of the statutory law of competence in the testamentary, contractual and family law contexts will provide the conceptual framework necessary to understand the case law addressing the legal mental capacity to marry.

### IV. Comparing Competence in the Testamentary, Marital and Other Contractual Contexts

In the testamentary context, a will made by a person of unsound mind is void. Things are *not* that simple with respect to the capacity to enter into a commercial contract or the civil contract out of which a marriage arises. A commercial contract by an incompetent is generally only *voidable* pursuant to the principles of equity. A lawsuit for rescission of a commercial contract may be brought by the incompetent's conservator or the representative of his or her probate estate. Only if the incompetent was "totally without understanding" whatever that means, is the contract void *ab initio*.<sup>14</sup>

Marital contracts by incompetents appear to be generally merely *voidable*. Family Code 2210 says that marriages are *voidable* and

*Continued on page 48*

# Mental Incapacity to Marry

Continued from page 47

may be annulled if a spouse was "of unsound mind [at the time of the entry into marriage] unless the party of unsound mind, after coming to reason, freely cohabited with the other as husband or wife." This appears analogous to the approach taken by the courts under Civil Code § 39 to contracts, holding that a contract is not void, but is only subject to the equitable law of rescission, and that the contract may be voided by a court if the contract was made by a person of "unsound mind."

In the context of less personal contracts, Civil Code § 38 takes a position more in keeping with the notion of *parens patriae* and the protection of incompetents from abusers. Section 38 says that a contract is *void ab initio* if the complaining party was "totally without understanding." A 1963 family law case, *Hudsted v. Hudsted*<sup>15</sup> appeared to engraft the same notion into the family law. Dictum in that case applied the "totally without understanding" level of mental impairment for the *voiding* of a marriage *ab initio*. A woman claimed to have been under sedation while married in Las Vegas. The Second District Court of Appeals indicated that if she did not know she was going through a marriage ceremony, the marriage would be void because she was "totally without understanding." The court did not indicate whether so severe a mental function impairment was necessary for a finding of "totally without understanding." The author has found no case voiding a marriage on a lesser showing, and such cases do not frequently confront the practitioner.

## V. Case Law Holds that the Capacity to Marry Is Determined by the Same Tests Applied to Set Aside a Contract

In the 1911 case of *Dunphy v. Dunphy*,<sup>16</sup> an action to annul a marriage, the California Supreme Court held that "the question of what is an unsound mind [incapable of entering into a valid marriage] must . . . be determined by the same tests which are applied in any case where it is sought to set aside the contract or other act of a person alleged to be insane." In more specific terms, the Court further held that the capacity to marry is the "capacity to understand the nature of the contract, and the duties and responsibilities it creates." Other cases have followed this contractual capacity approach.<sup>17</sup> See, e.g., *McClure v. Donovan*,<sup>18</sup> holding that marriage requires "the mental capacity and understanding to understand the subject matter of the marriage contract, its nature and probable consequences. . ."; *Goldman v. Goldman*, *supra*.<sup>19</sup>

But if the capacity to enter into a contract is what is required for a valid marriage, how can a conservatee be presumed to have the capacity to marry<sup>20</sup> and at the same time be subject to an irrebuttable presumption of incapacity to contract? The answer lies in the nature of the contract, the personal nature and the fundamental importance of the right to marry.

Each contract has its own subject matter. Some contracts are based on simple subjects of little importance, and some involve simple subjects of great importance. Other contracts such as securities trading may be very complex but can involve a small amount of a person's net worth or everything he or she owns.

The subject matter of marriage would appear to be rather complicated and to involve potentially everything that a person owns. Indeed, a court may permit an underage person to marry, but if the court does so, it must require the underage person "to participate in premarital counseling concerning the social, economic, and personal responsibilities incident to marriage."<sup>21</sup> The

person must be *capable* of understanding and appreciating those responsibilities and the "probable consequences"<sup>22</sup> arising from marriage. The codified economic and personal responsibilities of marriage include, for example, the duty of spousal support codified in Family Code §§ 720 and 4300, the right of both spouses to manage and control any community property codified in Family Code § 1103, the fiduciary duties of good faith and fair dealing codified in Family Code §§ 720, 721 and 1103, among others, the fiduciary duty of full disclosure codified in Family Code § 2102, and the right of each spouse to claim as a pretermitted spouse against the estate of the other if the survivor is not mentioned in the decedent's will.

The awesome complexity of even this incomplete list of the rights, consequences and responsibilities arising from marriage makes it difficult to understand why the Legislature decided to codify previous case law holding that a conservatee should be presumed to have the capacity to marry, and how the policy behind that presumption can be reconciled with the policy behind Civil Code § 40's irrebuttable presumption of the conservatee's incapacity to contract.

## VI. The Statutory Paradox Resolved

The simple answer appears to be based on the fact that the right to marry is a precious fundamental right, like the right to refuse or give informed consent to medical treatment. In enacting Probate Code § 1900, the Legislature merely reaffirmed the long-standing holding of the courts that the incapacity to exercise the fundamental right of marriage must be explicitly proven.<sup>23</sup> Although the appointment of a conservator is an adjudication of the incapacity of the conservatee to make any other contract, the incapacity of the conservatee to understand the peculiar nature of the *marital* contract, and the specific duties and responsibilities which a *marital* contract creates, and the probable consequence of the marital contract must be explicitly proven.<sup>24</sup> The author is unaware of any California case law directly on point, but at least one other jurisdiction has addressed the subject and concluded that the burden of proof for the conservator's action to end the marriage must be "clear and convincing evidence."<sup>25</sup>

## VII. How the Few Appellate Cases in California on the Incapacity to Marry Have Broken Marital Mental Capacity Down into Its Component Mental Functions

Capacity to perform any act is like community property; it is composed of a bundle of sticks. The issue of *mental incapacity* is most productively addressed by determining which component mental functions are absent, or more accurately stated, which component mental functions are impaired, and to what extent, and under what circumstances? Obviously, there will never be a definitive statement listing all the mental deficits that can generate a conclusion of incapacity to marry, nor will there ever be a graph showing what groups of impairments (and at which combinations of levels) will constitute such incompetence. But three cases, *Hudsted v. Hudsted*,<sup>26</sup> *McClure v. Donovan*,<sup>27</sup> and *Vitale v. Vitale*,<sup>28</sup> provide much insight.

An examination of the language used in these Appellate decisions, scrutinized in light of the constructs of modern neuro-behavioral theory, will give the practitioner guidelines to use in determining whether and how to proceed with a petition to seek annulment. It is important to keep in mind that the significance of the mental functions and the testimony described below is the fact that the Courts of Appeals chose to mention them in the Appellate decisions, and that the deficits indicated, therefore, may be consid-

ered relevant to the incapacity to marry.

#### A. Orientation to Time, Place, Person and Circumstances

In *Hudsted v. Hudsted*,<sup>29</sup> the Second District observed that if the petitioner's "story is to be believed, she had no knowledge [due to the influence of sedation and drugs] that she was in Nevada, no knowledge that she was executing an application for a marriage license, and no knowledge that she was a participant in a marriage ceremony." Under such circumstances, said the court in dictum, the marriage would be *void ab initio*.

#### B. Behavior Inappropriate to the Circumstances Seems to Be Relevant as Indicative of Disorientation

The California Supreme Court case of *McClure v. Donovan*,<sup>30</sup> upheld the annulment of a marriage based on incompetence to marry. The uncommonly complete recitation of evidence from the trial provides much insight into the mental function deficits that the Court considered relevant, and the evidence that Court considered probative.

It was necessary at times to prompt Mr. Caruthers regarding his responses in the proceeding. Apparently he was unaware of the fact that he was being married and he interjected remarks concerning matters foreign to such a solemn occasion. In fact, once defendant told him to "quit your clowning."<sup>31</sup>

Mr. Caruthers' cognitive functioning was apparently impaired. He did not appear to understand what the other people were saying to him during the marriage ceremony, and did not understand the objective of the proceeding. His socially inappropriate behavior tends to bespeak, in medical terms, a deficit in his ability to communicate with others, verbally or otherwise, or to abstract in the sense that he was unable to understand that the phenomenon presenting itself before him was a ritual, and that he was entering into a contract. Alternatively, it is possible also that he was disoriented and not capable of paying attention and concentrating.

#### C. Disorientation to Place

The following text tends to show a memory disorder, and a disorientation to place, which the Court apparently considered germane to its decision of a lack of capacity to marry.

His lack of understanding of the events that had occurred is indicated not only by his statement about the marriage but by his declaration that he had been taken to Long Beach, which was several miles farther from his home than Pasadena and in a different direction. Since he had resided on his farm for 40 years, it is reasonable to presume that he should have been acquainted with his surroundings, and that if he had been in his right mind he would have known whether he had been taken to Long Beach or Pasadena.<sup>32</sup>

The first part of the next paragraph demonstrates once again a long term memory deficit. But the reference to "Jeff," who cannot be the woman he "married," tends to demonstrate what is termed by the medical profession, "disorganized thinking" or "impaired recognition of familiar persons." The Court of Appeals apparently found such deficits noteworthy in determining a lack of mental legal capacity to marry.

A week later, during another visit of the relatives, mention was made of the fact that Mr. Caruthers had only a few of the livestock which he had previously kept on his farm. He was asked whether or not he had sold his horses and mules, as they were not "in the pasture." He answered: "No, someone came up and carted them down below here." Then defendant, who was present on that occasion, said: "You sold them for \$300 [a few days previously to Mr. Gill] and you gave the man a bill of sale for them." Mr. Caruthers replied: "Wait a minute... you are all wrong about that... I didn't sell any mules or stock." Defendant, after repeating that he had sold the animals and trying to explain it to him, said: "Well, it doesn't make any difference, it is none of your business anyhow.... Jeff and I are married.... I own this place."<sup>33</sup>

#### D. Memory Deficits

The following text tends to show a deficit in long term memory, which the Court of Appeals found relevant to Mr. Caruthers' capacity to contract when he sold the acres in question.

Although he had sold 16½ acres of his 17-acre farm less than two months previously to Mr. and Mrs. Gill, he said to his relatives during their visit: "I have had this place now for 40 years and I think I will keep it until I die, I am not going to sell it."<sup>34</sup>

#### E. Visual Hallucinations

*Vitale v. Vitale*<sup>35</sup> was a First District case annulling a marriage based on lack of capacity to marry. The plaintiff-incompetent had been normal, competent and fully functional until he returned from a trip abroad.

Plaintiff's son Frank testified that when plaintiff returned November 2, 1953, from a trip to Europe his father had changed. Frank then related many instances in which his father *talked incoherently, had hallucinations, believed that some organization was after him, and that television programs, cards in a drug store and other matters evidenced plots against him....*<sup>36</sup> (emphasis added.)

#### F. Auditory Hallucinations

The next paragraph indicates that auditory hallucinations were deemed germane to capacity, and supports the idea that Mr. Vitale's impaired ability to recognize familiar objects (*e.g.*, the dog) was considered important by the Court.

Mrs. Tharp, a real estate agent who knew plaintiff well for over 10 years, testified that after returning from Europe plaintiff acted "very odd," was upset, heard noises, had been "framed" by a woman who was after his money and from whom he was trying to get away (which was untrue), pointed to a dog on a postcard and claimed it was a woman. In her opinion plaintiff was very unsound and confused.

#### G. Delusions of Being Controlled by Outside Forces

The next paragraph demonstrates a delusion of being controlled by outside forces, and pseudo-scientific demons in the form of the

*Continued on page 50*

# Mental Incapacity to Marry

Continued from page 49

good doctor Wilbur, was relevant to a decision of mental incapacity.

Plaintiff [Ralph] had put needles in each of his own toes and told Dr. Wilbur that he was sure that when the doctor had repaired plaintiff's bunions the preceding February, the doctor had put radio receiving sets in each of his toes, so that the cops could keep track of plaintiff. Dr. Wilbur further testified that plaintiff was of unsound mind on May 22d, and was unable to understand the nature and responsibilities of marriage and even simpler relationships than that.

## H. Sudden Drops in Mental Function Integrity

The sudden onset of symptoms described in paragraph E above, and their character, suggest a possible stroke and a phenomenon currently known as Wernicke's syndrome. Ralph's incoherent speech, which may have been composed of clearly enunciated but unconnected words, might today be termed colloquially "word salad" by psychiatrists, and considered to be a deficit in his ability to communicate with others. Such an impairment is obviously relevant to a determination of capacity to marry. The Appellate decision noted that Ralph had paranoid *delusions* which controlled his thinking, and the Court of Appeals thought them relevant to the capacity to marry, even though none of the *hallucinations* were ever expressed directly in connection with his marriage. The Appellate decision also noted the existence of Ralph's hallucinations, suggesting that they too were relevant to marital capacity.

## I. Mere Diagnoses Are Not Sufficient Evidence in Incapacity

The issue of competence and any expert opinions on it must turn on evidence of specific incapacities in mental functioning, not on a diagnosis *per se*. The next paragraph shows the limitations of staking claims of competence on a diagnosis *per se*, such as schizophrenia. It is unclear whether the mere diagnosis of schizophrenia was particularly persuasive to the court. However, the doctor's comments below do describe abnormalities in thought processes which would be recognized today, and which do directly bear on Mr. Vitale's lack of capacity regardless of the underlying diagnosis or cause.

Dr. Quirnbach, Clinical Director of Agnew State Hospital who saw plaintiff for the first time at Agnew about June 8th (about fifteen days after the marriage), testified that plaintiff then had a paranoid psychosis, which could also be described as schizophrenia; that on June 8th he was not competent to understand the obligations of the marriage relation, nor to undertake any act of importance, and that his psychosis continued from November, 1953. When asked his opinion concerning plaintiff's competency on May 24th to comprehend the duties and responsibilities of marriage he stated that plaintiff could not do so, basing his reasoning on the fact that plaintiff "was markedly psychotic and delusional, and a delusional mental illness such as this colors a man's or person's whole actions and activity and thinking."

## J. Seriously Self-Destructive Behavior Appears to Be Relevant

Seriously self casually inflicted destructive behavior is another factor which tends to show incompetence to marry. "Plaintiff admitted that he had voluntarily cut himself. The cut was 1 $\frac{3}{4}$  inches long directly over an artery. The witness sent plaintiff to Dr. Johnston."

Dr. Wilbur (apparently a medical practitioner) who knew plaintiff since sometime in the 1930's, saw plaintiff at his office on May 22d (two days before the marriage), and testified that the day before plaintiff called him from Los Angeles and said he had a cut on his elbow which he had received in Los Angeles and which he wanted the witness to fix. When asked how he got the cut plaintiff said the witness knew all about it, as the witness was there when it happened. (This was not true.)<sup>37</sup>

## K. Delusions and Confabulation

The plaintiff's incorrect report, described in paragraph J above, about his injury could be simply a *delusion* that the doctor was somehow there. It could be evidence of *confabulation*, which is a tendency to report as memory something that did not happen. The decision seems to suggest that either mental function disorder might be relevant to the capacity to marry.

## L. The Mere Ability to Use Language, to Recall Simple Things, and to Interact Adequately with Some People Does Not Establish Competence to Marry

The importance of the holistic view of competence is highlighted by the fact that the appellate decision goes on, after recounting the doctors' testimony, to report that a Mrs. Carey and a Mr. Cabot gave testimony suggesting that the incompetent's ability to use language and to recall simple matters of fact were not impaired.

The fact that the plaintiff had been able to interact adequately with a man who was his insurance broker, tax consultant and accountant, and with other people, including an auto repairman, was not sufficient to render him competent to marry.

Mrs. Carey, a witness for defendant, testified that before he went to Europe plaintiff stated that he would like to marry defendant, and on his return stated that he liked her as much as ever.... The morning plaintiff went to Agnew [Hospital] he gave the witness separate bills for the damage to his car and seemed to understand the matter. He was always lucid and clear in his understanding of business matters. In the witness' opinion plaintiff had a proper understanding of marriage.<sup>38</sup>

## M. Moments of Lucidity Are Suspect

Rejecting a pure "moment of lucidity approach," the Court indicated that inferences about the plaintiff's mental capacity at a particular moment could be drawn from evidence about his condition before and after the moment of marriage.

Defendant seems to contend that because no witness for plaintiff testified to seeing plaintiff on the exact day of the wedding, and witnesses for defendant did, there is no evidence of unsoundness of mind on that day. While it is

plaintiff's mental condition on that day that is in issue, that condition may be determined from his condition prior and subsequent to the day. [citations].<sup>39</sup>

#### N. "He Would Have Married Her Anyway."

The decision *Vitale* suggests that an incompetent's purported marriage is not rendered valid by evidence that he or she would have married the other person anyway. While the "he would have done it anyway" approach might work in a conflict over the exercise of undue influence to procure a will, that approach apparently will not validate a marriage where one party lacked the capacity to marry. The decision mentions and then disregards the fact that the plaintiff had previously expressed a desire to marry the defendant.

#### O. The Role of the Mental Health Expert

The role of the mental health expert in a conflict over the capacity to marry is to show the evidence on which her opinion is based.

As said in *Dunphy v. Dunphy* [citation omitted], the law permits intimate acquaintances to give their opinions as to the mental sanity of a person and therefore, some weight "may be attributed to the opinion, over and above that which would follow, as matter of necessary inference, from the reasons assigned." As to the opinion of the three medical witnesses, "Expert witnesses may give their opinions concerning the mental condition of a person. They are not restricted to the mere declaration of an opinion that the person is or is not of sound mind, but may state the nature and extent of the deficiencies, if any, which they believe to exist." [Citation omitted.] Defendant characterized the opinions of the medical men as mere "abstract opinions" and hence not sufficient to support the finding of mental illness. They are not such. They are opinions based upon an examination of the subject, within a few days of the marriage. One doctor saw plaintiff two days before the marriage, the second saw him two days after, and the third fifteen days after. They were not giving their opinions based upon hypothetical questions, but from an actual observation of plaintiff himself.

If the complaint that the psychiatrists' opinions were mere "abstract opinions" and not useful evidence was the incompetent spouse's contention, and was not simply advocative argumentation by one of the lawyers, that contention probably would be evidence of an impaired ability to do abstract reasoning.

#### P. A Holistic View of Competence

The Court of Appeals went on to repeat with approval the psychiatrist's conclusions that a mental illness may be germane to the incapacity to marry even though the illness has not been shown to be focused on or directed at the subject matter of the marriage, *i.e.*, the nature of the ritual contract and the probable social, economic and personal consequences of the marriage. This holistic view of competence can be critical in cases where it is difficult to show a link between the particular mental function deficits and the incapacity to marry.

[The psychiatrist] stated that... "a delusional mental illness such as this colors a man's or person's whole actions

and activity and thinking. So that whatever he does is in some way touched by it when an illness becomes as marked as this, and so that he isn't really competent to make decisions as a rational person, rather is influenced by the false ideas that he has," and further that plaintiff entered into the marriage "as a kind of a device to ward off the troubles that were conflicting him at the time and bothering him," and that his "delusional ideas so affected his relationship with the woman that he did not understand what he was entering into."<sup>40</sup>

The testimony of doctors Wilbur and Johnson describe bizarre delusions, again *not specifically related to* the social, economic, legal and personal duties and responsibilities of *marriage*. But the fact that the Court chose to include their testimony in the decision reflects a holistic view of competence.

#### Q. The Whole Is Greater than the Sum of the Parts

Bringing all the evidence together, the Court explained how the disparate mental functions could be perceived having a direct bearing on the act of marriage. The Court simply observed that the collection of mental function deficits is more than the mere sum of the parts.

Defendant quotes from the Dunphy case, "The mental defect or derangement must be one having a direct bearing upon the particular act which is brought in question," (p. 383), and then contends that plaintiff's delusions and hallucinations did not have a direct bearing upon the act of getting married. *However, the delusions and hallucinations were merely parts of the mental defect or derangement. It was his whole mental condition, those matters included, which caused plaintiff to have the inability to comprehend the act of marriage.* (Emphasis added.)<sup>41</sup>

#### VIII. Procedure: Who May Bring the Action, and When?

Family Code § 2211(c) indicates *who* can bring an action on behalf of the conservatee for an order dissolving, annulling or voiding a marriage. It appears that a conservator may *not* seek a *dissolution* of a valid marriage.<sup>42</sup> By contrast, a "conservator" may bring an action for *annulment*. But query whether the conservator of the person or the estate is the proper party plaintiff? And if the court has appointed an attorney for the conservatee, what is the role of that lawyer in the action for annulment? What should happen if the court appointed lawyer for the conservatee disagrees with the conservator's decision to proceed? To date, there is no statutory or judicial guidance for the answers to these questions.

The action for annulment must be filed before either spouse dies,<sup>43</sup> but the court does not lose its jurisdiction over the cause of action merely because the conservatee dies before judgment is rendered.<sup>44</sup>

#### IX. Conclusion

All too often designing people take advantage of incompetent declining elders, alienating loving family members and frustrating an estate plan the victim spent a life building. While such abuses can and should be confronted, mentally impaired people do have rights which should be respected. Conservatorship orders can be tailored to protect the rights of the mentally impaired both to marry and to be free from abuse. Statutory reform to enhance and clarify those rights is long overdue.

*Continued on page 52*

# Mental Incapacity to Marry

Continued from page 51

## Endnotes

1. The authors wish to express their appreciation to Michael Morris for his assistance in researching this subject.
2. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See also, *Maynard v. Hill*, 125 U.S. 190 (1888).
3. *Hudsted v. Hudsted*, 222 Cal.App.2d 50 (1963)
4. Produced in 1986 by the Office of Technology and Assessment of the Congress of the United States. Library of Congress Catalog Card No. 87-619805.
5. *Goldman v. Goldman*, 169 Cal.App.2d 103, 109 (First Dist. 1959), reversing a judgment for annulment of marriage based on unsound mind.
6. *Cal. Prob. Code* § 1900.
7. *Cal. Prob. Code* § 1801.
8. See footnote No. 1 above, and the accompanying text.
9. When §§ 1900 *et seq.*, dealing with the capacity to marry, were added to the Probate Code, the 1980 Law Revision Commission expressed some uncertainty about whether a conservatee could have the capacity to marry. 15 California Law Revision Committee Reports 1075-1076 (1980). The Legislature decided that a conservatee should be presumed to be able to marry absent a showing that the conservatee lacked the capacity to marry. Probate Code § 1900. Preserving the rights and the freedom of mentally impaired people seemed like a nice idea, and it seemed that the minor details involved in how to determine that capacity could be left to future sessions of the Legislature. Fourteen years later, the Legislature still remains silent on those details.
10. Some people contend that marriage is in fact proof of just the opposite. With the encouragement of his spouse, one of the authors has opted not to explore this contention any further.
11. Civil Code § 40.
12. The authors did not find any California law so holding, but there is at least one out of state case which held that the capacity to marry demands a lesser level of mental function integrity than is required for other contracts. *Flynn v. Troesch*, 26 N.E.2d 91, 99 (Ill. Sup. Ct. 1940).
13. The senior author, Prof. James E. Spar, M.D., and Commissioner (Ret.) Ann E. Stodden conducted a survey posing questions to the American College of Probate Judges about competence issues. Our paper is still being drafted and has not yet been published.
14. Civil Code § 38.
15. 222 Cal.App.2d 50 (Second Dist. 1963).
16. 161 Cal. 380, 383 (1911).
17. *Hunt v. Hunt*, 412 S.W.2d 7, 16 (Tenn. Court of Appeals 1965).
18. 133 Cal.2d 717, 732 (1949).
19. 169 Cal.App.2d 103, 104 (First Dist. 1959).
20. Probate Code § 1900.
21. Family Code § 304.
22. *Goldman v. Goldman*, *supra*.
23. *Estate of Gregorson*, 160 Cal. 21 (1911).
24. See, *Dunphy v. Dunphy*, 161 C. 380, 383 (1911), holding that "The mental defect or derangement must be one having a *direct* bearing upon the particular act [of marriage and its related duties and responsibilities] which is brought into question." But *cf.*, *Vitale n. Vitale*, 147 Cal. App.2d 665 (First Dist. 1957) interpreting *Dunphy*, and responding to an objection that no direct link was proven by holding that the "whole mental condition... and caused the plaintiff to have the inability to comprehend the act of marriage."
25. *Ruvalcaba by Stubblefield v. Ruvalcaba*, 850 P.2d 674, 683. (Ariz.App.Div.1 1983).
26. *Supra*.
27. 33 Cal.2d 717 (1949).
28. 147 Cal.App.2d 665 (First Dist. 1957).
29. *Supra*.
30. 33 Cal.2d 717 (1949).
31. *Id.* at 733.
32. *Id.* at p. 734.
33. *Id.* at p. 734.
34. *Id.* at 733.
35. 147 Cal.App.2d 665 (First Dist. 1957).
36. *Id.* at 666.
37. *Id.* at 668.
38. *Id.*
39. *Id.* at 669.
40. *Id.* at 667.
41. *Id.* at 671.
42. *Cohen v. Cohen*, 73 Cal.App.2d 330, 335 (Second Dist. 1946), holding that "a suit for divorce must be regarded as one which is so strictly personal that it cannot be maintained at the pleasure of a guardian or committee of an insane spouse. [citations omitted.]"
43. *Estate of Karau*, 26 Cal.App.2d 606 (First Dist. 1938).
44. *In re the Marriage of Goldberg*, 22 Cal.App.4th 265 (Fourth Dist. 1994).■

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# CONSERVATORSHIP PRACTICE TIP

## Mental Function Deficit Information—

### A Medical Checklist

By Marc B. Hankin, Esq.  
Los Angeles, California

When you petition for the appointment of a conservator, a supporting medical declaration can be used for three purposes. First, it is used traditionally to show that the proposed conservatee is too ill to come to court, and that the proposed conservatee's weakened condition satisfies the requirements of Probate Code §1825(b) and (c), *i.e.*, attendance at court is likely to cause serious and immediate physiological damage.

Second, if you are seeking general medical consent authority under Probate Code §§1880 and 1890, a medical declaration must accompany your petition when you file it.

Third, a medical declaration can be used to show that the proposed conservatee really is so impaired as to need a conservator.

Lawyers often find that it is a daunting task (1) to find out from the doctor which mental function deficits the doctor has noticed, or (2) to get the doctor to spend enough time with you, for you to get him or her to change his or her focus from diagnosis *directed at treatment*, to diagnosis *directed at legal consequences*, or (3) to write the doctor's medical declaration for him or her. The second item is necessary in order for you to elicit from the doctor the relevant mental function deficit information, but doctors sometimes have even less idea than we do which mental function deficits are relevant to capacity.

James E. Spar, M.D., Stephen Read, M.D., and I have devised the form on the next page to make it easier for doctors to help you with all of the objectives indicated above. For purposes of Probate Code § 1825(b) and (c), it can simply be attached to the Judicial Council form "Declaration of Medical Practitioner." It will also serve as a good checklist for you to use in drafting the narrative information that is included (1) in paragraphs 5(b)(1) and 5(b)(2) of the petition for appointment of conservator, and in (2) paragraphs 2 and 3 of the Confidential Supplemental Declaration.

Feel free to duplicate this form, whiting out the "Law Offices of Marc B. Hankin" in the upper left hand corner and writing in your own office designation or anything else you like. If you have good experiences with the form, please let us know. Critical suggestions for improvements would be welcome, too (if gently offered). ■

Physician's Name: \_\_\_\_\_

Date: \_\_\_\_\_

Patient's Name: \_\_\_\_\_

**Instructions: Answer Ques. #1, and Circle the appropriate category below: a = No apparent impairment; b = Mild impairment; c = Major impairment; d = So impaired as to be incapable of being assessed.**

1. (circle one.) **True / False** The patient *cannot* give informed consent to any medical treatment because s/he cannot rationally understand and appreciate medical information.

a b c d 2.

**Alertness** (low levels, lethargic, responds only to vigorous and persistent stimulation, stupor)

a b c d 3.

**Orientation** (person, time [day, date, month, season, year], place [address, town, state], situation [why here?])

a b c d 4.

**Attention** (impaired ability attend to examiner, repeat serial sevens, stay with a train of thought, and shift appropriately);

a b c d 5.

**Concentration** (inability to spell words backward, give detailed answers from memory);

a b c d 6.

**Memory** (**immediate recall** [forgets question before answering, repetitive], **recent memory** [cannot recall events of past 24 hours], **remote memory** [cannot recall names of relatives, significant dates, names of past presidents]; **recognition** (fails to recognize familiar, faces, objects, other);

a b c d 7.

**Receptive language** (cannot comprehends questions, follow instructions);

a b c d 8.

**Expressive language** (cannot use words correctly or name objects, uses nonsense words);

a b c d 9.

**Temporal organization of behavior** (cannot carry out actions requiring several steps, or describe steps);

a b c d 10.

**Fund of information impaired** (does not know information patient should know)

**Higher cognitive functions:** Impaired ability to:

a b c d 11.

Perform **calculations**,

a b c d 12.

Correctly use **abstract concepts**, grasp abstract aspects of **his/her situation**,

a b c d 13.

Give abstract interpretations of **proverbs**,

a b c d 14.

Know **similarities** [apple-banana, painting-statue],

a b c d 15.

**Reasonably and reliably assess value, risks & benefits** of actions); [Judgment]

a b c d 16.

Mood and affect disorders:

displays **pervasive** or abnormally **intense feelings** [e.g., euphoria, anger, anxiety, fear, panic, sadness, depression] or expresses **profoundly negative feelings** [e.g. hopelessness, helplessness, worthlessness, profound

negativism, or pessimism, loss of interest in life, "better off dead", suicidal ideation, suicidal plan];

a b c d 17.

**Impaired reality testing** (**hallucinates, delusional beliefs, severely disorganized thinking** [behaves bizarrely]);

a b c d 18.

Reveals **impaired insight** into the nature, severity, or consequences of his/her mental or emotional impairment or other disorders.

a b c d 19.

Describes unwanted **repetitive or intrusive thoughts**; or displays **compulsive behaviors**;

a b c d 20.

Poor neurovegetative function (**emaciated, dehydrated, poor hygiene**);

a b c d 21.

Impaired **psychomotor behavior** (speech slurred, gait stooped, movements slowed, pacing, handwringing);

21. **Other relevant observations.** (a) Include frequency, severity and length of periods of impairment, *and* (b) a diagnosis of the principal disease (e.g. Alzheimer's, CVA, etc.) primarily responsible for the mental incapacity. (c) If you think a conservatorship of the person or estate is appropriate, include any commentary explaining why. **On the other hand**, if you think that the patient is competent and/or not lacking in mental capacity, say so, and explain why. \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

22. If bringing the patient to court would cause serious and immediate physical injury, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ **Feel free to write more on the reverse side of this page or to attach more paper and to write whatever you want to say.**