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Representing the Mentally Impaired Client

James V. Quillinan

CLIENT CAPACITY, ESTATE PLANNING, AND MALPRACTICE TRAPS

Three-Article Series by: James V. Quillinan, John Becker, Ph.D., Marita K. Marshall, and Frayda L. Bruton

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Representing the Mentally Impaired Client

The following articles discuss three troublesome guardianship cases from legal and medical perspectives. Statutes and forms for practitioners are provided.

By James V. Quillinan

James V. Quillinan has served as Chair, Estate Planning, Trust and Probate Law Section of the California State Bar, Member of the Estate Planning, Trust and Probate Law Specialization Commission, ACTEC Fellow, and Certified Specialist in Estate Planning, Trust and Probate law by the California State Bar Board of Legal Specialization. He was the founding member of California Trust & Estate Counselors, LLP. Currently, he serves as Special Master and/or Referee as well as Special Administrator, Successor Trustee and Conservator in Santa Clara County and San Mateo County Superior Courts in complex trust and probate matters. He is a frequent lecturer and author for the State Bar of California and for the Continuing Education of the Bar. Mr. Quillinan's areas of practice include Estate Planning, Wills, Trusts, Probate, Conservatorships, Related Litigation, Arbitration and Mediation.

This presentation is intended to promote discussion and comment. There are no answers. With the enactment of California Probate Sections 811 through 813 and Section 2356.5 in 1997, and their amendment in 1998, there are no longer any specific legal rules to evaluate client capacity. Rather, a medical test of evaluation and objective presentation of condition is to be used in evaluating capacity. Now, lawyers will rely more and more on professional advice from physicians and psychologists to determine whether clients have capacity to undertake any action.

Code Sections
The new California Probate Code Sections are:

Part 17 Legal Mental Capacity

§ 810. Legislative findings and declarations regarding legal capacity
The Legislature finds and declares the following:

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers

from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Unsound mind or incapacity

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, healthcare providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§ 812. Capacity to make decision

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

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

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

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

§ 813. Capacity to give informed consent to medical treatment

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

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

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

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

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

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

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

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

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

§ 2356.5. Dementia

(a) The Legislature hereby finds and declares:

(1) That people with dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders," should have a conservatorship to serve their unique and special needs.

(2) That, by adding powers to the probate conservatorship for people with dementia, their unique and special needs can be met. This will reduce costs to the conservatee and the family of the conservatee, reduce costly administration by state and county government, and safeguard the basic dignity and rights of the conservatee.

(3) That it is the intent of the Legislature to recognize that the administration of psychotropic medications has been, and can be, abused by caregivers and, therefore, granting powers to a conservator to authorize these medications for the treatment of dementia requires the protections specified in this section.

(b) Notwithstanding any other provision of law, a conservator may authorize the placement of a conservatee in a secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code, or a locked and secured nursing facility which specializes in the care and treatment of people with dementia pursuant to subdivision (c) of Section 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations, upon a court's finding, by clear and convincing evidence, of all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to this placement and has at least one mental function deficit pursuant to subdivision (a) of Section 812, and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of Section 812.

(3) The conservatee needs or would benefit from a restricted and secure environment, as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

(4) The court finds that the proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee.

(c) Notwithstanding any other provision of law, a conservator of a person may authorize the administration of medications appropriate for the care and treatment of dementia, upon a court's finding, by clear and convincing evidence, all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the care of dementia, and has at least one mental function deficit pursuant to subdivision (a) of Section 812, and this deficit or deficits significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of Section 812.

(3) The conservatee needs or would benefit from appropriate medication as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

(d) Pursuant to subdivision (b) of Section 2355, in the case of a person who is an adherent of a religion whose tenets and practices call for a reliance on prayer alone for healing, the treatment required by the conservator under subdivision (c) shall be by an accredited practitioner of that religion in lieu of the administration of medications.

(e) A conservatee who is to be placed in a facility pursuant to this section shall not be placed in a mental health rehabilitation center as described in Section 5675 of the Welfare and Institutions Code, or in an institution for mental disease as described in Section 5900 of the Welfare and Institutions Code.

(f) A petition for authority to act under this section shall be governed by Section 2357, except:

(1) The conservatee shall be represented by an attorney pursuant to Chapter 4 (commencing with Section 1470) of Part 1.

(2) The conservatee shall be produced at the hearing, unless excused pursuant to Section 1893.

(3) The petition shall be supported by a declaration of a licensed physician, or a licensed psychologist within the scope of his or her licensure, regarding each of the findings required to be made under this section for any power requested, except that the psychologist has at least two years of experience in diagnosing dementia.

(4) The petition may be filed by any of the persons designated in Section 1891.

(g) The court investigator shall annually investigate and report to the court every two years pursuant to Sections 1850 and 1851 if the conservator is authorized to act under this section. In addition to the other matters provided in Section 1851, the conservatee shall be specifically advised by the investigator that the conservatee has the right to object to the conservator's powers granted under this section, and the report shall also include whether powers granted under this section are warranted. If the conservatee objects to the conservator's powers granted under this section, or the investigator determines that some change in the powers granted under this section is warranted, the court shall provide a copy of the report to the attorney of record for the conservatee. If no attorney has been appointed for the conservatee, one shall be appointed pursuant to Chapter 4 (commencing with Section 1470) of Part 1. The attorney shall, within 30 days after receiving this report, do one of the following:

(1) File a petition with the court regarding the status of the conservatee.

(2) File a written report with the court stating that the attorney has met with the conservatee and determined that the petition would be inappropriate.

(h) A petition to terminate authority granted under this section shall be governed by Section 2359.

(i) Nothing in this section shall be construed to affect a conservatorship of the estate of a person who has dementia.

(j) Nothing in this section shall affect the laws that would otherwise apply in emergency situations.

(k) Nothing in this section shall affect current law regarding the power of a probate court to fix the residence of a conservatee or to authorize medical treatment for any conservatee who has not been determined to have dementia.

(l) (1) Until such time as the conservatorship becomes subject to review pursuant to Section 1850, this section shall not apply to a conservatorship established on or before the effective date of the adoption of Judicial Council forms that reflect the procedures authorized by this section, or January 1, 1998, whichever occurs first.

(2) Upon the adoption of Judicial Council forms that reflect the procedures authorized by this section or January 1, 1998, whichever occurs first, this section shall apply to any conservatorships established after that date.

Ethical Guidelines

Few ethical guidelines assist lawyers in determining what ought to be done when a client who presents himself or herself may lack capacity. There are no reported cases under these new standards yet, lawyers determine client capacity on a daily basis without giving it much thought. To paraphrase a Supreme Court Justice, "I know it when I see it."

Clear cases of capacity or of incapacity do not present any issues. The difficult, marginal case causes grief and uncertainty. Marita Marshall and Frayda Bruton's article, which follows, highlights the difficulty for lawyers practicing in this area.

Office Procedure

I have developed a procedure to deal with capacity issues when they present themselves. If I have any question concerning a client's capacity, I address the issue directly but politely with the client, and suggest that the client interview with a professional to establish the client's capacity so that there will be no question later on.

I set the stage as something positive for the client's protection and for the protection of the client's beneficiaries. Though this request can cause some distress with clients, if handled properly, it will win their agreement. So far, all clients that I have requested to be evaluated have agreed, save one. The one client who strenuously objected and stormed out of the office went to another lawyer. That lawyer is in litigation with my former client's family.

Forms

I have developed a form to send a physician or psychologist, which can be found in Appendix A. The form follows the dictate of CAL. PROB. CODE § 811, and uses terminology familiar to healthcare professionals. The form has multiple purposes and can be used in a variety of different circumstances. It has been adopted by the Santa Clara County Probate Court as a local form in conservatorship proceedings.

The form letter for retention of the healthcare professional to evaluate a client can be found in Appendix B. It is important that the attorney retain the healthcare professional in order to maintain client confidentiality. In order not to prejudice the healthcare professional, the attorney should provide basic, minimal information about the client.

Case Studies

Since the determination of capacity can only be done on a case-by-case basis, Dr. Becker (whose article follows) and I will discuss three cases we have in common to illustrate how to handle different situations.

Peter

Peter is a gentleman in his mid-sixties. He is once divorced, and has been married to his second wife for more than twenty years. His second marriage is solid. Peter has two adult sons from his first marriage, but no children with his second wife. While he is very close to his stepson, his relationship with his two sons from his first marriage is difficult. The two sons are close to his ex-wife. The extreme tension between Peter and his ex-wife has affected Peter's relationship with his sons.

Peter comes to the office in a wheelchair. He has suffered a stroke, has trouble speaking, and requires twenty-four-hour-a-day care. He is accompanied by only his attendant. He can sign his name, but otherwise cannot write. When asked questions about his family and assets, Peter responds cogently and completely, and recalls dates and places perfectly. Peter tells very funny stories about himself and his family that are all appropriately connected with the interview and what he is saying.

When Peter is asked how he wishes to dispose of his property at death he states, without hesitation, a list of specific bequests to spouse, friends and charities, and most to his children. The stepson shall be a child for all purposes. When asked what to do with the rest, a simple subtraction of the percentage already allocated from one hundred percent, he is unable to determine what that percentage is. He is then asked to estimate the value of his assets. Asset by asset, he is able to give what appears to be reasonable values. However, when asked to total the values, he is unable to calculate the total, and insists on an unreasonably low value for the total. The estate is in the range of forty to fifty million dollars, but Peter insists that his net worth is $90,000.

There are serious reservations about Peter's capacity. He is asked to come back another day so that his capacity can be evaluated again. At that second visit, it becomes clear that Peter needs to be professionally evaluated. It is gently suggested that he see a psychologist and why. Peter understands, and an appointment is made. Peter is so used to seeing doctors due to his ailments that this is just another trip to the doctor to him.

Dr. Becker will discuss the results of that evaluation.

Paula

Paula is a seventy-nine-year-old woman who is a respondent in a conservatorship proceeding. Her court-appointed attorney is presented with a family trust with seventeen amendments, some made very recently. There are four irrevocable trusts; one was made recently, and three were made many years ago. Substantial gifts have been made. Some of the estate-planning documents have been drafted and

executed with the benefit of counsel; others have not. Some of the gifts are complete; others are not. Paula presents herself well, but in most respects is confused as to time and place. She knows who her children are, but is confused about other relationships. She has never been able to handle her substantial wealth, and has always relied on others. There are issues in the family about the state of her estate plan. The tax effects of all of the gifts and trusts are beyond knowing. Paula's current capacity is in doubt and has been questionable for several years. The court directs the appointed attorney to evaluate the estate plan and make recommendations, and investigate allegations of elder abuse.

Paula is thoroughly evaluated by Dr. Becker and a physician specializing in dementia and Alzheimer's disease. She is determined to be presently incapacitated, and estimates are made as to when she last had capacity. After extensive negotiations and mediations, a revised and integrated estate plan is proposed, and a petition for substituted judgment is prepared.

Mary

Mary is a seventy-five-year-old who has had a conservator for over fifteen years. She is divorced, childless, and friendless, and lives alone in her own home. She is what is commonly known as a pack rat. Her home is stacked floor to ceiling with boxes and piles of junk. The heater cannot work due to clutter. The kitchen is not usable. The bathroom is usable, but barely so. There are ample assets to provide care for Mary for the rest of her life.

The conservators are professionals. They have determined that if Mary were treated with drugs, she could return to a normal existence. Mary appears to suffer from severe mental illness, but is otherwise very intelligent. She is a whiz at mathematics. She presents herself well. She appears clean and well dressed. She constantly and biannually objects to the conservatorship with the aid of able court-appointed counsel, but the conservatorship continues.

What can be done?

APPENDIX A	FOR COURT USE ONLY
Attorney or Party without Attorney (Name, state bar number and address): *Telephone and Fax No.:* *Attorney for (Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA 191 North First Street San Jose, California 95113	
Conservatorship of the ☐ Person ☐ Estate of ☐ Conservatee ☐ Proposed Conservatee	
DECLARATION RE ☐ LEGAL CAPACITY ☐ ABILITY TO ATTEND HEARING	CASE NUMBER:

TO PHYSICIAN, PSYCHOLOGIST, RELIGIOUS HEALING PRACTITIONER, OR LAY PERSON

The purpose of this form is to enable the court to determine whether the (proposed) conservatee

A. ☐ is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for *(date)*: _____ *(Complete item 5.)*

B. ☐ has the capacity to give informed consent to medical treatment. *(Complete items 6 and 7.)*

C. ☐ has the capacity to enter into financial transactions. *(Complete items 6 and 8.)*

D. ☐ has dementia and, if so, (1) whether he or she needs to be placed in a secured facility for the elderly or a facility that provides dementia treatment, and (2) whether he or she needs or would benefit from dementia medications. *(Complete items 6 and 9.)*

COMPLETE ITEMS 1-4 IN ALL CASES.

GENERAL INFORMATION

1. *(Name)*:
2. *(Office address and telephone number)*:
3. I am
   a. ☐ a California licensed ☐ physician ☐ psychologist acting within the scope of my licensure
      ☐ with at least two years' experience in diagnosing dementia.
   b. ☐ an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the patient. The patient is under my treatment. *(Practitioner may make the determination under item 5 ONLY.)*
   c. ☐ a layperson. I know the (proposed) conservatee in the following capacity *(describe)*: _____
4. ☐ (Proposed) Conservatee:
   a. ☐ I last saw the (proposed) conservatee on *(date)*:
   b. ☐ The (proposed) conservatee ☐ is ☐ is not a patient under my continuing treatment.

☐ **ABILITY TO ATTEND COURT HEARING**

5. Because of medical inability, the (proposed) conservatee is NOT able to attend the court hearing set for the date indicated in item A above *(check all items below that apply)*
   a. ☐ on the date set *(see date in box item A above)*.
   b. ☐ for the foreseeable future.
   c. ☐ until *(date)*:

Supporting facts *State facts in the space below or check this box* ☐ *and state the facts in an attachment marked "Attachment 5":*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... ▸ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

This declaration consists of pages 1 ☐, 2 ☐, 3 ☐, 4 ☐, ____ attachment pages ☐ *(check all appropriate page numbers).*

(Continued on next page)

Conservatorship of the ☐ Person ☐ Estate of *(Name):* ☐ Conservatee ☐ Proposed Conservatee	Case Number:

☐ **EVALUATION OF (PROPOSED) CONSERVATEE'S MENTAL FUNCTION.**

6. **Note to the Declarant:** This form is ***not*** a rating scale. It is intended to assist you in recording your *impressions* of the (proposed) conservatee's mental abilities. Where appropriate, please feel free to refer to scores on standardized rating instruments.
Instructions (Items A-C): Check the appropriate designation below: ***a*** = no apparent impairment; ***b*** = moderate impairment; ***c*** = major impairment; ***d*** = so impaired as to be incapable of being assessed; ***e*** = I have no opinion.

A. **Alertness and Attention**

(1) **Levels of arousal.** (Lethargic, responds only to vigorous and persistent stimulation, stupor.)
a☐ b☐ c☐ d☐ e☐

(2) **Orientation.** Encircle each *type of orientation* which is impaired:
a☐ b☐ c☐ d☐ e☐ Person
a☐ b☐ c☐ d☐ e☐ Time [day, date, month, season, year]
a☐ b☐ c☐ d☐ e☐ Place [address, town, state]
a☐ b☐ c☐ d☐ e☐ Situation [why am I here?]

(3) **Ability to attend and concentrate.** (Give detailed answers from memory, mental ability required to thread a needle.)
a☐ b☐ c☐ d☐ e☐

B. **Information Processing.** Ability to:

(1) **Remember.** (Ability to remember question before answering, to recall names, relatives, past presidents, events of past 24 hours.)
i. **Short-term memory:** a☐ b☐ c☐ d☐ e☐
ii. **Long-term memory:** a☐ b☐ c☐ d☐ e☐
iii. **Immediate recall:** a☐ b☐ c☐ d☐ e☐

(2) **Understand and communicate either verbally or otherwise.** (Deficits reflected by: inability to comprehend questions, follow instructions, use words correctly or name objects; nonsense words.)
a☐ b☐ c☐ d☐ e☐

(3) **Recognize familiar objects and persons.** (Deficits reflected by: inability to recognize familiar faces, objects, etc.)
a☐ b☐ c☐ d☐ e☐

(4) **Understand and appreciate quantities.** (Perform simple calculations.)
a☐ b☐ c☐ d☐ e☐

(5) **Reason using abstract concepts.** (Grasp abstract aspects of his/her situation; interpret idiomatic expressions or proverbs.)
a☐ b☐ c☐ d☐ e☐

(6) **Plan, organize and carry out actions (assuming physical ability) in one's own rational self interest.** (Break complex tasks down into simple steps and carry them out.)
a☐ b☐ c☐ d☐ e☐

(7) **Reason logically.**
a☐ b☐ c☐ d☐ e☐

C. **Thought disorders.**

(1) **Severely disorganized thinking.** (Rambling thoughts, nonsensical, incoherent or non-linear thinking.)
a☐ b☐ c☐ d☐ e☐

(2) **Hallucinations.** (Auditory, visual, olfactory.)
a☐ b☐ c☐ d☐ e☐

(3) **Delusions.** (Demonstrably false belief maintained without or against reason or evidence.)
a☐ b☐ c☐ d☐ e☐

(4) **Uncontrollable or intrusive thoughts.** (Unwanted compulsive thoughts, compulsive behavior.)
a☐ b☐ c☐ d☐ e☐

D. **Ability to modulate mood and affect.** The (proposed) conservatee ☐ has ☐ does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. *(If so, complete remainder of 6D.)*
☐ I have no opinion.
Instructions: Rate the *degree* of impairment of each *inappropriate* mood state *(if any)* as follows:
a = mildly inappropriate; **b** = moderately inappropriate; **c** = severely inappropriate

(Continued on next page)

Conservatorship of the ☐ Person ☐ Estate of *(Name)* ☐ Conservatee ☐ Proposed Conservatee	**Case Number**

Anger	a☐ b☐ c☐	Euphoria	a☐ b☐ c☐	Helplessness	a☐ b☐ c☐
Anxiety	a☐ b☐ c☐	Depression	a☐ b☐ c☐	Apathy	a☐ b☐ c☐
Fear	a☐ b☐ c☐	Hopelessness	a☐ b☐ c☐	Indifference	a☐ b☐ c☐
Panic	a☐ b☐ c☐	Despair	a☐ b☐ c☐		

E. The (proposed) conservatee's periods of impairment from the deficits indicated in Items 6A-6D
(1) ☐ do NOT vary substantially in frequency, severity, or duration.
(2) ☐ do vary substantially in frequency, severity, or duration *(explain)*:

F. ☐ *(Optional)* Other information regarding my evaluation of the (proposed) conservatee's mental function (e.g., diagnosis, symptomatology, and other impressions) *(specify)*:

☐ Stated in Attachment 6F.

☐ **ABILITY TO CONSENT TO MEDICAL TREATMENT**

7. Based on the information above, it is my opinion that the (proposed) conservatee
a. ☐ has the capacity to give informed consent to any form of medical treatment. The opinion expressed in item 7a is limited to medical consent capacity.
b. ☐ lacks the capacity to give informed consent to any form of medical treatment because the (proposed) conservatee is either (1) unable to respond knowingly and intelligently regarding medical treatment or (2) unable to participate in a treatment decision by means of a rational thought process, or both. The deficit(s) in the mental functions described above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of medical decisions. The opinion expressed in item 7b is limited to medical consent capacity. (If this paragraph applies, declarant shall initial here: _____.)

☐ **ABILITY TO ENTER INTO FINANCIAL TRANSACTIONS**

8. Based on the information above, it is my opinion that the (proposed) conservatee
a. ☐ has the capacity to enter into financial transactions and should not have his or her right to enter into contracts terminated by the Court.
b. ☐ lacks the capacity to enter into financial transactions because the mental deficits indicated above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of his or her actions such that the (proposed) conservatee lacks the capacity to understand and/or enter into any contracts or agreements regarding property. *(If this paragraph applies, declarant shall initial here:* _____.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

(Continued on next page)

Conservatorship of the ☐ Person ☐ Estate of *(Name)* ☐ Conservatee ☐ Proposed Conservatee	**Case Number**

☐ **FOR (PROPOSED) CONSERVATEE WITH DEMENTIA:**

9. Based on the information above, it is my opinion that the (proposed) conservatee has dementia as defined in the current edition of Diagnostic and Statistical Manual of Mental Disorders.
Note to Practitioner: If (proposed) conservatee requires placement in a secure facility, please check boxes and complete items 9a through 9c.

a. ☐ The (proposed) conservatee's mental function deficits, based on my assessment in item 6 above, include: ____
_____
_____

b. ☐ The deficits in the mental functions described above significantly impair the (proposed) conservatee's ability to understand and appreciate his or her actions with regard to giving informed consent to placement in a secure environment; the (proposed) conservatee does not have capacity to give informed consent to the placement; and the proposed conservatee needs or would benefit from placement in a secure facility because _____
_____
_____

c. ☐ A secure facility is the least restrictive environment for the (proposed) conservatee.

Note to Practitioner: If (proposed) conservatee requires administration of psychotropic medications for dementia treatment, please check boxes and complete items 9d through 9g.

d. ☐ The (proposed) conservatee needs or would benefit from the following medications for treatment of dementia *(list)*: ____
_____
_____

e. ☐ The (proposed) conservatee's mental function deficits, based on my assessment in item 6 above, include: _____
_____
_____
_____

f. ☐ The deficits in the mental functions described above significantly impair the (proposed) conservatee's ability to understand and appreciate his or her actions with regard to giving informed consent to administration of psychotropic medications for treatment of dementia; and the (proposed) conservatee does not have capacity to give informed consent to administration of psychotropic medications for treatment of dementia;

g. ☐ The (proposed) conservatee needs or would benefit from the administration of psychotropic medications for the treatment of dementia because _____
_____
_____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... ▸ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

THIS FORM HAS BEEN PREPARED BY THE ESTATE PLANNING, TRUST AND PROBATE SECTION OF THE SANTA CLARA COUNTY BAR ASSOCIATION FOR IMMEDIATE USE IN CONSERVATORSHIP PROCEEDINGS. PLEASE FORWARD ANY COMMENTS OR SUGGESTIONS TO: CAPACITY DECLARATION SUBCOMMITTEE, 400 CAMBRIDGE AVENUE, SUITE A, PALO ALTO, CA 94306.

APPENDIX B

DATE

NAME and ADDRESS of HEALTH CARE PROFESSIONAL

Re: CLIENT

Dear Dr. NAME:

I represent CLIENT who wishes to make changes to HIS/HER estate plan. CLIENT is under medical treatment for CONDITION. CLIENT's cognitive function appears to me to be at a fairly good level, but HE/SHE is concerned about possible repercussions from the changes HE/SHE wishes to make. You stated that you are available on DATE, at TIME to evaluate CLIENT. We have contacted CLIENT and have arranged for HIM/HER to be present for that appointment.

Please evaluate CLIENT to determine HIS/HER ability to recognize:

1. who HIS/HER family members are;

2. the nature and extent of HIS/HER assets and property; and

3. the effect of creating and signing a will or a trust.

Please also determine that CLIENT is making changes as HE/SHE sees fit, and that no one is asking HIM/HER or forcing HIM/HER to make any specific disposition of HIS/HER property.

Please send your report as well as your bill for services to my office. If you have any questions, please feel free to contact me at any time.

Very truly yours,

ATTORNEY