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IN THE SUPREME COURT OF CALIFORNIA

CONSERVATORSHIP OF THE PERSON OF O.B.

SUPREME COURT
FILED

OCT 29 2019

Jorge Navarrete Clerk

Deputy

T.B. et al., as Coconservators, etc.,
Petitioners and Respondents,
v.

O.B.
Objector and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B290805

MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JEREMY B. ROSEN; DECLARATION OF JAN S. RAYMOND; [PROPOSED] ORDER [Filed Concurrently with Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief]

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IN THE SUPREME COURT OF CALIFORNIA

CONSERVATORSHIP OF THE PERSON OF O.B.

T.B. et al., as Coconservators, etc.,
Petitioners and Respondents,
v.

O.B.
Objector and Appellant.

MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, subdivision (c), 453, and 459, and rule 8.252(a) of the California Rules of Court, amicus curiae the Chamber of Commerce of the United States of America (the Chamber) requests that this Court take judicial notice of the following two documents, which are cited in its amicus curiae brief: (1) Senate Committee on the Judiciary, comment on Senate Bill No. 48 (1987-1988 Reg. Sess.) (Declaration of Jeremy B. Rosen, exh. A, pp. 362-368 [Civil Code section 3294, as amended in 1987]); and (2) Senate Committee on the Judiciary, Analysis of Senate Bill No. 730 (1995-1996 Reg. Sess.) (Rosen Decl., exh. B, pp. 634-648 [Probate Code section 1801, as amended in 1995]).

This motion is being filed concurrently with the application for leave to file amicus curiae brief by the Chamber in support of

neither party. This motion is supported by the attached memorandum of points and authorities, the attached declaration of Jeremy B. Rosen, the attached declaration of Jan Raymond, the supporting exhibits filed concurrently with this motion, and the proposed amicus curiae brief.

While this motion seeks judicial notice of only the two documents cited in the amicus curiae brief, we also provide the complete legislative history of the 1987 amendment of Civil Code section 3294 and the 1995 amendment of Probate Code section 1801 for the Court's convenience. This legislative history, which neither party has fully put before this Court, is necessary to understand why the clear and convincing evidence standard must be taken into account on appellate review.

October 10, 2019

HORVITZ & LEVY LLP
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JEREMY B. ROSEN
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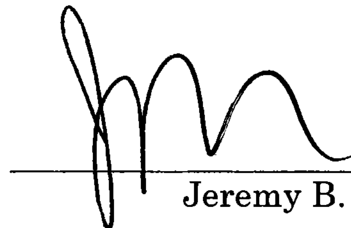

By: ______________________
Jeremy B. Rosen

Attorneys for Amicus Curiae
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

Judicial notice should be taken of the legislative history materials cited in the proposed amicus curiae brief.

Under Evidence Code section 452, subdivision (c), judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9 [granting request for judicial notice of legislative history material].) Appellate courts have the same right, power, and duty to take judicial notice as trial courts. (Evid. Code, § 459.)[1]

The Chamber requests judicial notice of the documents cited in its proposed amicus curiae brief bearing on the question of whether appellate courts must take into account the clear and convincing evidence standard on appellate review. In particular, the Chamber seeks judicial notice of two documents: (1) Senate Committee on the Judiciary, comment on Senate Bill No. 48 (1987-1988 Reg. Sess.) (Rosen Decl., exh. A, pp. 362-368 [Civil Code section 3294, as amended in 1987]); and (2) Senate Committee on the Judiciary, Analysis of Senate Bill No. 730 (1995-1996 Reg.

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[1] This Court has previously granted judicial notice requests by amicus curiae. (E.g., *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 317, fn. 10; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083, fn. 3, abrogated on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66.)

Sess.) (Rosen Decl., exh. B, pp. 634-648 [Probate Code section 1801, as amended in 1995]). Both of these legislative committee reports explain the reason why the Legislature added the clear and convincing evidence standard to Civil Code section 3294 and Probate Code section 1801.[2]

The Chamber seeks judicial notice of only the two legislative reports cited in its proposed amicus curiae brief. However, to provide the context of the specific documents for which judicial notice is sought, the exhibits accompanying this motion also include the entire set of legislative history documents received from Legislative Intent Service, Inc. (See generally *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 598 [criticizing reliance on "isolated fragments" of legislative history]; *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 776, fn. 4 ["The entire legislative history should have been submitted to us"].)

Appellate courts routinely take judicial notice of various Senate Committee documents as part of the legislative history. (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, fn. 3 [the Supreme Court of California granted party's request to take judicial notice of legislative history materials "including committee reports . . . from . . . Senate committee bill files"]; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1554, fn. 16 [the court took judicial notice of "a conference report of the

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[2] All of this legislative history is contained in the exhibits filed concurrently with this request, and consists of documents that were obtained from Legislative Intent Service, Inc. Citations to the legislative history are to the consecutively-paginated exhibits to this motion.

Senate Rules Committee" because " '[i]t is well established that reports of legislative committees and commissions are part of a statute's legislative history and may be considered when the meaning of a statute is uncertain' "]; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 719-720 ["Contemporaneous legislative committee analyses are subject to judicial notice" and can be regarded "as reliable indicia of the legislative intent underlying the enacted statute"].)

Furthermore, Senate Committee hearings are useful legislative records from which legislative history and intent may be obtained. (See *Conservatorship of Bryant* (1996) 45 Cal.App.4th 117, 121, fn. 4 ["Statements made during the legislative process and reflected in the records of the legislative hearings are useful in determining legislative intent"].)

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court take judicial notice of the legislative reports cited in its amicus curiae brief.

October 10, 2019

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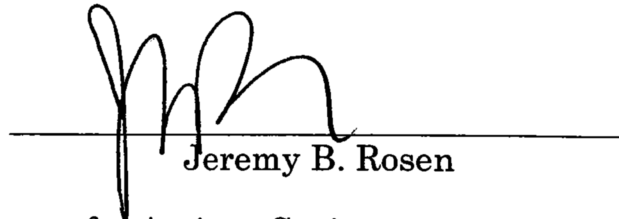


By: ______________________
Jeremy B. Rosen

Attorneys for Amicus Curiae
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

DECLARATION OF JEREMY B. ROSEN

1. I am an attorney admitted to practice law in California. I am a partner in the law firm of Horvitz & Levy LLP, which is appellate counsel for amicus curiae The Chamber of Commerce of The United States of America (the Chamber). I am the attorney principally responsible for preparing the Chamber's proposed amicus curiae brief.

2. As part of my work preparing the proposed amicus curiae brief, I contacted Jan Raymond of Legislative Intent Services, Inc. I asked him and his team to provide me the complete legislative history for the bills adding the clear and convincing evidence standard to Civil Code section 3294 and Probate Code section 1801. Raymond's team provided me a link to all of the legislative history materials that were responsive to my request.

3. Accompanying this request are four volumes of exhibits containing true and correct copies of all documents contained in the link sent to me by Legislative Intent Service, Inc. pertaining to: (1) Civil Code section 3294, as amended in 1987; and (2) Probate Code section 1801, as amended in 1995.

4. These documents are also described and authenticated in the attached Declaration of Jan Raymond.

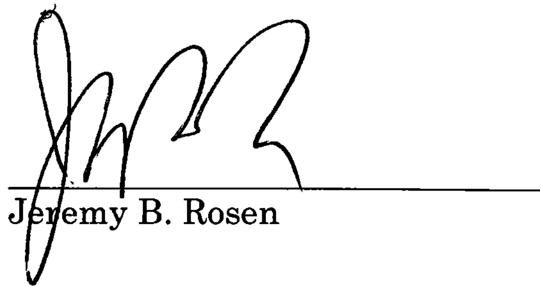
5. For the Court's convenience, I have attached to my declaration the two legislative reports cited in the proposed amicus curiae brief. Those documents can also be found in in the four volumes of exhibits attached to the Declaration of Jan Raymond along with the complete history of each amendment.

6. Attached as Exhibit A is a true and correct copy of Senate Committee on the Judiciary, comment on Senate Bill No. 48 (1987-1988 Reg. Sess.). (Rosen Decl., exh. A, pp. 362-368.)

7. Attached as Exhibit B is a true and correct copy of Senate Committee on the Judiciary, Analysis of Senate Bill No. 730 (1995-1996 Reg. Sess.). (Rosen Decl., exh. B, pp. 634-648.)

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

Executed October 10, 2019, at Burbank, California.



Jeremy B. Rosen

EXHIBIT A

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1987-88 Regular Session

SB 48 (Lockyer)
As introduced
Hearing: May 13, 1987
Civil Code
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PUNITIVE DAMAGES
-PROOF BY CLEAR AND CONVINCING EVIDENCE-

HISTORY

Source: Author

Prior Legislation: SB 1513 (1984) - Held in this Committee
SB 227 (1979) - Amended out

Support: Associated General Contractors; Calif. State Auto Assoc.; Calif. Legislative Council on Professional Engineers; National Federation of Independent Businesses; So. Calif. Contractor's Ass'n

Opposition: CTLA

KEY ISSUE

SHOULD PROOF OF LIABILITY FOR PUNITIVE DAMAGES BE BY CLEAR AND CONVINCING EVIDENCE, INSTEAD OF BY THE PREPONDERANCE OF THE EVIDENCE?

PURPOSE

Under existing law, the standard of proof for proving liability for punitive damages is by a preponderance of the evidence.

This bill would instead require proof by clear and convincing evidence--a slightly higher burden.

The purpose of this bill is to reduce punitive damages awards.

(More)

COMMENT

1. Highlights of analysis

-Proponents say that the usual preponderance of the evidence standard is inappropriate for punitive damages awards which are assessed for punishment purposes and that due process and fairness considerations argue for a higher standard (see Comment 3).

-Opponents say that the higher burden would remove a significant deterrence to oppressive or unconscionable conduct by potential defendants (see Comment 7).

-The courts have refused to adopt the higher standard on their own (see Comment 6).

-The higher standard may confuse juries; but a court may bifurcate the issues to avoid confusion (see Comment 4).

-Findings of the recent Rand Study on punitive damages are noted in Comment 8.

2. Punitive damages awards under existing law

Civil Code Section 3294 permits the assessment of punitive damages against a defendant who has been guilty of "oppression, fraud, or malice,. . . for the sake of example and by way of punishing the defendant." Ordinary or simple negligence does not furnish a basis for a punitive damages award.

(a) Definitions

"Malice" is defined as "conduct which is intended . . . to cause injury . . . or which is carried on by the defendant with a conscious disregard of the rights and safety of others."

"Oppression" is defined as "subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights."

"Fraud" means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention . . . of depriving a person of property or legal rights or otherwise causing injury."

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(b) Burden and standard of proof

The burden of proving punitive damages is on the plaintiff. The standard used is the same as in all civil cases, i.e., by a preponderance of the evidence.

3. Higher burden proposed

Proponents assert that the normal civil standard of proof is inappropriate for punitive damage awards which are assessed against a defendant for punishment purposes. Recognizing that the criminal "beyond-a-reasonable-doubt" standard may be overly harsh, proponents propose a middle test: clear and convincing evidence. Proponents offer several arguments in support for the change, as noted below.

(a) Considerations of fairness and due process justify higher standard

Punitive damages, through denominated as "civil" damages, are awarded for the statutory purpose of punishing a defendant. As a sanction, it may be deemed sufficiently punitive in purpose and effect so as to require safeguards against its unjust imposition. Thus, say the proponents, a higher standard than that required for ordinary civil remedies is justified.

In addition, procedural due process may apply to warrant the higher standard of proof in punitive damages awards. While the U.S. Supreme Court has yet to rule on whether the procedures by which punitive damages are awarded satisfy the requirements of procedural due process, the Court on March 9, 1987, has noted probable jurisdiction in a case raising these issues (Bankers Life and Casualty v. Crenshaw (Miss. 1985) 483 So.2d 254, prob.juris. noted (1987) 107 S.Ct. 1367.)

(b) Apparent emerging trend

Several states within the past few years have by judicial decision adopted the clear and convincing standard in punitive damage cases: Indiana, Wisconsin, Maine, and Arizona. Several other states have adopted the higher standard by statute : Alaska, Minnesota, Montana, and Oregon. In addition, in February of this year, the American Bar Association House of Delegates

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adopted a recommendation that the standard of proof for punitive damages should be clear and convincing evidence.

4. Impact of bill

(a) Creates double standards for damages

The bill would not affect the standard of proof for actual damages. Thus, under this bill, a plaintiff would have to prove actual damages by a preponderance of the evidence and punitive damages by clear and convincing evidence.

While the different standards are potentially confusing to a jury, the court may separate the punitive damages claim from the compensatory damages issue by bifurcating the trial. Authority to do so is set forth in CCP Section 598 and Section 1048(b).

(b) Possible limited impact

The higher burden may be of no import in some cases involving an egregious defendant or a sympathetic jury--punitive damages would likely be assessed under either test.

5. Comparison of burdens

(a) Preponderance of the evidence

The customary standard or degree of proof for civil cases is the "preponderance-of-the-evidence" or the "balance-of-probabilities" standard. As set forth in BAJI 2.60, it requires a party to convince the trier of fact that the existence of a fact sought to be proved is more probable than its nonexistence. ("By a preponderance of the evidence is meant such evidence as, when weighted with the opposed to it, has more convincing force and the greater probability of truth." BAJI 2.60.)

(b) Clear and convincing

The phase "clear and convincing evidence" has been defined in case law as "clear, explicit, and unequivocal," "so clear as to leave no substant6ial

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doubt," and "sufficiently strong to demand the unhesitating assent of every reasonable mind." [See People v Martin (1970) 2 Cal.3d 822, at 831.]" "Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a higher probability." [Witkin, California Evidence, Second Ed., Section 209, p. 190.]

This higher standard is used in action to sever relationship between parent and child; to rebuff the presumption of parentage; to prove novation of a contact or an oral agreement to make a mutual will; and to establish a probate conservatorship.

The clear and convincing standard is also constitutionally required for proof of malice in libel actions. (See Field Research Corp. v. Patrick (1973) 30 Cal.App.3d 603.)

6. Higher burden rejected by courts

In Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, the third district Court of Appeal expressly rejected Ford's argument that the plaintiff had the burden of proving "malice" (and, therefore, liability for punitive damages) by clear and convincing evidence. In so doing, the court noted that the Supreme Court also had rejected the clear and convincing test in a fraud case in which punitive damages were at stake [Liodas v. Sahadi (1977) 19 Cal.3d 278].

7. Opposition

The CTLA asserts that punitive damages awards play an important role in forcing potential defendants to consider the consequences of actions that cause foreseeable injuries to others. Raising the burden of proof would make such awards harder to obtain and, therefore, remove a significant deterrence to oppressive or unconscionable conduct.

CTLA also asserts that current law already adequately protects against an unjust or excessive award. Under Section 662.5, the trial court may reduce the amount of any award which is not supported by the evidence.

Furthermore, punitive damages are deemed desirable to help defray expenses of litigation not compensated for by the ordinary "compensatory" award.

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8. Rand Study on Punitive Damages

The Institute for Civil Justice, part of the Rand Corporation, recently released its report and findings on punitive damages awards. Its finding provides a mixed picture. In the words of the report, in pertinent part:

In some ways punitive damages have remained fairly stable. They were most likely to be assessed against defendants who were found by juries to have defrauded or harmed plaintiffs intentionally or through willful negligence, the traditional bases for such awards. Punitive damages were rarely awarded in personal injury cases and there is little evidence that that frequency has increased significantly. The study also found that most punitive damage awards remained fairly modest, although medians have increased in both Cook County and San Francisco County in recent years.

But the study also found two substantial changes in recent years. First, punitive awards in business/contract cases have become more frequent and far larger. In part, this reflects the growing number of jury trials involving disputes about business or contracts.... Furthermore, the size of both extraordinary and routine punitive damage awards increased greatly. The changes in business/contract cases partly reflect expanding bases for punitive damages, primarily the development of theories of bad faith and breach of implied covenants of good faith and fair dealing....

But punitive damages also grew for other types of business/contract disputes. Many punitive damages now go to businesses suing other businesses for unfair business practices, cases that are not a vehicle for punishing or benefiting individual litigants....

The second major change concerns extraordinarily large punitive damage awards. Most of the total amount of money awarded as punitive damages is awarded in a few cases. Our survey of post-trial activity indicates that these large awards were frequently, but not always, reduced by settlements or judicial action.

9. Related Legislation

SB 282 (Maddy), also scheduled for hearing today, would require proof of punitive damages by beyond a reasonable doubt. The bill would also limit punitive damages awards

(More)

against employers, and would further require a specific "evil" intent on the part of a defendant before punitive damages may be assessed.

SB 773 (Beverly), also scheduled for hearing today would limit any punitive damages award to three times the amount of compensatory damages, or to the amount that would deter the defendant's conduct in light of the defendant's financial condition, whichever is less. It would also limit the introduction into evidence of a defendant's financial condition of the profits gain from the conduct until the liability for punitive damages has been established by the trier of fact.

SCA 27 (Doolittle), scheduled for hearing on May 19, would require a unanimous verdict for a punitive damages award instead of the current three-fourths requirement.

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EXHIBIT B

SENATE JUDICIARY COMMITTEE
Charles M. Calderon, Chairman
1995-96 Regular Session

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SB 730 (Mello)
As amended on April 19, 1995
Hearing date: May 16, 1995
Civil Code; Probate Code
MBS:md

THE CAPACITY TO CONSENT TO MEDICAL TREATMENT

CONSERVATORSHIPS

HISTORY

Source: Author, California Medical Association and the State Bar, Estate Planning, Trust and Probate Law Section.

Related Pending Legislation: None Known

KEY ISSUES

1. SHOULD THE LEGISLATURE ENACT THE DUE PROCESS IN COMPETENCY DETERMINATION ACT (ACT), AS PROVIDED?

   A. IS IT SOUND PUBLIC POLICY TO DETERMINE THAT A PERSON MAY HAVE A MENTAL OR PHYSICAL DISORDER AND STILL BE CAPABLE OF CONTRACTING, CONVEYING, MARRYING, MAKING MEDICAL DECISIONS, AND EXECUTING WILLS OR TRUSTS, AMONG OTHER THINGS?

   B. SHOULD THE ABILITY OF A PATIENT TO GIVE INFORMED CONSENT

(more)

TO MEDICAL TREATMENT BE DETERMINED BY A SIGNIFICANT IMPAIRMENT OF ONE OR MORE OF A SPECIFIED SET OF MENTAL FUNCTIONS, RATHER THAN BY THE DIAGNOSIS OF A PARTICULAR MENTAL OR PHYSICAL DISORDER?

   C. SHOULD THE PHYSICIANS AND FAMILY MEMBERS OF A PATIENT BE PERMITTED TO DETERMINE THE CAPACITY OF A PATIENT TO MAKE MEDICAL DECISIONS IN CERTAIN CASES, SO LONG AS THERE IS NO SERIOUS DISAGREEMENT ABOUT THE PATIENT'S DECISION-MAKING CAPACITY?

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D. SHOULD THERE BE TWO SEPARATE STANDARDS FOR DETERMINING A PATIENT'S ABILITY TO MAKE MEDICAL DECISIONS: ONE USED BY PHYSICIANS FOR MEDICAL PURPOSES AND ONE USED TO DETERMINE CAPACITY TO GIVE INFORMED CONSENT IN A LEGAL/JUDICIAL CONTEXT?

E. SHOULD A DETERMINATION THAT A PERSON LACKS THE CAPACITY TO GIVE AN INFORMED CONSENT BE BASED UPON A SIGNIFICANT DEFICIT IN ONE OR MORE OF THE FOLLOWING CATEGORIES OF MENTAL FUNCTIONS AND CONSIDERING ALSO THE FREQUENCY, SEVERITY AND DURATION OF SUCH DEFICIT(S)?

1) ALERTNESS AND ATTENTION, AS DEFINED.

2) INFORMATION PROCESSING, AS DEFINED.

3) THOUGHT PROCESSES, AS DEFINED.

4) ABILITY TO MODULATE MOOD AND AFFECT, AS DEFINED.

F. SHOULD A DETERMINATION THAT A PATIENT LACKS THE ABILITY TO GIVE AN INFORMED CONSENT TO RECOMMENDED MEDICAL TREATMENT BE MEASURED BY A PATIENT'S INABILITY TO RESPOND KNOWINGLY AND INTELLIGENTLY TO QUERIES REGARDING THE TREATMENT AND TO PARTICIPATE IN THE DECISION-MAKING REGARDING THE TREATMENT, AS DEFINED IN THIS BILL?

G. WHEN A PATIENT FAILS TO EXERCISE THE RIGHT, OR WAIVES THE RIGHT, TO OBJECT TO A FINDING OF INCAPACITY, SHOULD THERE BE NO REQUIREMENT TO DETERMINE WHETHER THE PATIENT IS COMPETENT TO DO SO?

2. SHOULD THERE BE A REBUTTABLE PRESUMPTION AFFECTING THE BURDEN OF PROOF THAT A PERSON IS OF UNSOUND MIND, IF THE PERSON IS SUBSTANTIALLY UNABLE TO MANAGE HIS OR HER OWN FINANCIAL RESOURCES OR TO RESIST FRAUD OR UNDUE INFLUENCE -- SO THAT ANY CONTRACT ENTERED INTO BY SUCH A PERSON IS SUBJECT TO RECISSION?

3. SHOULD THE STANDARD OF PROOF FOR THE NEED TO APPOINT A CONSERVATOR BE BY CLEAR AND CONVINCING EVIDENCE?

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PURPOSE

This bill creates the Due Process in Competence Determinations Act (Act), which, most significantly, provides that:

1. The Legislature finds and declares:

A. A person may have a mental or physical disorder and still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other functions.

(more)

B. A judicial determination that a person lacks the legal capacity to perform a specified 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 mental or physical disorder.

C. The physicians and family members of patients may determine the capacity of the patient to make medical decisions, in appropriate cases and without judicial authorization -- if there are no serious disagreements about the patient's decision-making capacity.

2. By enacting this Act, the Legislature intends only to affect the evidence that is presented to, and findings made by, a court and does not intend:

A. To increase or decrease the burdens of documentation on, or the potential liability of, physicians who are determining a patient's ability to make medical decisions outside of the judicial context.

B. To increase or decrease the number or kinds of cases in which a judicial determination of capacity is required.

3. Except where otherwise provided by law, a person is not competent to make a decision unless the person has the ability to communicate the decision, and to understand and appreciate, to the extent relevant, all of the following:

A. The rights, duties, and responsibilities created or affected by the decision.

B. The probable consequences for the decision-maker and the persons affected by the decision.

C. The significant risks, benefits, and reasonable alternatives involved in the decision.

4. A determination that a person is of unsound mind or lacks the capacity to do a certain act (including, but not limited to, the capacity to contract, make a conveyance, marry, make medical decisions, vote and execute a will or trust) shall be supported

(more)

by evidence of a deficit in at least one of the following mental functions (hereinafter referred to as a "function deficit" for ease of reference):

A. Alertness and attention, including but not limited to, the following:

1) Level of arousal or consciousness.

2) Orientation to time, place, person and

situation.

3) Ability to attend and concentrate.

B. Information processing, including but not limited to, the following:

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

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

3) Recognition of objects and familiar persons.

4) Ability to understand and appreciate quantities.

5) Ability to reason using abstract concepts.

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

7) Ability to reason logically.

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

1) Severely disorganized thinking.

2) Hallucinations.

(more)

3) Delusions.

4) Uncontrollable, repetitive, or intrusive thoughts.

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

5. A function deficit may be considered only if the deficit 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. (The function deficit may be considered by itself or in combination with one or more other mental function deficits.)

6. The court may consider the frequency, severity and duration of periods of impairment, when determining whether a person suffers from a function deficit so substantial that the person lacks the capacity to do a certain act.

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

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8. A person has the capacity to give informed consent to a proposed medical treatment (hereinafter referred to as "legal capacity" for ease of reference) if the person is able to do all of the following:

   A. Respond knowingly and intelligently to queries about that medical treatment.

   B. Participate in that treatment decision by means of a rational thought process.

   C. Understand and appreciate all of the following items of minimum basic medical treatment information (hereinafter referred to as basic treatment information for ease of reference) with respect to that treatment:

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

      2) The nature of the medical recommended treatment.

      3) The probable degree and duration of any benefits and risks of the recommended medical treatment and the probable consequences of lack of treatment.

      4) The nature, risks and benefits of any reasonable alternative.

Current law provides that:

1. A conservator for a person may be appointed for a person who is unable to properly provide for his or her own personal needs.

2. 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.

3. A limited conservator of the person or estate, or both, may be appointed for a developmentally disabled adult. (The limited conservatorship is used only to the extent necessary to protect

(more)

and promote the well-being of the individual and is designed to encourage the development of maximum self-reliance.)

This bill provides that the standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

Current law provides that where the court determines that a conservatee lacks legal capacity, the court shall give to the conservator the power to consent on behalf of the conservatee. (This does not include the ability to: have the conservatee committed to a mental health treatment facility, use experimental drugs or convulsive treatments, or sterilize a minor.)

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This bill adds that a conservatee is deemed to lack legal capacity if, for all medical treatments, the conservatee is unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process.

1. In order to make the determination that a person is unable to respond or participate as required above, the court shall do both of the following:

   A. Determine that, for all medical treatments, the conservatee is unable to understand and appreciate at least one of the items of basic information (listed in #C, above).

   B. Determine that there is a function deficit, and there is a link between the deficit and the conservatee's inability to give consent.

2. However, a deficit may only be considered if the deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her decisions.

3. In the interest of minimizing unnecessary expense, where a person does not object to, or waives, the finding of incapacity, there is no necessity to determine the condition of the person's mental functions, regardless of whether the person is competent to waive the objection.

Current law provides that where a patient requires medical treatment for an existing or continuing medical condition and the patient is unable to give an informed consent, a petition may be filed requesting an order authorizing the treatment and authorizing the petitioner to give consent on behalf of the patient. The petition must provide the following:

1. The nature of the medical condition of the patient which requires treatment.

2. The recommended course of medical treatment which is considered to be medically appropriate.

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

4. The predictable or probable outcome of the recommended course of treatment.

5. The medically available alternatives, if any, to the course of treatment recommended.

6. The efforts made to obtain an informed consent from the patient.

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7. If the petition is filed on behalf of a medical facility, the name of the person designated to give consent on behalf of the patient.

This bill adds that a petition may be filed to determine that a patient has legal capacity as to a specified medical treatment for an existing or continuing medical condition, and adds to the list of information that must be provided in a petition, information regarding the function deficit(s) which are impaired and identification of the link between the deficits and the patient's inability to respond knowingly and intelligently to queries about treatment or to participate in a treatment decision.

Current law provides that a conveyance or other contract made before a judicial determination of incapacity, by a person of unsound mind (but who is not entirely without understanding), is subject to recission.

This bill provides that there is a rebuttable presumption affecting the burden of proof that a person is of unsound mind, if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. However, substantial inability may not be proved by isolated incidences of negligence or improvidence.

COMMENT

1. Should the Legislature enact the Due Process in Competency Determination Act (Act), as provided?

According to the author, SB 730 there are currently no statutory standards instructing a court about the type and degree of mental function deficit that should be considered when a court determines legal capacity. Thus, standards for determining capacity vary from judge to judge. For this reason, the author developed SB 730, which places into statute clear standards (most of which have been culled from case law) by which a court would determine if a person has the capacity to perform a particular act (e.g., to contract or give medical consent).

A. Is it sound public policy to determine that a person may

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have a mental or physical disorder and still be capable of contracting, conveying, marrying, making medical decisions, and executing will or trusts, among other things?

According to the California Medical Association (CMA), a co-sponsor of this bill, modern scientific research demonstrates that the mere fact that a patient falls into a particular diagnostic category may not be, in and of itself, a sufficient basis for determining the patient is incompetent to make decisions regarding particular acts.

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As an example, CMA cites the case of a patient diagnosed with Alzheimer's Disease, or some other mental disorder in an early state. The patient may be quite able to make a wide variety of decisions, regardless of the disorder.

CMA argues this bill will protect the individual's civil rights by ensuring that court's are provided with relevant medical information regarding an individual's specific mental function deficits and the relationship that those deficits bear to the particular capacity at issue.

CMA believes these evidentiary requirements will maximize individual autonomy while protecting vulnerable individuals.

B. Should the ability of a patient to give informed consent to medical treatment be determined by a significant impairment of one or more of a specified set of mental functions, rather than by the diagnosis of a particular mental or physical disorder?

The arguments presented above by the CMA, apply as well here. In fact, as the right to give or withhold consent to medical treatment has been deemed a constitutionally protected right, it seems even more important to ensure that the determination that a person lacks the capacity to give or withhold consent to medical treatment be done in a manner designed to ensure, to the degree scientifically possible, that the finding of incapacity is correct.

(See the discussion below regarding the constitutional protection of the right to give or withhold consent to medical treatment.)

C. Should the physicians and family members of a patient be permitted to determine the capacity of a patient to make medical decisions in certain cases, so long as there is no serious disagreement about the patient's decision-making capacity?

The right of a competent adult patient to refuse medical treatment has its origins in the constitutional right of

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privacy. This right is specifically guaranteed by the California Constitution, Article I, Section 1 and has been found to exist in the "penumbra" of rights guaranteed by the fifth and Ninth Amendments to the United States Constitution. [Griswold v. Connecticut (1965) 381 U.S. 479;

Bartling v. Superior Court (1984) 163 Cal.App.3d 186.]

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This bill provides that a patient's family members and physicians can make a decision regarding the patient's health care, without judicial adjudication, so long as they are not in serious disagreement. It does not address the issue of the disagreement of the patient himself or herself.

The right of a competent adult patient to refuse medical treatment is a constitutionally protected right which must not be abridged (Bartling, at p.195.) This bill appears to permit that right to be abridged without the due process protections of a judicial determination.

D. Should there be two separate standards for determining a patient's ability to make medical decisions: one used by physicians for medical purposes and one used to determine capacity to give informed consent in a legal/judicial context?

The CMA and State Bar argue that two different standards are necessary. They note that currently, a physician must make certain diagnoses for purposes of treatment, but there can be an inherent conflict for the physician when such a diagnosis will affect a determination of legal capacity -- particularly where the physician and patient have a long-standing relationship and the physician does not believe that the patient is legally incompetent.

By providing a set of objectively measurable functions as the basis for determining legal competency, physicians are freed from concerns about the possible effect of their medical diagnosis on the patient's ability to maintain some control over their lives. This helps to protect the important physician-patient relationship, by not forcing the physician into a potentially adversarial role with the patient.

E. Should a determination that a person lacks the capacity to give an informed consent be based on a significant deficit in one or more of the following categories of mental functions and considering also, the frequency, severity and duration of such deficit(s)?

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The CMA and State Bar argue that it is necessary to move away from the archaic methods currently used to determine legal competency, many of which were derived from case law from the early part of the century. The co-sponsors note that modern science has far surpassed the point where behavioral quirks or mere diagnosis are the only means of evaluating legal competency. It is their belief that the following criteria represent a more objective, rational process for evaluating legal competency.

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The co-sponsors further note that it is important to recognize that all persons have some function deficit at different times in their lives. Therefore it is important, not only to note the particular function deficit, but to find that the deficit is significant and that it has some demonstrable link to the particular issue of capacity. This means that the legal capacity to perform some acts, such as making a will, may be more or less complicated and require different functional capabilities than others, such as the ability to vote, or marry.

The author notes that this list of mental functions was created by a group of professors in geropsychiatry and neurology and the list has been widely circulated among CMA committees for comment.

The author states that finding a function deficit does not mean a person lacks capacity. However, in order to find that someone lacks legal capacity, there must be some function deficit.

According to Dr. James Spar (who has been involved in the development of the list and is recognized as an expert in this area): "The list of mental functions is exhaustive, in that any level of impairment should be describable in some combination of its terms. However, some functions may be more or less important to some tasks. For example, capacity for abstract thought, ability to plan and organize may be less critical to the task of executing a will than to executing a complicated contract or trust."

F. Should a determination that a patient lacks the ability to give an informed consent to recommended medical treatment be measured by a patient's inability to respond knowingly and intelligently to queries regarding the treatment and to participate, by means of a rational thought process in the

decision-making regarding the treatment?

Current law provides that a conservatee (regardless of whether the conservatorship was appointed pursuant to the Lanterman-Petris-Short (LPS) Act or the general conservatorship provisions of the Probate Code) retains the

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right to refuse medical treatment unless the court, after making the appropriate findings, denies the conservatee this right and authorizes the conservator to make informed consent decisions. [Riese v. St. Mary's Hospital & Medical Center, at p. 1313; Keyhea v. Rushen, at pp. 535-536.]

Further, California common law protects the right to give or withhold consent to medical treatment of those not adjudicated as incompetent. [Riese v. St. Mary's Hospital & Medical Center, at p. 1317; Cobbs v. Grant (1972) 8 Cal.3d 229; Foy v. Greenblott (1983) 141 Cal.App.3d 1.]

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Representatives from Protection and Advocacy (PA), have expressed some concern that this list is too long and complicated and question the need for such a list, rather than the simpler tests set forth in Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal.App.3d 1303:

"Judicial determination of the specific competency to consent to drug treatment should focus primarily on three factors: (a) whether the patient is aware of his or her situation (e.g., if the court is satisfied of the existence of psychosis, does the individual acknowledge that condition); (b) whether the patient is able to understand the benefits and risks of, as well as the alternatives to, the proposed intervention (e.g., "an acutely psychotic patient should understand that psychotropic medication carries the risk of dystonic reactions[i.e., abnormal control and coordination of movement]...that the benefit is the probable resolution of the psychotic episode...; and (c) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given to patients whose informed consent is sought, and otherwise participate in the treatment decision by means of a rational thought process. With

respect to this last consideration, it was with reason been urged that "the appropriate test is a negative one; in the absence of a clear link between an individual's delusional or hallucinatory perceptions and his ultimate decision," it should be assumed "that he is utilizing rational modes of thought"." [The Riese court (pp. 1322-1323) also citing various LPS provisions and Gutheil & Appelbaum, Clinical Handbook of Psychiatry and the Law (1982) at p. 220.]

Based upon the above language, it is clear that this portion of the bill is derived from the Riese three-part test. However, this section of the bill also refers back to the function deficit list as the objective means of evaluating the three-part test. In fact, some portions of the function deficit list appear to have also been derived from the Riese case, as well as reference to relevant

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medical journals. For example, Riese refers above to the need to find a "link" between certain inabilities and the decision to be made. Further, Riese refers to evaluation of thought processes, which is one of the functions listed in this bill.

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G. When a patient fails to exercise the right, or waives the right, to object to a finding of incapacity, should there be no requirement to determine whether the patient is competent to do so?

This bill provides that "[i]n the interest of minimizing unnecessary expense to the parties to a proceeding" the requirement to determine the extent of a function deficit will not apply to a petition to determine legal capacity to give informed consent -- where the patient does not object to, or waives any objection to, a proposed finding of incapacity, regardless of whether or not the patient is

competent to waive the objections.

This provision would make sense if one assumes that the only reason a patient would fail to object to, or waive the right to object to, a proposed finding of incapacity was because of the incapacity. However, that is not necessarily true.

A patient may fail to object because the patient did not sufficiently understand his or her legal right to object and the consequences of not objecting. This lack of understanding may be due to a failure to have such rights fully explained, not because of a function deficit.

Further, a patient may feel intimidated by the physician or family members and/or have difficulty in articulating his or her desires.

This provision seems to be diametrically opposed to the philosophy of the rest of the bill, which is to ensure the patient's right to make decisions, to give or withhold consent, unless there is a demonstrated significant link between a particular function deficit or deficits and the particular decision to be made.

2. Should there be a rebuttable presumption affecting the burden of proof that a person is of unsound mind if, the person is substantially unable to manage his or her own financial resources or to resist fraud or undue influence -- so that any contract entered into by such a person is subject to recission?

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Current law provides that a contract may be rescinded if a court determines that a person was of unsound mind at the time the contract was entered into, and such a recission is governed by the general rules and procedures relating to recission of contracts, as found in Civil Code (CC) Sections 1688 et seq.

Current law also provides that the burden of proof is on the person seeking to rescind the contract. [Evidence Code Sections 500 and 522; Sacramento Suburban Fruit Lands Co. v. Boucher (C.C.A. 1930) 36 F.2d 912; Elko Mfg. Co. v. Brinkmeyer (1932) 216 Cal. 658; Dorris v. McManus (1906) 3 Cal.App. 576.]

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This bill brings the standard for determining competency in the conservatorship sections of the Probate Code (Probate Code Section 1801) to this Civil Code Section by defining being of unsound mind as, "the substantial inability to manage his or her own financial resources or to resist fraud and undue influence."

Further, the author notes that this bill makes the standard a rebuttable presumption affecting the burden of proof, as a means of giving more notice of the standard to prospective financial abusers who might otherwise claim that they thought the person did not have an "unsound mind" at the time they were dealing with the person.

Evidence Code Section 605 states that a presumption affecting the burden of proof is a presumption established to implement some public policy. (E.g., the policy in favor of establishment of a parent and child relationship, the stability of titles to property, or the security of those who entrust themselves or their property to the care of others.)

This differs from a presumption affecting the burden of producing evidence, which is designed to facilitate the determination of the particular action in which the presumption is applied, as provided for in Evidence Code Sections 603 and 604.

It is a question of public policy whether to create a rebuttable presumption affecting the burden of proof that a contract may be rescinded where the person contracting was incompetent to enter into the contract at the time the contract was entered into.

3. Should the standard of proof for the need to appoint a conservator be by clear and convincing evidence?

This bill provides that the standard of proof that a person requires a conservator shall be by clear and convincing evidence. Case law has consistently provided that the rights of the individual to make decisions regarding his or her own affairs is constitutionally protected and thus, the standard of proof in such cases must be by clear and convincing evidence. [Riese v. St. Mary's Hospital & Medical Center (supra); Cobbs v.

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Grant (1972) 8 Cal.3d 229; Foy v. Greenblott (1983) 141 Cal.App.3d 1; Bartling v. Superior Court (1984) 163 Cal.App.3d 186.]

While this bill specifically provides that the standard of proof for appointment of a conservator is by clear and convincing evidence, and further provides that there is a rebuttable presumption affecting the burden of proof that a person was incompetent at the time of entering a contract so that the contract may be rescinded.

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However this bill does not also provide that the standard of proof that a person lacks capacity to consent to medical treatment should be by clear and convincing evidence, although the case law clearly supports this standard [see the cases cited above].

By statutorally specifying high standards of proof for two out of three instances only, it could be construed that the Legislature intended to provide for a lower burden of proof when determining the capacity to give consent to medical treatment.

Should not this bill also provide that the standard of proof for determining a person lacks the capacity to give an informed consent to medical treatment is by clear and convincing evidence?

Support: California Medical Association, The State Bar, Estate Planning, Trusts and Probate Law Section, the UCLA Neuro-psychiatric Department, several individuals involved in the field of elder abuse.

Opposition: None Known

Prior Legislation: SB 1679 (Mello), 1994 was held in Committee to resolve issues between CMA and the State Bar.

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DECLARATION OF JAN S. RAYMOND
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4 I, Jan Raymond, declare:

5 1. I am an attorney licensed to practice by the California State Bar, State Bar number 6 88703, and admitted to practice in the United States Federal Court for the Eastern District of 7 California. My business is researching the history and intent of legislative and regulatory 8 enactments and adoptions; I have over 30 years experience in research and analysis of 9 legislative and regulatory intent. In cooperation with persons working under my supervision 10 and at the request of my client, Jeremy B. Rosen, I undertook to research the following project. 11 All use of the word "project" in this declaration refers to legislative research addressed to this 12 focus:

13 **The addition of the "clear and convincing evidence" burden of proof language to**
14 Chapter 1498 of 1987 relating to punitive damages
Chapter 842 of 1995 relating to conservatorship

15 2. At all times, all persons working on this project operated under instructions to locate 16 all documents available pertinent to these adoptions. This research was compiled between 17 August 19, 2019 and September 6, 2019, and reflects all the documents, and sources, available 18 during that time pertinent to this project.

19 3. All substantive documents relevant to this project that were found and provided to 20 Jeremy B. Rosen are posted at the following digital link:

21 **http://legislativeintent.com/rpt/M19.059-pb.1801**

22
23 4. The target page to which the link is directed has two links. The Research Report link 24 provides our report on the terms of research and a brief overview of the documents posted at 25 the link. The Documents link goes to the collection of all documents located during the 26 research. The documents are organized in two sub-folders: one for each chaptered bill. The 27 materials pertaining to Chapter 1498 of 1987 have been organized into a single chronological

file for each enactment. The materials pertaining to Chapter 842 of 1995 are organized in multiple files named for the origin of the materials in each file.

5. The documents within the Documents folder listed on the target page of the link are all substantive documents collected pertinent to the history of this project. The term "substantive documents" as used in the previous sentence refers to those documents relevant to the scope of the project. Some documents regarding the proposal related to this project may not be forwarded in this report. Documents not forwarded may include fiscal analyses addressing the budgetary impact of legislation, documents addressing other portions of the proposal not directly relevant to the project, documents addressing simple support for or opposition to the proposal, or other documents unlikely to be helpful in understanding the substantive purpose of the proposal.

6. The California Legislature historically has not regularly recorded and/or transcribed committee or floor proceedings. But in recent decades, individual committees have sporadically recorded, and in some cases transcribed, committee proceedings. In addition, a select few committee, and many floor, proceedings since the early 1990's are available on videotape. Beginning in the 2003-2004 session, an effort has been made to record almost all legislative proceedings in either audio or video format, although the effort is informal rather than mandated by detailed legislative rules and procedures. The recordings available in all media are uniformly difficult and time-consuming to access, rarely transcribed, and rarely contain substantive discussion that goes beyond the most simple and basic assertions about the legislation in question. In general, the documentary history contains much more detailed discussion of the intent and purpose of the bill under consideration. Therefore, this report was compiled using documentary sources only.

7. Individual documents may appear in multiple locations or files. We endeavor to obtain only one copy of the document. Where the specific location a particular document was

found becomes an issue important in individual circumstances, all source locations of particular documents can be identified upon request.

8. All documents included are true and correct copies of the original documents. All documents were obtained at one of the following sources:

A. Copies of documents from legislative offices at the California State Capitol, the California State Library, the California State Archives, libraries at the University of California at Davis or McGeorge School of Law, or

B. Downloaded documents from the legislative counsel web site (www.leginfo.ca.gov/bilinfo.ca.gov) or other websites of Legislative Counsel, the Assembly Clerk or other State agencies or departments.

10. In naming documents references to "bill file" refer to files maintained regarding the legislation that is the subject of the document collection, the abbreviation SFA refers to the Office of Senate Floor Analyses, ARC refers to the Assembly Republican Caucus, SDC refers to the Senate Democratic Caucus, SRC refers to the Senate Republican Caucus, and CLRC refers to the California Law Revision Commission. SC refers to Senate Committee and AC refers to Assembly Committee.

11. Some documents copied from microfilm originals may be of poor quality; all copies included with this report are the best available copies.

\\ End of Declaration Text \\

I declare under penalty of perjury the foregoing is true and correct.

Executed at Berkeley California, October 2, 2019.

Jan S. Raymond

IN THE SUPREME COURT OF CALIFORNIA

CONSERVATORSHIP OF THE PERSON OF O.B.

T.B. et al., as Coconservators, etc.,
Petitioners and Respondents,
v.

O.B.
Objector and Appellant.

[PROPOSED] ORDER

IT IS HEREBY ORDERED that judicial notice is taken of the two legislative reports cited by amicus curiae The Chamber of Commerce of The United States of America in its proposed brief.

DATED:________________

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