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'Mr. Elder Abuse'

Attorney Practices at Intersection of Philosophy and Jurisprudence

By Tom Dresslar
Daily Journal Staff Writer

SACRAMENTO — "Free will" may be a more likely subject for philosophers' roundtables than courtroom counsel tables.

But as lawmakers have struggled to properly balance civil liberties protections against financial abuse prevention in mental competency and conservatorship matters, the meaning of free will has vexed lawyers and judges, just as it has, for centuries, boggled the minds of the Descartes and Kants of the world.

Marc B. Hankin, a leading elder law attorney, makes his living practicing at the intersection of philosophy and jurisprudence. The West Hollywood lawyer believes the legal determinations of free will in competency proceedings are too other-worldly. They lack sufficient empirical roots, he says.

To rectify the situation, Hankin helped draft and win enactment this year of a statute backers hope will inject more common sense and objectivity into an area of the law that is growing in importance as the population ages and elder abuse rises.

SB730 by Sen. Henry Mello, D-Watsonville, seeks to reduce courts' reliance on sometimes mystical medical and psychiatric diagnoses in making competency decisions. Instead, emphasis will be placed on the assessment of specific mental functions to help courts determine whether people have the capacity to "freely" make their own decisions. Co-sponsored by Hankin, the State Bar, the California Judges Association and the California Medical Association, the law takes effect Jan. 1.

'Two-Edged Sword'

"We have to abandon the somewhat spiritual notion of free will," said Hankin, who has acquired the moniker "Mr. Elder Abuse" in Capitol circles. With enactment of SB730, he added, "we're making a step in that direction."

Although proponents call the bill a major advance, opponents blast it as a possibly dangerous move in too many different directions at once.

Hankin and other proponents contend SB730, by providing clearer, more measurable standards, will produce a two-sided benefit to elders and dependent adults in competency and conservatorship proceedings.

On one side, the mentally fit will be better able to protect their right to make their own decisions on finances, medical treatment and other matters. On the other side, family members and the courts will be better able to protect the mentally infirm from con artists and others trying to steal their money. "It's a two-edged sword," said Hankin.

Supporters also contend the measure will reduce litigation.

"It's going to produce more settlements," said Don E. Green, a probate attorney for the Sacramento Superior Court. Stressing he was speaking for himself and not the court, Green added, "With the more objective standard, there will be less need for litigation. And the litigation that does occur will produce more predictable results."

'Convoluted and Confusing'

But some elder-rights advocates argue SB730 is seriously flawed. Particularly in the area of medical treatment, they contend the measure could threaten people's right to make their own decisions. And opponents say the complexity of the bill's provisions will spur litigation, not reduce it.

"It's totally convoluted and confusing," said Eric Gelber, senior attorney with Sacramento-based Protection and Advocacy Inc., a group that seeks to protect the decisionmaking rights of elders. The organization focused its opposition on the medical treatment provisions of the bill. "There's going to be litigation just to sort out what is meant by these provisions," said Gelber.

At the heart of the bill stand two additions to the Probate Code: Sections 811 and 812.

Drawing on case law relating to the ca-

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Attorney Tackles Standard in Competency Hearings

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pacity to marry and make contracts, section 811 specifies a person is not capable of making a decision unless, with regard to a particular decision, the person can communicate all of the following: the rights, duties and responsibilities entailed in the decision; the probable consequences of the decision; and the "significant risks, benefits and reasonable alternatives involved in the decision."

Section 812 says that, before courts determine a person incapable of making a decision, evidence must be presented showing the person has a deficit in at least one of four mental functions. Those functions include: alertness and attention; information processing, including short- and long-term memory, communication and reasoning; thought processes; and ability to "modulate mood and affect." Any deficit also must be shown to impair the person's ability to make the particular decision at issue.

Further, the bill specifies, "The mere diagnosis of a mental or physical disorder shall not be sufficient in an of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act."

Hankin called sections 811 and 812 "a roadmap to determinations of incapacity." He added: "It gets us away from the diagnostic, almost epithetic determinations of incapacity." Hankin described section 811 as "the data set," and section 812 as "the pipes through which the data must get into the head."

He said: "If one of those pipes is blocked up ... you can't make an informed, rational decision."

Geriatric psychiatrist Jim Spar, who has worked with Hankin on competency cases, said the two sections "allow the court to prohibit testimony in weird, idiosyncratic psychological terms ... that defy any legitimate cross-examination."

Green said that although SB730 might not affect the outcome in many cases, it will produce a better procedure for making competency decisions. Saying such diagnoses as Alzheimer's and dementia "don't really tell you anything," Green said, "now courts are going to have to be advised what it is specifically a person cannot do. You're going to get a more consistent and more understandable process."

SB730 contains another key provision — designed to protect the mentally infirm from ripoff artists — that amends section 39 of the Civil Code to establish a rebuttable presumption in contract recission cases.

The section currently states contracts are subject to recission if one of the parties is "of unsound mind, but not entirely without understanding." Under the change, a person will be presumed of unsound mind for purposes of recission if "the person is unable to manage his or her own financial resources or resist fraud or undue influence."

Hankin argued the provision moves the statute beyond the vagueness of the term "unsound mind" and protects the mentally disabled by shifting the burden of proof to the party seeking to enforce a contract. " 'Unsound mind' is a term so vague it provides an opportunity for arbitrary and capricious justice, which is no justice at all," he said.

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> Sacramento Superior Court probate attorney

SB730 also establishes a "clear and convincing evidence" standard of proof for placing people under a conservatorship.

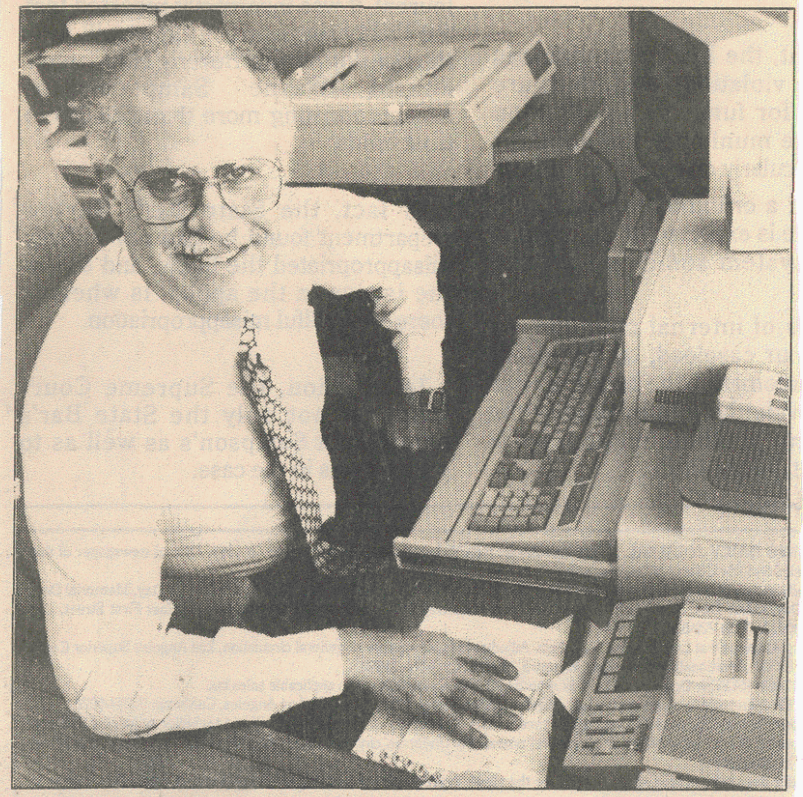
But it is the measure's provisions on informed medical treatment decisions that has stirred controversy and opposition.

The bill amends section 3201 of the Probate Code to create two rights: to petition the court for a determination that a person has the capacity to give informed consent to medical treatment; and to petition the court for a determination that a person lacks the capacity to give the consent, and for a court order authorizing someone else to give the consent.

The measure also establishes a three-pronged test for determining whether persons not under conservatorship have the capacity to make informed health-care decisions. Under new section 813 of the Probate Code, such persons are deemed to have such capacity if they can do all of the following: respond intelligently to questions about the treatment; participate in the treatment decision "by means of a rational thought process"; and understand the nature and seriousness of the disorder, the nature of the recommended treatment, the risks and benefits of the treatment, and the risks and benefits of alternatives.

For people who are under conservatorship, SB730 also establishes standards for determining they are incapable of providing informed consent to medical treatment.

In such cases, new section 1881 of the Probate Code requires the court to find: that the person can't understand at least one element of the third prong of the sec-



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tion 813 test; that the person suffers a deficit in one of the mental functions listed in section 812; and that the impairment affects the ability to give informed consent.

But the court does not have to make the second ruling on section 812 mental functions if the person does not object to the proposed finding of incapacity. That exception has drawn fire from Protection and Advocacy attorneys.

Senior attorney Daniel A. Pone, in an analysis of the bill, contended it will leave less protected "people who are intimidated by their doctors or family members [who] may be unable or unwilling to raise objections even though they maintain the capacity to give or withhold consent to treatment." He added: "These are the very people who are in most need of protection."

In his analysis, Pone also objected to the bill's failure to codify case law that establishes a "clear and convincing evidence" standard of proof for determining incapacity to make treatment decisions. "It makes no sense to add new standards for determining medical decisionmaking capacity, but to omit such a fundamental element of due process as the applicable burden and standard of proof," he said. "Judges and practitioners should not be required to hunt up the relevant standard in case law."

But Hankin and Green, in a talking-points paper on the bill, defended the omission. "SB730 makes absolutely no change in the current law on this issue," they said. "Legislation on this point would be difficult because of the need to avoid burdening practicing physicians with technical, legalistic procedures which would result in more litigation, and in patients being denied needed treatment."

Pone also criticized the competency standards established under SB730 as "confusing and unnecessarily cumbersome." He noted section 812 sets up "elaborate procedures" for lack-of-capacity decisions in general. Then section 813 establishes a different set of rules for ruling on capacity to give informed consent to medical treatment. Finally, he said in his analysis, section 1881 establishes "a totally separate procedure" for determining conservatees' incapacity to make treatment decisions, which, in turn, incorporates part of section 812.

Citing case law that already sets competency guidelines in the medical treatment arena, Pone said the SB730 standards "are likely to result in their inconsistent application by the courts and may invite unnecessary litigation."

But in their paper, Hankin and Green rejected such criticism. "The vast majority of attorneys and physicians who have reviewed the standards have found them comprehensive and comprehensible," they said.