

CAPACIDAD JURÍDICA Y DISCAPACIDAD

Proyecto a cargo de FUTUEX
(Fundación Tutelar de Extremadura),
Fundación Aequitas y Fundación
Academia Europea de Yuste, en el
marco del Congreso Permanente
sobre Discapacidad y Derechos
Humanos bajo la autoría de:
Rafael de Lorenzo García
Bianca Entrena Palomero
Aimudena Castro-Girona Martínez
Miguel Ángel Cabra de Luna
José Javier Soto Ruiz (Dirección)

Francisco J. Bariffi Artigue
Agustina Palacios Rizzo (Recopilación
y coordinación)

Prólogo: Dr. Miguel Ángel Cabra de Luna

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CAPACIDAD JURÍDICA Y DISCAPACIDAD







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**(Un estudio de Derecho Privado Comparado a la luz de
la Convención Internacional sobre los Derechos de las
Personas con Discapacidad)**

CUADERNO DE TRABAJO N° 10 / ESTADOS UNIDOS



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Rafael de Lorenzo García

Blanca Entrena Palomero

Almudena Castro-Girona Martínez

Miguel Ángel Cabra de Luna

José Javier Soto Ruiz (Dirección)

Francisco J. Bariffi Artigue

Agustina Palacios Rizzo (Recopilación y coordinación)

Prólogo: Miguel Ángel Cabra de Luna

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PRÓLOGO

*Dr. Miguel Angel Cabra de Luna
Director de Relaciones Sociales e Internacionales y
Planes Estratégicos de la Fundación ONCE; y Jefe de
la Asesoría Jurídica del CERMI*

La Convención de Naciones Unidas sobre los Derechos de las Personas con Disca- pacidad

El contexto global de las personas con discapacidad

La Organización Mundial de la Salud calcula que en el mundo existen unos 650 millones de personas con algún tipo de discapacidad, es decir, un 10 % de la población mundial, de los cuales 200 millones son niños. El número de personas con discapacidad crece cada día debido al crecimiento de la población mundial, al envejecimiento de los habitantes de algunas zonas del planeta y a los avances médicos que permiten salvar y prolongar la vida de muchos pacientes.



Sin embargo, encontramos que el 80% de las personas con discapacidad viven en países en desarrollo, y en su mayoría en condiciones de pobreza. Se calcula que entre las personas que viven con menos de un dólar por día -y que tienen serias dificultades para cubrir sus necesidades básicas de agua potable, alimentos, vivienda y vestido- una de cada cinco tiene algún tipo de discapacidad.

La Unión Europea, pese a que las condiciones de vida no son comparables a las de los países empobrecidos, no está exenta de esta discriminación. Los 50 millones de ciudadanos europeos con discapacidad tienen problemas para acceder en igualdad de oportunidades al mercado de trabajo –*su tasa de desempleo es de dos a tres veces mayor que la del resto de la población y tan sólo el 16% de las personas que necesitan asistencia para trabajar la reciben*-, al sistema educativo –*acceden a la educación superior la mitad de alumnos con discapacidad que sin discapacidad*-, y a otras actividades de tiempo libre, culturales, y de participación en la comunidad –*una de cada dos personas con discapacidad nunca ha practicado deporte, y un tercio de ellas nunca ha hecho una excursión o visita cultural debido a la inaccesibilidad de los transportes o de las instalaciones*-.

El sistema de protección de los derechos humanos y las personas con discapacidad

Pese a tratarse del colectivo minoritario más amplio del planeta, el sistema de protección de derechos humanos no le ha ofrecido el mismo lugar que a otros grupos vulnerables, como las mujeres, los niños y niñas o las personas refugiadas.

Al igual que estos, las personas con discapacidad, en tanto que seres humanos, se encuentran protegidas por los seis tratados internacionales existentes en materia de derechos humanos¹, y por diversas resoluciones específicas². Sin embargo, las personas con discapacidad carecían de un órgano internacional que velara por el cumplimiento de estos derechos de forma singularizada. De igual forma, las Normas Uniformes sobre la igualdad de oportunidades para las personas con discapacidad (adoptadas en 1993) destinadas a servir de orientación sobre cómo ofrecer igualdad de oportunidades a las personas con discapacidad, no tenían carácter vinculante. Así, los derechos de las personas con discapacidad, pese a estar formalmente reconocidos y protegidos, han sido con frecuencia ignorados, o aplicados de forma deficiente, no poniéndose los medios para su efectiva puesta en marcha.

Era, por tanto, necesario un instrumento jurídicamente vinculante que permitiera exigir el cumplimiento de las obligaciones contraídas por



los Estados miembros, así como un mecanismo de garantía que velara por su cumplimiento efectivo.

Pese a que el primer intento de crear una Convención data de 1987, hasta el año 2001 no se constituyó el comité que elaboraría el texto de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad (en adelante referida como CDPD o Convención) y que iría acompañado de un protocolo adicional que permite a las personas con discapacidad y a sus representantes presentar quejas ante los incumplimientos de los Estados signatarios.

Tras cinco años de intensas negociaciones, en las que destacó la alta participación de las organizaciones de personas con discapacidad y de sus familiares, la Convención sobre los Derechos de las Personas con Discapacidad se adoptó el 13 de diciembre de 2006.

Fue la Convención sobre derechos fundamentales que más adhesiones ha tenido en su primer día de apertura a la firma, con ochenta y dos Estados signatarios. Tras ser ratificada por veinte Estados, la CDPD entró en vigor el 3 de mayo de 2008. En la actualidad la han firmado ciento treinta y siete Estados, de los cuales cuarenta y siete la han ratificado.

Cabe destacar que entre los Estados signatarios encontramos a la Comunidad Europea, por primera vez en un convenio de derechos



humanos, dada la convergencia de objetivos entre la CDPD y la Estrategia Europea sobre Discapacidad. La Comisión Europea trabaja ahora en el proceso de conclusión de la CDPD por parte de la Comunidad Europea y en cómo llevar a la práctica el reparto de competencias con los Estados miembros signatarios de la Convención.

De una visión médica de la discapacidad a un modelo de derechos humanos

La novedad más importante de la Convención es quizá la cristalización del cambio de paradigma que en la sociedad ya había comenzado en los años 80. Partimos de una visión médica de la discapacidad en torno a la cual se desarrollan políticas destinadas a «rehabilitar» a las personas con discapacidad en la sociedad y a ayudarlas a superar las limitaciones individuales que su discapacidad supone, ya que no podían hacerlo por sí mismos. Esta visión estaba cargada de paternalismo hacia las personas con discapacidad, a las que era necesario tutelar en mayor o menor medida y a quienes en muchas ocasiones es privaba de la capacidad de decidir sobre su propia situación (tratamientos médicos, internamiento en centros especiales, etc.).

Por el contrario, la CDPD está basada en un modelo social de la discapacidad en el que ésta



no reside en la persona sino en el entorno que no le permite desarrollar sus potencialidades. La discapacidad resulta, según este modelo, de la interacción entre las capacidades de la persona y las barreras que plantea el entorno y las actitudes. Así, las personas con discapacidad pueden aportar a la sociedad en igual medida que las personas sin discapacidad siempre que ésta se construya sobre los valores del respeto y de la inclusión de todas las personas.

Y sobre estos valores se asienta la Convención, considerando a las personas con discapacidad como sujetos de derechos y no como meros objetos de asistencialismo, y obligando a los Estados signatarios a adoptar esta visión en sus propias políticas públicas.

El objetivo de la Convención sobre los Derechos de las Personas con Discapacidad

Según el artículo 1 de la Convención, su propósito no es otro que el de «promover, proteger y asegurar el goce pleno y en condiciones de igualdad de todos los derechos humanos y libertades fundamentales por todas las personas con discapacidad, y promover el respeto de su dignidad inherente».

Como señaló Don MacKay, embajador neozelandés y presidente del Comité donde se ne-



goció el texto de la Convención, el objetivo de ésta no es otro que el de detallar los derechos de las personas con discapacidad y establecer un código de aplicación.

Y es que la Convención no crea nuevos derechos ni se limita a desarrollar los derechos sustantivos de las personas con discapacidad. La CDPD recoge y especifica los derechos ya existentes, asegurando la aplicación del principio de no discriminación en cada uno de ellos³ y detallando los pasos que los Estados signatarios y las organizaciones de la sociedad civil deben dar a fin de lograr su efectiva aplicación, como si de un manual de instrucciones se tratara, lo que supone una de sus principales innovaciones tanto para los derechos de las personas con discapacidad como para el sistema de derechos humanos en general.

Qué entiende la CDPD por discapacidad y por discriminación

La Convención entiende que las personas con discapacidad incluyen a aquellas que tengan deficiencias físicas, mentales, intelectuales o sensoriales a largo plazo que al interactuar con diversas barreras puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con las demás (Artículo 1).

También aporta información sobre este punto el Preámbulo del texto, en el que se explica que la discapacidad es entendida como un concepto en evolución, que resulta de la interacción entre las personas con deficiencias y las barreras debidas al entorno y a las actitudes de la sociedad.

De esta definición se desprende que la Convención asume el modelo social de la discapacidad, y que incluye a las personas citadas pero que no excluye a otras que puedan estar protegidas por las legislaciones nacionales, por lo que se trata de una definición de mínimos y que irá evolucionando con los cambios sociales y científicos.

La Convención entiende por «discriminación por motivos de discapacidad» cualquier distinción, exclusión o restricción por motivos de discapacidad que tenga el efecto o el propósito de obstaculizar o dejar sin efecto el reconocimiento de, goce o ejercicio, en condiciones de igualdad, de todos los derechos humanos y libertades fundamentales en los ámbitos político, económico, social, cultural, civil o de otro tipo (Artículo 2).

Lo que se prohíbe en realidad es la *discriminación por motivos de discapacidad* por lo que pone el acento sobre el fenómeno de la discriminación y no tanto sobre las capacidades de la persona. Por ello, se podría considerar⁴ que pue-

de existir discriminación por motivos de discapacidad sin que la persona que la sufre tenga en realidad una discapacidad, cubriendo así la discriminación por asociación.

Los derechos recogidos en la Convención

Todos los derechos recogidos en esta Convención forman un núcleo normativo interrelacionado que requiere tanto para su comprensión como para su aplicación de una lectura conjunta.

Cabe destacar que se trata de una combinación de derechos civiles, políticos, sociales, económicos y culturales, novedosa en los tratados internacionales. También hay que señalar que en la mayoría de estos derechos la Convención recoge implícitas una serie de obligaciones para los Estados miembros, que deberán no sólo prohibir determinadas acciones sino tomar un papel activo, poniendo en marcha las medidas que sean necesarias para el disfrute de esos derechos.

Existen varios criterios sistemáticos para agrupar los diferentes artículos de la Convención, uno de los cuales los clasifica en cinco ámbitos genéricos: derechos de igualdad, de protección, de libertad y autonomía personal, derechos de participación y derechos sociales.

Derechos de igualdad

Este es uno de los pilares de la Convención,



puesto que el propósito de la misma no es otro que garantizar el disfrute de los derechos humanos en condiciones de igualdad para las personas con discapacidad. Por ello tiene una aplicación transversal en todos los artículos del texto.

En esta categoría podemos incluir los derechos de igualdad y no discriminación (artículo 5), sobre accesibilidad (artículo 9), sobre igual reconocimiento de la ley (artículo 12 que se abordará en detalle más adelante) y sobre la igualdad en el acceso a la justicia (artículo 13).

Derechos de protección

Los derechos recogidos en esta categoría pretenden garantizar la protección específica de las personas con discapacidad partiendo de la idea de que se encuentran en una situación de mayor vulnerabilidad. No obstante la convención se centra en la situación de vulnerabilidad y en las circunstancias sociales que la originan y no en la vulnerabilidad en sí misma, por lo que se aleja del paternalismo con el que anteriormente se habían abordado estos derechos.

En esta categoría podemos incluir los derechos de protección de la vida (artículo 10), protección ante situaciones de riesgo y emergencia humanitaria (artículo 11), protección contra la tortura y otros tratos o penas crueles, inhumanos o degradantes (artículo 15), protección con-

tra la explotación, la violencia y el abuso (artículo 16), protección de la integridad personal (artículo 17), protección de la privacidad (artículo 22), y la protección del hogar y de la familia (artículo 23).

Derechos de libertad y autonomía personal

Esta categoría de derechos incluiríamos aquellos destinados a asegurar la autonomía y la libertad personal de las personas con discapacidad. Sin embargo, mientras que tradicionalmente la regulación de esta categoría se centraba en la pasividad, en la obligación de «no hacer» por parte del Estado, en este caso de estos derechos se derivan obligaciones «de hacer» para los Estados signatarios, que deberán tomar las medidas necesarias para garantizar los derechos.

En esta categoría se incluyen los derechos a la libertad y la seguridad de la persona (artículo 14), libertad de desplazamiento y nacionalidad (artículo 18), derecho a vivir de forma independiente y a ser incluido en la comunidad (artículo 19) y derecho a la movilidad personal (artículo 20).

Derechos de participación

Este grupo de derechos buscan acabar con la invisibilidad de las personas con discapacidad en los asuntos de la esfera pública. Al igual que la categoría anterior, la Convención no se limi-



ta a reconocer estos derechos sino que implica un papel activo de los Estados signatarios en garantizar el ejercicio de los mismos. Se busca así que las personas con discapacidad sean ciudadanos activos de sus comunidades, que se informen y participen de los procesos de toma de decisiones, de forma que no sólo sean tenidas en cuenta sus necesidades específicas sino que la sociedad que se construye sea inclusiva para todas las personas.

En este grupo incluiríamos los derechos a la libertad de expresión, de opinión y de acceso a la información (artículo 21), de participación en la vida política y pública (artículo 29), de participación en actividades culturales y recreativas, de tiempo libre y deportes (artículo 30).

Derechos sociales

Este apartado recoge los derechos sociales sin los cuales las personas con discapacidad no podrán alcanzar la igualdad real. Pese a estar recogidos, con distinto grado de protección en la legislaciones nacionales de muchos Estados signatarios, la Convención reconoce que es necesario poner en funcionamiento medidas específicas que garanticen a las personas con discapacidad su disfrute.

Esta categoría englobaría los derechos a la educación (artículo 24), a la salud (artículo 25),

a la habilitación y rehabilitación (artículo 26), al trabajo y al empleo (artículo 27) y a un nivel de vida adecuado y a una protección social (artículo 28).

Los mecanismos de control de la Convención

Según el artículo 33 de la Convención, los Estados signatarios deberán designar al menos un organismo gubernamental que se encargue de supervisar la aplicación de la Convención en ese país. De igual forma, y dada la transversalidad de las políticas implicadas, se deberán poner en marcha mecanismos de coordinación entre las distintas administraciones encargadas de las diferentes medidas, estableciendo marcos para la puesta en marcha y supervisión de la Convención.

La sociedad civil, y en particular las personas con discapacidad y las organizaciones que las representan, deberán tomar parte en todos los niveles del proceso de seguimiento.

Siguiendo la «hoja de ruta» establecida por la propia Convención (artículos 34 y 35), se ha creado un Comité sobre los Derechos de las Personas con Discapacidad formado por 12 expertos de diferentes Estados, al que los Estados parte deberán remitir un informe sobre los progresos realizados en la puesta en marcha de la Conven-



ción a los dos años de su entrada en vigor en ese estado. Posteriormente los estados parte deberán remitir informes cada cuatro años y siempre que el Comité así lo solicite. El Comité podrá igualmente realizar las preguntas y recomendaciones que estime convenientes a los estados parte.

El Comité tendrá también la obligación de informar cada dos años a la Asamblea General de las Naciones Unidas y al Consejo Económico y Social sobre sus actividades.

De igual forma, en aquellos Estados parte que hayan firmado el Protocolo Adicional (facultativo), el Comité será competente para recibir de las personas con discapacidad y las organizaciones que las comunicaciones acerca del incumplimiento de derechos recogidos en la Convención.

Especial referencia al Artículo 12

Sin duda, una de las cuestiones más debatidas durante la negociación y a la hora de interpretar la Convención, ha sido y es el contenido del artículo 12 que consagra la igualdad ante la Ley y el reconocimiento de la capacidad jurídica de todas las personas con discapacidad⁵.

Las diferentes posiciones debatidas quedaron ya reflejadas en los informes elaborados por la Subcomisión de Expertos sobre la Convención de la ONU del Real Patronato sobre Discapa-

idad que sirvieron de base para el posicionamiento de España y, consecuentemente de la Unión Europea durante las negociaciones⁶ de la Convención.

Así, en el informe de propuestas de la Subcomisión mencionada y de cara a la Séptima Reunión de trabajo del Comité Especial de las Naciones Unidas sobre la Convención que se celebró en la sede de las Naciones Unidas en Nueva York, del 16 de enero al 3 de febrero de 2006 se recomendaba que la redacción del artículo 12 reflejara de un modo más preciso que «todas las personas son iguales ante la ley sin distinción por motivo de discapacidad». Asimismo, se indicaba la necesidad de que el reconocimiento de la plena capacidad jurídica de las personas con discapacidad incluyera la «capacidad de obrar» y añadiéndose que cuando el ejercicio de la capacidad de obrar de modo autónomo y personal pueda verse dificultado a causa de la discapacidad, los Estados deberían proveer un sistema de apoyo para el ejercicio de dicha capacidad jurídica, así como garantizar la protección contra el abuso en dicho apoyo.

Del mismo modo, a la hora de abordar el punto referido a la capacidad de obrar para elaborar las propuestas para la Octava reunión del Comité Especial de las Naciones Unidas que tuvo lugar en esta ocasión del 14 al 25 de agosto de 2006 se indicó que el debate respecto de este tema y del consecuente artículo 12 se centraba en torno al

modelo a adoptar a la hora de regular la capacidad legal de las personas con discapacidad. Y que mientras que el sistema tradicional tiende hacia un modelo de sustitución, el modelo de derechos humanos basado en la dignidad intrínseca de todas las personas aboga por un modelo de apoyo.

No obstante, y sin perjuicio de que la mayoría de las Delegaciones reconocían la tendencia respecto del cambio del paradigma –a favor del modelo de apoyo-, existían desacuerdos respecto de cómo instrumentarlo en el texto de la Convención. Sobre ello se mantenían entonces dos posturas:

Una primera – de toma de decisiones asistida - en la cual la intervención sea la mínima e indispensable.

Una segunda –que si bien lo apoya-, asume que no se está en posición de adoptar un modelo de apoyo remitiendo el control y las garantías del mismo al derecho internacional vigente, que por cierto no reconoce dicho modelo, sino más bien el modelo de sustitución y por ello, opta por establecer de forma explícita salvaguardias en el ejercicio del apoyo en la toma de decisiones.

Ante la anterior disyuntiva la Subcomisión consideró que si había de decidirse por alguna de las opciones, la que más se adaptaría al modelo social de discapacidad sería la segunda de ellas. No obstante, se consideró por la Subcomisión que lo mejor era la fusión de ambas propuestas.

En el Comité Especial de la ONU, después

de los debates sobre la amplitud del concepto de capacidad jurídica en sus diferentes reuniones, llegado el momento de aprobación del texto final se optó por la segunda opción comentada, pero se incluyó una preocupante nota al pie en la que China, Rusia y los Países árabes dejaban constancia de su disconformidad al especificar que *«En árabe, chino y ruso, la expresión «capacidad jurídica» se refiere a la «capacidad jurídica de ostentar derechos» no a la «capacidad de obrar».*⁷

Finalmente gracias al buen ejemplo de disposición y colaboración de las organizaciones no gubernamentales, las diferentes Delegaciones y el propio presidente del Comité, se consiguió eliminar dicha nota y que se aprobase el texto por la Asamblea General en base al concepto amplio de capacidad jurídica, referido tanto a la capacidad legal como de obrar, y al modelo de asistencia o apoyo.

El tema de la capacidad jurídica deviene esencial y es condición básica para el ejercicio de cualquier derecho, de ahí la importancia de éste artículo cuyo contenido se dimensiona a todos los derechos recogidos en la Convención.

Quiero mencionar el buen hacer de la Subcomisión de Expertos⁸ sobre la Convención de la ONU del Real Patronato sobre Discapacidad antes mencionada y llevada a cabo durante todo el proceso de negociación, así como la contribución

del Comité Español de Representantes de Personas con Discapacidad, CERMI, al adherirse en aquel momento a las peticiones promovidas desde diferentes instancias, tanto públicas como de representantes de la sociedad civil, solicitando enérgicamente la supresión de la nota a pie de página incluida en el Artículo 12 del borrador de texto de la Convención, así como por su labor durante el rápido proceso de ratificación en nuestro país.

Hay que subrayar que en el derecho español el concepto de capacidad jurídica no implica la capacidad de obrar, es decir el ejercicio de los derechos. Siendo además que dicha capacidad de obrar en nuestro ordenamiento sí puede ser limitada. Una limitación que viene establecida por Ley, y que puede derivar por un lado de la edad, pues el menor de edad no tiene plena capacidad de obrar, y por otro lado de la hasta ahora llamada incapacitación, concepto ya de por sí contrario a la Convención.

En este sentido, y dado que la ratificación por el Estado español de la Convención exige adaptar la normativa española al contenido de la misma, será necesaria una revisión sustantiva y cualitativa de la actual regulación de la modificación de la capacidad de obrar y de su procedimiento judicial.

Revisión que viene prevista en *la Disposición final primera del Proyecto de Ley 621/000006*

de reforma de la Ley de 8 de junio de 1957, sobre el Registro Civil, en materia de incapacitaciones, cargos tutelares y administradores de patrimonios protegidos, y de la Ley 41/2003, de 18 de noviembre, sobre protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la normativa tributaria con esta finalidad, que se encuentra a día de hoy en tramitación parlamentaria en el Senado.

«Disposición final primera. — Reforma de la legislación reguladora de los procedimientos de modificación de la capacidad de obrar.

El Gobierno, en el plazo de seis meses desde la entrada en vigor de esta Ley, remitirá a las Cortes Generales un Proyecto de Ley de reforma de la legislación reguladora de los procedimientos de incapacitación judicial, que pasarán a denominarse procedimientos de modificación de la capacidad de obrar, para su adaptación a las previsiones de la Convención Internacional sobre los Derechos de las Personas con Discapacidad, adoptada por Naciones Unidas el 13 de diciembre de 2006.»



Para la modificación del procedimiento de capacidad de obrar deberá partirse de la base de que determinadas personas con discapacidad, aun teniendo capacidad de obrar –que se presume plena en toda persona mayor de edad – pueden precisar para el ejercicio de dicha capacidad ciertos mecanismos de apoyo.⁹ Medidas de apoyo que los Estados están obligados a garantizar y que deberán ser «proporcionales y adaptadas a las circunstancias de la persona» y, asimismo deberán «respetar los derechos, la voluntad y las preferencias» de dichas personas.

Dicha revisión y adaptación deberá hacerse igualmente teniendo siempre presente la discapacidad en sentido amplio, y por tanto las diferentes discapacidades existentes en relación con las circunstancias de cada persona, así como la discapacidad como un concepto dinámico, que puede variar a lo largo de la vida por diferentes causas. Por este motivo, debemos crear un sistema que de pie a un abanico de medidas que permitan graduar el apoyo según cada caso, teniendo en cuenta la atención específica a la diversidad de las personas y a sus diferentes situaciones.

De todo ello, podemos decir que el artículo 12 refleja de manera especial el cambio de paradigma que la Convención supone; cambio que requiere no sólo su correcta implementación en la normativa afectada, si no también un paso



adelante en la mentalidad de la sociedad en todos sus ámbitos e igualmente de las propias personas con discapacidad y de los que tenemos el orgullo y la satisfacción de trabajar diariamente por la mejora de su calidad de vida.

Dr. Miguel Angel Cabra de Luna



1) Breve descripción del sistema legal

A) El sistema de gobierno

El sistema de gobierno de Estados Unidos se constituye como un sistema federalista que congrega un conjunto de cincuenta estados soberanos. En aplicación del principio de «reserva» todos los poderes o competencias no delegados expresamente en su Constitución nacional al gobierno federal, se presumen reservados a los Estados. A pesar de ello, los poderes delegados al gobierno federal son importantes.

B) El sistema judicial

El sistema judicial de Estados Unidos es jerárquico y se divide en jurisdicción federal y jurisdicción estatal. El máximo tribunal es la Corte Suprema de los Estados Unidos que tiene su base en la Constitución y se constituye como la

máxima instancia lo que la ha convertido prácticamente en un órgano de apelaciones. Por debajo de la Corte Suprema se encuentran las Cortes de Circuito que entiendo cuestiones en apelación provenientes de las Cortes de Distrito.

C)El sistema legal

El sistema legal de los Estados Unidos se basa en el llamado derecho común «*common law*», que tiene sus bases en el derecho inglés del Medioevo. A diferencia del sistema civil-continental europeo, el *common law* se constituye no a través de leyes o códigos, sino a través de la creación jurisprudencial de los tribunales. En el caso del Estados Unidos el mayor porcentaje de precedentes jurisprudenciales se produce en los fueros estatales, puesto que los tribunales federales se encuentran más determinados por el derecho estatutario.

2)Concepto de discapacidad y/o de persona con discapacidad

FEDERAL

Ley sobre Estadounidenses con Discapacidades (*Americans with Disabilities Act 1990 ADA*)

Sec. 1210

e unknown;

(II) who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility; or»;

(III) who is involuntarily confined in a municipal detention facility for reasons other than serving a sentence resulting from conviction for a criminal offense; or

(ii) who satisfies the requirements of subparagraph (A) and lives in a community setting, including their own home.

Sec. 15002. Definitions

(...)

(8) Developmental disability

(A) In general

The term «developmental disability» means a severe, chronic disability of an individual that –

(i) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(ii) is manifested before the individual attains age 22;

(iii) is likely to continue indefinitely;

(iv) results in substantial functional limitations in 3 or more of the following areas of major life activity:

(I) Self-care.

(II) Receptive and expressive language.

(III) Learning.

(IV) Mobility.

(V) Self-direction.

(VI) Capacity for independent living.

(VII) Economic self-sufficiency; and

(v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

(B) Infants and young children

An individual from birth to age 9, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting 3 or more of the criteria described in clauses (i) through (v) of subparagraph (A) if the individual, without services and supports, has a high probability of meeting those criteria later in life.

ESTATAL (CALIFORNIA)

Código Civil de California (*California Civil Code*)

54. (a) Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets,

highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.

(b) For purposes of this section:

(1) «Disability» means any mental or physical disability as defined in Section 12926 of the Government Code. (...)

Código de Gobierno de California (*California Government Code*)

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(...)

(i) «Mental disability» includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) «Limits» shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or

condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) «Major life activities» shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

«Mental disability» does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(...)

(k) «Physical disability» includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) «Limits» shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) «Major life activities» shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) «Physical disability» does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

12926.1. The Legislature finds and declares as follows:

(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the

Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of «physical disability» and «mental disability» under the law of this state require a «limitation» upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a «substantial limitation.» This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, «working» is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

Código de Asistencia Social e Instituciones de California (*California Welfare and Institutions Code*)

Section 4900. (a) The definitions contained in this section shall govern the construction of this division, unless the context requires otherwise. (...)

(d) «Disability» means a developmental disability, as defined in Section 15002(8) of Title 42 of the United States Code, a mental illness, as defined in Section 10802(4) of Title 42 of the United States Code, a disability within the meaning of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.), as defined in Section 12102(2) of Title 42 of the United States Code, or a disability within the meaning of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), as defined in subdivision (i) or (k) of Section 12926 of the Government Code.

(...)

(f) «Legal guardian,» «conservator,» or «legal representative,» means a person appointed by a state court or agency empowered under state law to appoint and review the legal guardian, conservator, or legal representative, as appropriate. With respect to an individual described under paragraph (2) of subdivision (i), this person is one who has the legal authority to consent to

health or mental health care or treatment on behalf of the individual. With respect to an individual described under paragraphs (1) or (3) of subdivision (i), this person is one who has the legal authority to make all decisions on behalf of the individual. These terms include the parent of a minor who has legal custody of the minor. These terms do not include a person acting solely as a representative payee, a person acting solely to handle financial matters, an attorney or other person acting on behalf of an individual with a disability solely in individual legal matters, or an official or his or her designee who is responsible for the provision of treatment or services to an individual with a disability.

(...)

(i) «Protection and advocacy agency» means the private nonprofit corporation designated by the Governor in this state pursuant to federal law for the protection and advocacy of the rights of persons with disabilities, including the following:

(1) People with developmental disabilities, as authorized under the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code.

(2) People with mental illness, as authorized under the federal Protection and Advocacy for

Mentally Ill Individuals Amendments Act of 1991, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code.

(3) People with disabilities within the meaning of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.) as defined in Section 12102(2) of Title 42 of the United States Code, who do not have a developmental disability as defined in Section 15002(8) of Title 42 of the United States Code, people with a mental illness as defined in Section 10802(4) of Title 42 of the United States Code, and who are receiving services under the federal Protection and Advocacy of Individual Rights Act as defined in Section 794e of Title 29 of the United States Code, or people with a disability within the meaning of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), as defined in subdivision (i) or (k) of Section 12926 of the Government Code.

3) Régimen general de capacidad jurídica

FEDERAL

Código de los Estados Unidos (*U.S. Code*)

Salud y bienestar público

TITLE 42 - THE PUBLIC HEALTH AND
WELFARE

Sec. 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) «Make and enforce contracts» defined For purposes of this section, the term «make and enforce contracts» includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.(...)

Sec. 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

ESTATAL

Código Civil de California (*California Civil Code*)

38. A person entirely without understanding has no power to make a contract of any kind, but the person is liable for the reasonable value of things furnished to the person necessary for the support of the person or the person's family.

39. (a) A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission, as provided in Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3.

(b) A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of this section if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(...)

43. Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

Código de Sucesiones de California (*California Probate Code*)

810. 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.

4) Régimen de incapacitación o limitación de la capacidad de obrar de las personas con discapacidad

A) De la incapacitación

ESTATAL (LEGISLACIÓN UNIFORME)

Ley Uniforme sobre Tutela y Procedimientos de Protección (*Uniform Guardianship and Protective Proceedings Act 1997*)

SECTION 102. DEFINITIONS. In this [Act]:

(...)

(5) «Incapacitated person» means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.(...)

(...)

SECTION 301. APPOINTMENT AND STATUS OF GUARDIAN. A person becomes a guardian of an incapacitated person by a parental or spousal appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

ESTATAL

Código de Gobierno de California (*California Government Code*)

203. The State may establish custody and restraint of:

(a) Mentally ill persons, insane persons, chronic inebriates, and other persons of unsound mind.
(...)

Código de Sucesiones de California
(California Probate Code)

811. (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 decision-making 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, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

812. 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. (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 health care providers.

(C) The probable degree and duration of any benefits and risks of any medical intervention that is being recommended by the person's

health care 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.

B) De la institucionalización

FEDERAL

Código de los Estados Unidos (U.S. Code)

Salud y bienestar público

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

Carta de Derechos de los Enfermos mentales

Sec. 9501. Bill of Rights

It is the sense of the Congress that each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision should take into account the recommendations of the President's Commission on Mental Health and the following:

(1) A person admitted to a program or facility for the purpose of receiving mental health services should be accorded the following:

(A) The right to appropriate treatment and related services in a setting and under conditions that –

(i) are the most supportive of such person’s personal liberty; and

(ii) restrict such liberty only to the extent necessary consistent with such person’s treatment needs, applicable requirements of law, and applicable judicial orders.

(B) The right to an individualized, written, treatment or service plan (such plan to be developed promptly after admission of such person), the right to treatment based on such plan, the right to periodic review and reassessment of treatment and related service needs, and the right to appropriate revision of such plan, including any revision necessary to provide a description of mental health services that may be needed after such person is discharged from such program or facility.

(C) The right to ongoing participation, in a manner appropriate to such person’s capabilities, in the planning of mental health services to be provided such person (including the right to participate in the development and periodic revision of the plan described in subparagraph (B)), and, in connection with such participation,

the right to be provided with a reasonable explanation, in terms and language appropriate to such person's condition and ability to understand, of -

(i) such person's general mental condition and, if such program or facility has provided a physical examination, such person's general physical condition;

(ii) the objectives of treatment;

(iii) the nature and significant possible adverse effects of recommended treatments;

(iv) the reasons why a particular treatment is considered appropriate;

(v) the reasons why access to certain visitors may not be appropriate; and

(vi) any appropriate and available alternative treatments, services, and types of providers of mental health services.

(D) The right not to receive a mode or course of treatment, established pursuant to the treatment plan, in the absence of such person's informed, voluntary, written consent to such mode or course of treatment, except treatment -

(i) during an emergency situation if such treatment is pursuant to or documented contemporaneously by the written order of a responsible mental health professional; or

(ii) as permitted under applicable law in the case of a person committed by a court to a treatment program or facility.

(E) The right not to participate in experimentation in the absence of such person's informed, voluntary, written consent, right to appropriate protections in connection with such participation, including the right to a reasonable explanation of the procedure to be followed, the benefits to be expected, the relative advantages of alternative treatments, and the potential discomforts and risks, and the right and opportunity to revoke such consent.

(F) The right to freedom from restraint or seclusion, other than as a mode or course of treatment or restraint or seclusion during an emergency situation if such restraint or seclusion is pursuant to or documented contemporaneously by the written order of a responsible mental health professional.

(G) The right to a humane treatment environment that affords reasonable protection from harm and appropriate privacy to such person with regard to personal needs.

(H) The right to confidentiality of such person's records.

(I) The right to access, upon request, to such person's mental health care records, except such person may be refused access to -

(i) information in such records provided by a third party under assurance that such information shall remain confidential; and

(ii) specific material in such records if the

health professional responsible for the mental health services concerned has made a determination in writing that such access would be detrimental to such person's health, except that such material may be made available to a similarly licensed health professional selected by such person and such health professional may, in the exercise of professional judgment, provide such person with access to any or all parts of such material or otherwise disclose the information contained in such material to such person.

(J) The right, in the case of a person admitted on a residential or inpatient care basis, to converse with others privately, to have convenient and reasonable access to the telephone and mails, and to see visitors during regularly scheduled hours, except that, if a mental health professional treating such person determines that denial of access to a particular visitor is necessary for treatment purposes, such mental health professional may, for a specific, limited, and reasonable period of time, deny such access if such mental health professional has ordered such denial in writing and such order has been incorporated in the treatment plan for such person. An order denying such access should include the reasons for such denial.

(K) The right to be informed promptly at the time of admission and periodically thereafter, in language and terms appropriate to such person's

condition and ability to understand, of the rights described in this section.

(L) The right to assert grievances with respect to infringement of the rights described in this section, including the right to have such grievances considered in a fair, timely, and impartial grievance procedure provided for or by the program or facility.

(M) Notwithstanding subparagraph (J), the right of access to (including the opportunities and facilities for private communication with) any available -

(i) rights protection service within the program or facility;

(ii) rights protection service within the State mental health system designed to be available to such person; and

(iii) qualified advocate; for the purpose of receiving assistance to understand, exercise, and protect the rights described in this section and in other provisions of law.

(N) The right to exercise the rights described in this section without reprisal, including reprisal in the form of denial of any appropriate, available treatment.

(O) The right to referral as appropriate to other providers of mental health services upon discharge.

(2)(A) The rights described in this section should be in addition to and not in derogation of any other statutory or constitutional rights.

(B) The rights to confidentiality of and access to records as provided in subparagraphs (H) and (I) of paragraph (1) should remain applicable to records pertaining to a person after such person's discharge from a program or facility.

(3)(A) No otherwise eligible person should be denied admission to a program or facility for mental health services as a reprisal for the exercise of the rights described in this section.

(B) Nothing in this section should -

(i) obligate an individual mental health or health professional to administer treatment contrary to such professional's clinical judgment;

(ii) prevent any program or facility from discharging any person for whom the provision of appropriate treatment, consistent with the clinical judgment of the mental health professional primarily responsible for such person's treatment, is or has become impossible as a result of such person's refusal to consent to such treatment;

(iii) require a program or facility to admit any person who, while admitted on prior occasions to such program or facility, has repeatedly frustrated the purposes of such admissions by withholding consent to proposed treatment; or

(iv) obligate a program or facility to provide treatment services to any person who is admitted to such program or facility solely for diagnostic or evaluative purposes.

(C) In order to assist a person admitted to a

program or facility in the exercise or protection of such person's rights, such person's attorney or legal representatives should have reasonable access to -

- (i) such person;
- (ii) the areas of the program or facility where such person has received treatment, resided, or had access; and
- (iii) pursuant to the written authorization of such person, the records and information pertaining to such person's diagnosis, treatment, and related services described in paragraph (1)(I).

(D) Each program and facility should post a notice listing and describing, in language and terms appropriate to the ability of the persons to whom such notice is addressed to understand, the rights described in this section of all persons admitted to such program or facility. Each such notice should conform to the format and content for such notices, and should be posted in all appropriate locations.

(4)(A) In the case of a person adjudicated by a court of competent jurisdiction as being incompetent to exercise the right to consent to treatment or experimentation described in subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph

(H) or (I) of such paragraph, or to provide authorization as described in paragraph (3) (C) (iii), such right may be exercised or such autho-

rization may be provided by the individual appointed by such court as such person's guardian or representative for the purpose of exercising such right or such authorization.

(B) In the case of a person who lacks capacity to exercise the right to consent to treatment or experimentation under subparagraph (D) or (E) of paragraph (1), or the right to confidentiality of or access to records described in subparagraph

(H) or (I) of such paragraph, or to provide authorization as described in paragraph (3)(C)(iii), because such person has not attained an age considered sufficiently advanced under State law to permit the exercise of such right or such authorization to be legally binding, such right may be exercised or such authorization may be provided on behalf of such person by a parent or legal guardian of such person.

(C) Notwithstanding subparagraphs (A) and (B), in the case of a person admitted to a program or facility for the purpose of receiving mental health services, no individual employed by or receiving any remuneration from such program or facility should act as such person's guardian or representative.

ESTATAL

Código de Asistencia Social e Instituciones de California (*California Welfare and Institutions Code*)

5002. Mentally disordered persons and persons impaired by chronic alcoholism may no longer be judicially committed.

Mentally disordered persons shall receive services pursuant to this part. Persons impaired by chronic alcoholism may receive services pursuant to this part if they elect to do so pursuant to Article 3 (commencing with Section 5225) of Chapter 2 of this part. Epileptics may no longer be judicially committed.

This part shall not be construed to repeal or modify laws relating to the commitment of mentally disordered sex offenders, mentally retarded persons, and mentally disordered criminal offenders, except as specifically provided in Penal Code Section 4011.6, or as specifically provided in other statutes.

(...)

5114. At any judicial proceeding under the provisions of this division, allegations that the person is a danger to others, or to himself, or gravely disabled as a result of mental disorder or impairment by chronic alcoholism, shall be presented by the district attorney for the county, unless the board of supervisors, by ordinance or resolution, delegates such duty to the county counsel.

(...)

5150. When any person, as a result of mental disorder, is a danger to others, or to himself

or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.

5151. If the facility for 72-hour treatment and evaluation admits the person, it may detain him or her for evaluation and treatment for a period

not to exceed 72 hours. Saturdays, Sundays, and holidays may be excluded from the 72-hour period if the Department of Mental Health certifies for each facility that evaluation and treatment services cannot reasonably be made available on those days. The certification by the department is subject to renewal every two years. The department shall adopt regulations defining criteria for determining whether a facility can reasonably be expected to make evaluation and treatment services available on Saturdays, Sundays, and holidays.

Prior to admitting a person to the facility for 72-hour treatment and evaluation pursuant to Section 5150, the professional person in charge of the facility or his or her designee shall assess the individual in person to determine the appropriateness of the involuntary detention.

If in the judgment of the professional person in charge of the facility providing evaluation and treatment, or his or her designee, the person can be properly served without being detained, he or she shall be provided evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis.

Nothing in this section shall be interpreted to prevent a peace officer from delivering individuals to a designated facility for assessment under Section 5150. Furthermore, the preadmission assessment requirement of this section shall not

be interpreted to require peace officers to perform any additional duties other than those specified in Sections 5150.1 and 5150.2.

5152. (a) Each person admitted to a facility for 72-hour treatment and evaluation under the provisions of this article shall receive an evaluation as soon as possible after he or she is admitted and shall receive whatever treatment and care his or her condition requires for the full period that he or she is held. The person shall be released before 72 hours have elapsed only if the psychiatrist directly responsible for the person's treatment believes, as a result of the psychiatrist's personal observations, that the person no longer requires evaluation or treatment. However, in those situations in which both a psychiatrist and psychologist have personally evaluated or examined a person who is placed under a 72-hour hold and there is a collaborative treatment relationship between the psychiatrist and psychologist, either the psychiatrist or psychologist may authorize the release of the person from the hold, but only after they have consulted with one another. In the event of a clinical or professional disagreement regarding the early release of a person who has been placed under a 72-hour hold, the hold shall be maintained unless the facility's medical director overrules the decision of the psychiatrist or psychologist opposing the release.

Both the psychiatrist and psychologist shall enter their findings, concerns, or objections into the person's medical record. If any other professional person who is authorized to release the person believes the person should be released before 72 hours have elapsed, and the psychiatrist directly responsible for the person's treatment objects, the matter shall be referred to the medical director of the facility for the final decision. However, if the medical director is not a psychiatrist, he or she shall appoint a designee who is a psychiatrist. If the matter is referred, the person shall be released before 72 hours have elapsed only if the psychiatrist making the final decision believes, as a result of the psychiatrist's personal observations, that the person no longer requires evaluation or treatment.

(b) Any person who has been detained for evaluation and treatment shall be released, referred for further care and treatment on a voluntary basis, or certified for intensive treatment, or a conservator or temporary conservator shall be appointed pursuant to this part as required.

(c) A person designated by the mental health facility shall give to any person who has been detained at that facility for evaluation and treatment and who is receiving medication as a result of his or her mental illness, as soon as possible after detention, written and oral infor-

mation about the probable effects and possible side effects of the medication. The State Department of Mental Health shall develop and promulgate written materials on the effects of medications, for use by county mental health programs as disseminated or as modified by the county mental health program, addressing the probable effects and the possible side effects of the medication.

The following information shall be given orally to the patient:

(1) The nature of the mental illness, or behavior, that is the reason the medication is being given or recommended.

(2) The likelihood of improving or not improving without the medication.

(3) Reasonable alternative treatments available.

(4) The name and type, frequency, amount, and method of dispensing the medication, and the probable length of time the medication will be taken.

The fact that the information has or has not been given shall be indicated in the patient's chart. If the information has not been given, the designated person shall document in the patient's chart the justification for not providing the information. A failure to give information about the probable effects and possible side effects of the medication shall not constitute new grounds for release.

(d) The amendments to this section made by

Assembly Bill 348 of the 2003-04 Regular Session shall not be construed to revise or expand the scope of practice of psychologists, as defined in Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(...)

5156. At the time a person is taken into custody for evaluation, or within a reasonable time thereafter, unless a responsible relative or the guardian or conservator of the person is in possession of the person's personal property, the person taking him into custody shall take reasonable precautions to preserve and safeguard the personal property in the possession of or on the premises occupied by the person. The person taking him into custody shall then furnish to the court a report generally describing the person's property so preserved and safeguarded and its disposition, in substantially the form set forth in Section 5211; except that if a responsible relative or the guardian or conservator of the person is in possession of the person's property, the report shall include only the name of the relative or guardian or conservator and the location of the property, whereupon responsibility of the person taking him into custody for such property shall terminate.

As used in this section, «responsible relative» includes the spouse, parent, adult child, or adult brother or sister of the person, except that it

does not include the person who applied for the petition under this article.

5) Instituciones de guardo o protección de las personas con discapacidad

A) De la tutela (Guardianship)

ESTATAL (LEGISLACIÓN UNIFORME)

Ley Uniforme sobre Tutela y Procedimientos de Protección (*Uniform Guardianship and Protective Proceedings Act 1997*)

SECTION 102. DEFINITIONS.

In this [Act]:

(...)

(4) «Guardian» means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court, and includes a limited, emergency, or temporary substitute guardian but not a guardian ad litem.

(...)

Designación y constitución de la tutela

SECTION 301. APPOINTMENT AND STATUS OF GUARDIAN.

A person becomes a guardian of an incapacitated person by a parental or spousal appointment or upon appointment by the court. The

guardianship continues until terminated, without regard to the location of the guardian or ward.

Designación del tutor por medio de testamento

SECTION 302. APPOINTMENT OF GUARDIAN BY WILL OR OTHER WRITING.

(a) A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, may specify the desired limitations on the powers to be given to the guardian, and may revoke or amend the appointment prior to court confirmation.

(b) An individual by will or other signed writing, may appoint a guardian for his or her spouse who the appointing spouse believes is an incapacitated person, may specify the desired limitations on the powers to be given to the guardian, and may revoke or amend the appointment prior to court confirmation.

(c) Subject to the right of the incapacitated person, the person having custody or care of the incapacitated person if other than the appointing parent or spouse, or the adult nearest in kinship to the incapacitated person to object, the guardian's appointment becomes effective upon the death of the appointing parent or spouse, the adjudication of incapacity of the appointing parent or spouse, or a written determination by

a physician who has examined the appointing parent or spouse that the appointing parent or spouse is no longer able to care for the incapacitated person, whichever first occurs.

(d) Upon petition of the appointing parent or spouse, and a finding that the appointing parent or spouse will likely become unable to care for the incapacitated person within [two] years or less, and after notice as provided in this section, the court, before the appointment becomes effective, may confirm the appointing parent's or spouse's selection of a guardian and terminate the rights of others to object.

(e) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days following the guardian's appointment becoming effective. The guardian shall:

(1) file the notice of acceptance of appointment and a copy of the will with the court of the [county] in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court in the [county] in which the incapacitated person resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent or spouse if living, the incapacitated person, a person having custody or care of the incapacitated person

other than the appointing parent or spouse, and the adult nearest in kinship.

(f) Unless the appointment was previously confirmed by the court, the notice given under subsection (e)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in this section.

(g) An appointment effected by filing the guardian's acceptance under a will probated in the State of the testator's domicile is effective in this State.

(h) The filing of a written objection to an appointment by the alleged incapacitated person or another person interested in the alleged incapacitated person's welfare in the court in which the guardian's written acceptance was filed terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. An objection does not preclude the court from appointing the parental or spousal appointee as guardian. The court may treat the filing of an objection as a petition for the appointment of an emergency guardian under Section 311 or for the appointment of a limited or unlimited guardian under Section 303 and proceed accordingly.

(i) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument,

a guardian appointed under this section shall file a petition in the court for confirmation of the appointment, giving notice in the manner provided in Section 308, and, if necessary, for an appointment as conservator.

(j) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to subsection (h).

(k) The appointment of a guardian under this section is not a determination of incapacity.

(l) The powers of a guardian who timely complies with the requirements of subsections (e) and (f) relate back to give acts by the guardian which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

Designación judicial del tutuor: Solicitud

SECTION 303. JUDICIAL APPOINTMENT OF GUARDIAN: PETITION.

(a) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual.

(b) The petition must set forth the petitioner's

name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(2) the name and address of the respondent's:

(A) spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(3) the name and address of the person responsible for care or custody of the respondent;

(4) the name and address of any legal representative for the respondent;

(5) the name and address of any person nominated as guardian by the respondent;

(6) the name and address of any proposed guardian and the reason why the proposed guardian should be selected;

(7) the reason why guardianship is necessary,

including a brief description of the nature and extent of the respondent's alleged incapacity;

(8) if an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

(9) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

Designación judicial del tutor: Audiencia preliminar

SECTION 304. JUDICIAL APPOINTMENT OF GUARDIAN: PRELIMINARIES TO HEARING.

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a [visitor]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.

(c) The [visitor] shall interview the respondent in person, and to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorneys fees, will be paid from the respondent's estate.

(d) In addition to the duties set out in subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed guardian;

(2) visit the respondent's present dwelling and the place where the respondent will dwell if the appointment is made;

(3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report in writing with the court, which must include:

(1) a recommendation whether a lawyer should be appointed to represent the respondent;

(2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(3) recommendations regarding the appropriateness of guardianship, including whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;

(5) a statement as to whether the proposed dwelling meets the respondent's individual needs;

(6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(7) any other matters the court directs.

Designación judicial del tutor: Evaluación por parte de un perito

SECTION 305. JUDICIAL APPOINTMENT OF GUARDIAN: PROFESSIONAL EVALUATION.

At or before a hearing under this [article], the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

- (1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;
- (2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- (3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- (4) the date of any assessment or examination upon which the report is based.

Confidencialidad de las actuaciones

SECTION 306. CONFIDENTIALITY OF RECORDS. The written report of a [visitor] and any professional evaluation are confidential and

must be sealed upon filing, but are available to:

- (1) the court;
- (2) the respondent without limitation as to use;
- (3) the petitioner, the [visitor], and the petitioner's and respondent's lawyers, for purposes of the proceeding; and
- (4) other persons for such purposes as the court may order for good cause.

Designación judicial del tutor: Presencia y derechos en la audiencia

SECTION 307. JUDICIAL APPOINTMENT OF GUARDIAN: PRESENCE AND RIGHTS AT HEARING.

(a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor]; and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon deter-

mining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

Notificación

SECTION 308. NOTICE.

(a) A copy of the petition and notice of the hearing on a petition for guardianship must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing shall be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a guardian or the making of a protective order.

(c) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, shall be given to the ward, the guardian, and any other person the court directs.

(d) The guardian shall give notice of the filing of the guardian's report, together with a copy of

the report, to the ward and any other person the court directs. The notice must be sent or delivered within 14 days after the filing of the report.

Quienes pueden ser tutores: preferencias

SECTION 309. WHO MAY BE GUARDIAN: PRIORITIES.

(a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this State or elsewhere;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;

(3) an agent appointed by the respondent under [a durable power of attorney for health care] [the Uniform Health-Care Decisions Act];

(4) the spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;

(5) an adult child of the respondent;

(6) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of [a long-term-care institution] at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

Pruebas, órdenes y designación

SECTION 310. FINDINGS; ORDER OF APPOINTMENT.

(a) The court may appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

(1) the respondent is an incapacitated person; and

(2) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.

(b) Alternatively, the court, with appropriate findings, may treat the petition as one for a protective order under Section 401, enter any other appropriate order, or dismiss the proceeding.

(c) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will

encourage the development of the ward's maximum self-reliance and independence.

(d) Within 14 days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

Tutor de emergencia

SECTION 311. EMERGENCY GUARDIAN.

(a) If the court finds that compliance with the procedures of this [article] will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed [60] days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed

without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or other sworn testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this [Act] concerning guardians apply to an emergency guardian.

Tutor sustituto temporario

SECTION 312. TEMPORARY SUBSTITUTE GUARDIAN.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise

ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, within five days after the appointment, the court shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this [Act] concerning guardians apply to a temporary substitute guardian.

Deberes del tutor

SECTION 313. DUTIES OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all

times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(3) expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

(4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs; and

(5) immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed.

Derechos del tutor

SECTION 314. POWERS OF GUARDIAN.

Except as otherwise limited by the court, a guardian may:

(1) apply for and receive money payable to the ward or the ward's guardian or custodian for the

support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the person of the ward and establish the ward's place of dwelling within or without this State. The guardian may establish or move the ward's place of dwelling outside this State only if expressly authorized by the court. The guardian shall inform the court of any change in the ward's custodial dwelling or address;

(3) if a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) consent to medical or other care, treatment, or service for the ward;

(5) consent to the marriage[, divorce,] or adoption of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

Derechos e inmunidades del tutor: Limitaciones

SECTION 315. RIGHTS AND IMMUNITIES OF GUARDIAN; LIMITATIONS.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third party.

(c) A guardian, without authorization of the court, may not revoke a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] of which the ward is the principal. If a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(d) A guardian may not initiate the commitment of a ward to a [mental health-care] institu-

tion except in accordance with the State's procedure for involuntary civil commitment.

Informes y supervisión de la tutela

SECTION 316. REPORTS; MONITORING OF GUARDIANSHIP.

(a) Within 30 days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. A report must state or contain:

(1) the current mental, physical, and social condition of the ward;

(2) the living arrangements for all addresses of the ward during the reporting period;

(3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

(5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(6) plans for future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a [visitor] to review a report, interview the ward or guardian, and make any other investigation the court directs.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

Finalización o modificación de la tutela

SECTION 317. TERMINATION OR MODIFICATION OF GUARDIANSHIP.

(a) A guardianship terminates upon the death of the ward or upon order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(c) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship. Upon presentation by

the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven that continuation of the guardianship is in the best interest of the ward.

B)De la curatela (Conservatorship)

ESTATAL (LEGISLACIÓN UNIFORME)

Ley Uniforme sobre Tutela y Procedimientos de Protección (*Uniform Guardianship and Protective Proceedings Act 1997*)

SECTION 102. DEFINITIONS.

In this [Act]:

(...)

(2) «Conservator» means a person who is appointed by a court to manage the estate of a protected person and includes a limited conservator.

(...)

(11) «Protected person» means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(...)

Procedimientos de protección

SECTION 401. PROTECTIVE PROCEEDING. Upon petition and after notice and hearing, the court may appoint a limited or unli-

mitted conservator or make any other protective order provided in this [article] in relation to the estate and affairs of:

(1) a minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be jeopardized or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; and

(2) any individual, including a minor, if the court determines that, for reasons other than age:

(A) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(B) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

Poderes sobre los asuntos económicos de la persona protegida

SECTION 402. JURISDICTION OVER BUSINESS AFFAIRS OF PROTECTED PERSON.

After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservatorship or other protective order;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

Demanda de designación u orden de protección

SECTION 403. ORIGINAL PETITION FOR APPOINTMENT OR PROTECTIVE ORDER.

(a) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(1) the person to be protected;

(2) an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(3) a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(2) if the petition alleges impairment in the respondent's ability to receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(3) if the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;

(4) the name and address of the respondent's:

(A) spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(5) the name and address of the person responsible for care or custody of the respondent;

(6) the name and address of any legal representative for the respondent;

(7) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(8) the reason why a conservatorship or other protective order is in the best interest of the respondent.

(c) If a conservatorship is requested, the petition must also set forth to the extent known:

(1) the name and address of any proposed conservator and the reason why the proposed conservator should be selected;

(2) the name and address of any person nominated as conservator by the respondent if the respondent has attained 14 years of age; and

(3) the type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

Notificación

SECTION 404. NOTICE.

(a) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, but if the respondent's whereabouts is unknown or personal service cannot be made, service on the respondent must be made by [substituted service] [or] [publication]. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing shall be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a conservator or the making of another protective order.

(c) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, shall be given to the protected

person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(d) The conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person and any other person the court directs. The notice must be sent or delivered within 14 days after the filing of the inventory, report, or plan of conservatorship.

Demanda: menores; cuestiones previas a la audiencia

SECTION 405. ORIGINAL PETITION: MINORS; PRELIMINARIES TO HEARING.

(a) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

(b) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to

others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor, and may appoint a [master] to assist in that task.

Demanda: personas con discapacidad; cuestiones previas a la audiencia

SECTION 406. ORIGINAL PETITION: PERSONS UNDER DISABILITY; PRELIMINARIES TO HEARING.

(a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a [visitor] unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the [visitor]; or
- (3) the court determines that the respondent needs representation.

(c) The [visitor] shall interview the respondent in person, and to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;

(2) if the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(3) inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorneys fees, will be paid from the respondent's estate.

(d) In addition to the duties set out in subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed conservator, if any; and

(2) make any other investigations the court directs.

(e) The [visitor] shall promptly file a report with the court which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) recommendations regarding the appro-

priateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;

(3) a statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of the proposed conservator, and the powers and duties proposed or the scope of the conservatorship;

(4) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(5) any other matters the court directs.

(f) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(g) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent, and may appoint a [master] to assist in that task.

Confidencialidad del procedimiento

SECTION 407. CONFIDENTIALITY OF RECORDS. The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available to:

- (1) the court;
- (2) the respondent without limitation as to use;
- (3) the petitioner, the [visitor], and the petitioner's and respondent's lawyers, for purposes of the proceeding; and
- (4) other persons for such purposes as the court may order for good cause.

Demanda: procedimiento ante la audiencia

SECTION 408. ORIGINAL PETITION: PROCEDURE AT HEARING.

(a) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor], and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon request of the respondent and a showing of good cause.

(b) Any person may request permission to

participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

Demanda: Órdenes

SECTION 409. ORIGINAL PETITION: ORDERS.

(a) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.

(b) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(c) Within 14 days after an appointment, the conservator shall send or deliver a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the

protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

(d) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.

Poderes del tribunal

SECTION 410. POWERS OF COURT.

(a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(1) with respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor which may be necessary for the best interest of the minor and members of the minor's immediate family.

(2) with respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person which the protected person could exercise if an adult, present, and not under conservatorship or other protective order.

(b) Subject to the provisions of Section 110 relating to letters of office, the court may at any time limit the powers of a conservator otherwise

conferred and may remove or modify any limitation.

Requerimiento de autorización judicial

SECTION 411. REQUIRED COURT APPROVAL.

(a) After notice to interested persons and upon express authorization of the court, a conservator may:

(1) make gifts, except as otherwise provided in Section 427(b);

(2) convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety;

(3) exercise or release a power of appointment;

(4) create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or to revoke or amend a trust revocable by the protected person;

(5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value;

(6) exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and

(7) make, amend, or revoke the protected person's will.

(b) A conservator, in making, amending, or revoking the protected person's will, shall comply with [the enacting jurisdiction's statute for executing wills].

(c) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider:

(1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;

(2) possible reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the protected person's previous pattern of giving or level of support;

(5) the existing estate plan;

(6) the protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and

(7) any other factors the court considers relevant.

(d) Without authorization of the court, a conservator may not revoke or amend a durable power of attorney of which the protected person is the

principal. If a durable power of attorney is in effect, absent a court order to the contrary, a decision of the agent takes precedence over that of a conservator.

Asignación de las medidas protectoras y transacciones específicas

SECTION 412. PROTECTIVE ARRANGEMENTS AND SINGLE TRANSACTIONS.

(a) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

(1) authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

(A) sale, mortgage, lease, or other transfer of property;

(B) purchase of an annuity;

(C) making a contract for life-time care, a deposit contract, or a contract for training and education; or

(D) addition to or establishment of a suitable trust[, including a trust created under the Uniform Custodial Trust Act]; and

(2) authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person.

(b) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors listed in Section 411(c).

(c) The court may appoint a [master] to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The [master] has the authority conferred by the order and shall serve until discharged by order after report to the court.

Quienes pueden ser curadores: preferencias

SECTION 413. WHO MAY BE CONSERVATOR: PRIORITIES.

(a) Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

(1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

- (4) the spouse of the respondent;
- (5) an adult child of the respondent;
- (6) a parent of the respondent; and
- (7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) A person having priority under subsection (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(d) An owner, operator, or employee of [a long-term care institution] at which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

Solicitud de orden posterior a la designación

**SECTION 414. PETITION FOR ORDER
SUBSEQUENT TO APPOINTMENT.**

(a) A protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

- (1) requiring bond or collateral or additional bond or collateral, or reducing bond;
- (2) requiring an accounting for the administration of the protected person's estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or

(6) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) On notice and hearing the petition, the court may give appropriate instructions and make any appropriate order.

Fianza

SECTION 415. BOND.

The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. Unless otherwise directed by the court, the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation of power, lacks power to sell

or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

Condiciones y requisitos de la fianza

SECTION 416. TERMS AND REQUIREMENTS OF BOND.

(a) The following rules apply to any bond required:

(1) Except as otherwise provided by the terms of the bond, sureties and the conservator are jointly and severally liable.

(2) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding must be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(3) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(4) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(b) A proceeding may not be brought against a

surety on any matter as to which an action or proceeding against the primary obligor is barred.

Compensación y gastos

SECTION 417. COMPENSATION AND EXPENSES.

If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, and any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order, but, if the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

Deberes principales del curador: Planificación

SECTION 418. GENERAL DUTIES OF CONSERVATOR; PLAN.

(a) A conservator, in relation to powers conferred by this [article], or implicit in the title acquired by virtue of the proceeding, shall act as a fiduciary and observe the standards of care applicable to a trustee.

(b) A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, encourage the person to participate in decisions, to act in the person's own behalf, and to develop or regain

the ability to manage the person's estate and business affairs.

(c) Within 60 days after appointment, a conservator shall file with the appointing court a plan for managing, protecting, expending, and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the plan steps to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

(d) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person.

Inventario y comprobantes

SECTION 419. INVENTORY; RECORDS.

(a) Within 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

Informes; designación de supervisores; supervisión

SECTION 420. REPORTS; APPOINTMENT OF [VISITOR]; MONITORING.

(a) A conservator shall report to the court for administration of the estate annually unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs. An order, after notice and hearing, allowing an intermediate report of a conservator adjudicates liabilities concerning the matters adequately disclosed in the accounting. An order, after notice and hearing, allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship.

(b) A report must state or contain:

(1) a listing of the assets of the estate under the conservator's control and a listing of the receipts, disbursements, and distributions during the reporting period;

(2) a listing of the services provided to the protected person; and

(3) any recommended changes in the plan for the conservatorship as well as a recommendation as to the continued need for conservator-

ship and any recommended changes in the scope of the conservatorship.

(c) The court may appoint a [visitor] to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs.

(d) The court shall establish a system for monitoring of conservatorships, including the filing and review of conservators' reports and plans.

Título mediante designación

SECTION 421. TITLE BY APPOINTMENT.

(a) The appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the person's successors.

(c) Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

Intereses inalienable de las personas protegidas

SECTION 422. PROTECTED PERSON'S INTEREST NON- ALIENABLE.

(a) Except as otherwise provided in subsections (c) and (d), the interest of a protected person in property vested in a conservator is not transferrable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in Section 429.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed pursuant to Section 429.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery

from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

Venta, encubrimiento u otras transacciones que supongan conflicto de intereses

SECTION 423. SALE, ENCUMBRANCE, OR OTHER TRANSACTION INVOLVING CONFLICT OF INTEREST.

Any transaction involving the conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or corporation or other enterprise in which the conservator has a substantial beneficial interest.

Protección de personas sujetas a curatela

SECTION 424. PROTECTION OF PERSON DEALING WITH CONSERVATOR.

(a) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under Section 410 or 411 is protected as though the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in Section 110 are effective as to other persons. A person need not see to the proper application of assets of the estate paid or delivered to a conservator.

(b) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

Derechos de administración del curador

SECTION 425. POWERS OF CONSERVATOR IN ADMINISTRATION.

(a) Except as qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this State.

(b) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

(1) collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another State, until the conservator considers that disposition of an asset should be made;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest assets of the estate as though the conservator were a trustee;

(6) deposit money of the estate in a financial institution, including one operated by the conservator;

(7) acquire or dispose of an asset of the estate, including real property in another State, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public

use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights;

(16) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(17) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(18) insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(19) borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(20) pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(21) pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(22) allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;

(23) pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the

distributee or by paying the sum for the use of the distributee:

(A) to the guardian of the distributee;

(B) to a distributee's custodian under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act]; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(24) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and

(25) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

Delegación

SECTION 426. DELEGATION.

(a) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(3) periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and

(4) redressing an action or decision of an agent which would constitute a breach of trust if performed by the conservator.

(c) A conservator who complies with subsections (a) and (b) is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(d) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(e) By accepting a delegation from a conservator subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

Principios de distribución por parte del curador

SECTION 427. PRINCIPLES OF DISTRIBUTION BY CONSERVATOR.

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to Section 418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:

(1) The conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(2) The conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to the protected person or an individual who is in fact dependent on the protected person pursuant to the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(3) In making distributions under this subsection, the conservator shall consider:

(A) the size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage business affairs and the estate;

(B) the accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(C) other money or sources used for the support of the protected person.

(4) Money expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(b) If an estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts which the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year of the conservator 20 percent of the income from the estate.

Muerte de la persona protegida

SECTION 428. DEATH OF PROTECTED PERSON.

[(a)] If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto.

[(b)] If a personal representative has not been appointed within 40 days after the death of a

protected person and an application or petition for appointment is not before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to administer and distribute the decedent's estate. Upon application for an order conferring upon the conservator the powers of a personal representative, after notice given by the conservator to any person nominated personal representative by any will of which the applicant is aware, the court may grant the application upon determining that there is no objection and endorse the letters of conservatorship to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

(c) The making and entry of an order under this section has the effect of an order of appointment of a personal representative [as provided in Section 3-308 and Parts 6 through 10 of Article III of the Uniform Probate Code], but the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without retransfer to the conservator as personal representative.]

Reclamaciones ante personas protegidas

SECTION 429. CLAIMS AGAINST PROTECTED PERSON.

(a) A conservator may pay, or secure by encumbering assets of the estate, claims against

the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d). A claimant may present a claim by:

(1) sending or delivering to the conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing a written statement of the claim, in the form prescribed by rule, with the clerk of court and sending or delivering a copy of the statement to the conservator.

(b) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within 60 days after its presentation. The conservator before payment may change an allowance to a disallowance in whole or in part, but not after allowance by a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until 30 days after its disallowance.

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute

of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(d) If it appears that the estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

- (1) costs and expenses of administration;
- (2) claims of the federal or state government having priority under other law;
- (3) claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;
- (4) claims arising before the conservatorship; and
- (5) all other claims.

(e) Preference may not be given in the payment of a claim over any other claim of the same class, and a claim due and payable may not be preferred over a claim not due.

(f) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in

the best interest of the protected person, may order the conservator to give a mortgage or other security on the conservatorship estate to secure payment at some future date of any or all claims.

Responsabilidad civil por curador

SECTION 430. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

[e] A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of a transfer of title pursuant to Section 421.]

Finalización del procedimiento

SECTION 431. TERMINATION OF PROCEEDINGS.

(a) A conservatorship terminates upon the death of the protected person or upon order of the court. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains majority or is emancipated.

(b) Upon the death of a protected person, the conservator shall conclude the administration of the estate by distribution to the person's successors. The conservator shall file a final report and petition for discharge no later than [30] days after distribution.

(c) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(d) Except as otherwise ordered by the court

for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. Upon the establishment of a prima facie case for termination, the court shall order termination unless it is proved that continuation of the conservatorship is in the best interest of the protected person.

(e) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title or confirm a distribution previously made and to file a final report and a petition for discharge upon approval of the final report.

(f) The court shall enter a final order of discharge upon the approval of the final report and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge.

Pago de deudas y entrega de propiedades a antiguos curadores

SECTION 432. PAYMENT OF DEBT AND DELIVERY OF PROPERTY TO FOREIGN CONSERVATOR WITHOUT LOCAL PROCEEDING.

(a) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the State of residence of the protected person. Payment or delivery may be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this State and the foreign fiduciary is entitled to payment or to receive delivery.

(b) Payment or delivery in accordance with subsection (a) discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this State.

Antiguos curadores: Prueba de pederes, fianza y derechos

SECTION 433. FOREIGN CONSERVATOR: PROOF OF AUTHORITY; BOND; POWERS. If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the State in which the protected person resides may file in a court of this State, in a [county] in which property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all

powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties.

Código de Sucesiones de California (*California Probate Code*)

1800.3. (a) If the need therefor is established to the satisfaction of the court and the other requirements of this chapter are satisfied, the court may appoint:

(1) A conservator of the person or estate of an adult, or both.

(2) A conservator of the person of a minor who is married or whose marriage has been dissolved.

(b) No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

1801. Subject to Section 1800.3:

(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.

(b) A conservator of the estate may be appointed

for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and Independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying

mandate of this division in its application to adults alleged to be developmentally disabled.

(e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

1802. Subject to Section 1800.3, a conservator of the person or estate, or both, may be appointed for a person who voluntarily requests the appointment and who, to the satisfaction of the court, establishes good cause for the appointment.

C) Del procedimiento para la designación de tutor o curador

ESTATAL (LEGISLACIÓN UNIFORME)

Ley Uniforme sobre Tutela y Procedimientos de Protección (*Uniform Guardianship and Protective Proceedings Act 1997*)

Jurisdicción material

SECTION 106. SUBJECT-MATTER JURISDICTION. This [Act] applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this State, protective proceedings for individuals domiciled in or having property located in this State, and property coming into the control of a guardian or conservator who is subject to the laws of this State.

Transferencia de jurisdicción

SECTION 107. TRANSFER OF JURISDICTION.

(a) Following the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this State or to another State if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(b) If a guardianship or protective proceeding is pending in a foreign jurisdiction and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court, and after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(c) A guardian, conservator, or like fiduciary appointed in another State may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other State and presentation of a certified copy of the portion of the court record in the other State specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of of age, and

to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this [Act] were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

Sede judicial

SECTION 108. VENUE.

(a) Venue for a guardianship proceeding for a minor is in the [county] of this State in which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person is in the [county] of this State in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the [county] in which that court is located. Venue for the appointment of an emergency or a temporary guardian of an incapacitated person is also in the [county] in which the respondent is present.

(c) Venue for a protective proceeding is in the [county] of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this State, in any [county] of this State in which property of the respondent is located.

(d) If a proceeding under this [Act] is brought in more than one [county] in this State, the court of the [county] in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

Actuaciones ante el tribunal

SECTION 109. PRACTICE IN COURT.

(a) Except as otherwise provided in this [Act], the rules of civil procedure, including the rules concerning appellate review, govern proceedings under this [Act].

(b) If guardianship and protective proceedings as to the same individual are commenced or pending in the same court, the proceedings may be consolidated.

Carta de autorización

SECTION 110. LETTERS OF OFFICE. The court shall issue appropriate letters of guardianship upon the guardian's filing of an acceptance of office. The court shall issue appropriate letters of conservatorship upon the conservator's filing of an acceptance of office and any required bond.

Letters of guardianship must indicate whether the guardian was appointed by the court, a parent, or the spouse. Any limitation on the powers of a guardian or conservator or of the assets subject to a conservatorship must be endorsed on the guardian's or conservator's letters.

Efectos de la aceptación y de la designación

SECTION 111. EFFECT OF ACCEPTANCE OF APPOINTMENT. By accepting appointment as guardian or conservator, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall send or deliver notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner.

Finalización o cambio en la designación del tutor o del curador

SECTION 112. TERMINATION OF OR CHANGE IN GUARDIAN'S OR CONSERVATOR'S APPOINTMENT.

(a) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by the court. [A parental or spousal appointment as guardian

under an informally probated will terminates if the will is later denied probate in a formal proceeding.] Termination of the appointment of a guardian or conservator does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(b) A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A guardian or conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment prior to a vacancy, to serve when a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but in no case later than 30 days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy

or designated event, or the filing of the acceptance of appointment, whichever last occurs. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

Notificación

SECTION 113. NOTICE.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with [insert the applicable rule of civil procedure], at least 14 days before the hearing.

(b) Proof of notice must be made before or at the hearing and filed in the proceeding.

(c) A notice under this [Act] must be given in plain language.

Dispensa de notificación

SECTION 114. WAIVER OF NOTICE.

A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. However, a respondent, ward, or protected person may not waive notice.

Tutela judicial

SECTION 115. GUARDIAN AD LITEM.

At any stage of a proceeding, a court may

appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

Requerimiento de notificación; personas interesadas

SECTION 116. REQUEST FOR NOTICE; INTERESTED PERSONS.

An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

Nominaciones o designaciones múltiples

SECTION 117. MULTIPLE APPOINTMENTS OR NOMINATIONS. If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

6)Capacidad jurídica de las personas con discapacidad para la realización de actos jurídicos

A)De la capacidad en materia contractual

ESTATAL

Código Civil de California (*California Civil Code*)

Contratos (Contracts)

1549. A contract is an agreement to do or not to do a certain thing.

1550. It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. A sufficient cause or consideration

1556. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

1557. (...)

(b) The capacity of a person of unsound mind to contract is governed by Part 1 (commencing with Section 38) of Division 1.

(...)

40. (a) Subject to Section 1871 of the Probate Code, and subject to Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, after his or her incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his or her restoration to capacity.

(b) Subject to Sections 1873 to 1876, inclusive, of the Probate Code, the establishment of a conservatorship under Division 4 (commencing with Section 1400) of the Probate Code is a judicial determination of the incapacity of the conservatee for the purposes of this section.

41. A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful.

B)De la capacidad de realizar transacciones

Código de Sucesiones de California (*California Probate Code*)

1870. As used in this article, unless the context otherwise requires, «transaction» includes, but is not limited to, making a contract, sale, transfer, or conveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right.

1871. Nothing in this article shall be construed to deny a conservatee any of the following:

(a) The right to control an allowance provided under Section 2421.

(b) The right to control wages or salary to the extent provided in Section 2601.

(c) The right to make a will.

(d) The right to enter into transactions to the extent reasonable to provide the necessities of life to the conservatee and the spouse and minor children of the conservatee and to provide the basic living expenses, as defined in Section 297 of the Family Code, to the domestic partner of the conservatee.

1872. (a) Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

(b) Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions.

1873. (a) In the order appointing the conservator or upon a petition filed under Section 1874, the court may, by order, authorize the conservatee, subject to Section 1876, to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. The court, by order, may modify the legal capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

(b) In an order made under this section, the court may include limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate including, but not limited to, the following:

(1) A requirement that for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

(2) A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not one into which a reasonably prudent person might enter.

(c) The court, in its discretion, may provide in the order that, unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order.

(d) An order under this section continues in effect until the earliest of the following times:

- (1) The time specified in the order, if any.
- (2) The time the order is modified or revoked.
- (3) The time the conservatorship of the estate is terminated.

(e) An order under this section may be modified or revoked upon petition filed by the conservator, conservatee, the spouse or domestic partner of the conservatee, or any relative or friend of the conservatee, or any interested person. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

1874. (a) After a conservator has been appointed, a petition requesting an order under Section 1873 may be filed by any of the following:

- (1) The conservator.
- (2) The conservatee.
- (3) The spouse, domestic partner, or any relative or friend of the conservatee.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

1875. A transaction that affects real property of the conservatorship estate, entered into by a person acting in good faith and for a valuable consideration and without knowledge of the establishment of the conservatorship, is not affected by any provision of this article or any order made under this article unless a notice of the establishment of the conservatorship or temporary conservatorship has been recorded prior to the transaction in the county in which the property is located.

1876. The provisions of this article relating to the legal capacity of a conservatee to bind or obligate the conservatorship estate, and the provisions of any order of the court broadening such capacity, do not displace but are supplemented by general principles of law and equity relating to transactions including, but not limited to, capacity to contract, joinder or consent requirements, estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating cause.

C)De la capacidad para celebrar matrimonio

Código de Familia de California (California Family Code)

300. Marriage is a personal relation arising out of a civil contract between a man and a woman,

to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).

(...)

352. No marriage license shall be granted if either of the applicants lacks the capacity to enter into a valid marriage or is, at the time of making the application for the license, under the influence of an intoxicating liquor or narcotic drug.

Código de Sucesiones de California (California Probate Code)

1900. The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership.

1901. (a) The court may by order determine whether the conservatee has the capacity to enter into a valid marriage, as provided in Part 1 (commencing with Section 300) of Division 3 of the Family Code, or to enter into a registered domestic partnership, as provided in Section 297 of the Family Code, at the time the order is made.

(b) A petition for an order under this section may be filed by the conservator of the person or

estate or both, the conservatee, any relative or friend of the conservatee, or any interested person.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

7) Legislación notarial

Ley Modelo Notarial (*The Model Notary Act*)

Objeto (§ 1-2 Purposes.)

This [Act] shall be construed and applied to advance its underlying purposes, which are:

(1) to promote, serve, and protect the public interest;

(2) to simplify, clarify, and modernize the law governing notaries;

(3) to foster ethical conduct among notaries;

(4) to enhance cross-border recognition of notarial acts;

(5) to integrate procedures for traditional and electronic notarial acts; and

(6) to unify state notarial laws.

(...)

Reconocimiento (§ 2-1 Acknowledgment).

«Acknowledgment» means a notarial act in which an individual at a single time and place:

(1) appears in person before the notary and presents a document;

(2) is personally known to the notary or identified by the notary through satisfactory evidence; and

(3) indicates to the notary that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document and, if applicable, that the individual had due authority to sign in a particular representative capacity.

(...)

Presencia de la persona (§ 2-13 Personal Appearance).

«Appears in person before the notary» means that the principal and the notary are physically close enough to see, hear, communicate with, and give identification documents to each other.

(...)

Derechos y Prohibiciones (§ 5-1 Powers and Prohibitions).

(a) A notary is empowered to perform the following notarial acts:

(1) acknowledgments;

(2) oaths and affirmations;

(3) jurats;

(4) signature witnessings;

(5) copy certifications;

[(6) verifications of fact;]

[(7)] electronic notarizations as defined in

Article III; and

[8] any other acts so authorized by the law of this [State].

(b) A notary shall not perform a notarial act if the principal:

(1) is not in the notary's presence at the time of notarization;

(2) is not personally known to the notary or identified by the notary through satisfactory evidence;

(3) shows a demeanor which causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act; or

(4) in the notary's judgment, is not acting of his or her own free will.

(c) A notary may certify the affixation of a signature by mark on a document presented for notarization if:

(1) the mark is affixed in the presence of the notary and of 2 witnesses unaffected by the document;

(2) both witnesses sign their own names beside the mark;

(3) the notary writes below the mark: «Mark affixed by (name of signer by mark) in presence of (names and addresses of witnesses) and undersigned notary under Section 5-1(c) of [Act]»; and

(4) the notary notarizes the signature by mark through an acknowledgment, jurat, or signature witnessing.

(d) A notary may sign the name of a person physically unable to sign or make a mark on a document presented for notarization if:

(1) the person directs the notary to do so in the presence of 2 witnesses unaffected by the document;

(2) the notary signs the person's name in the presence of the person and the witnesses;

(3) both witnesses sign their own names beside the signature;

(4) the notary writes below the signature: «Signature affixed by notary in the presence of (names and addresses of person and 2 witnesses) under Section 5-1(d) of [Act]»; and

(5) the notary notarizes the signature through an acknowledgment, jurat, or signature witnessing.

(...)

Denegación de la actuación notarial (§ 5-3 Refusal to Notarize).

(a) A notary shall not refuse to perform a notarial act based on the principal's race, advanced age, gender, sexual orientation, religion, national origin, health or disability, or status as a non-client or non-customer of the notary or the notary's employer.

(b) A notary shall perform any notarial act described in Section 5-1

(a) of this Chapter for any person requesting such an act who tenders the appropriate fee

specified in Section 6-2(a), unless:

(1) the notary knows or has good reason to believe that the notarial act or the associated transaction is unlawful;

(2) the act is prohibited under Section 5-1(b);

(3) the number of notarial acts requested practicably precludes completion of all acts at once, in which case the notary shall arrange for later completion of the remaining acts; or

(4) in the case of a request to perform an electronic notarial act, the notary is not registered to notarize electronically in accordance with Chapter 15.

(c) A notary may but is not required to perform a notarial act outside the notary's regular workplace or business hours.

8)Legislación general sobre discapacidad

·Air Carrier Access Act of 1986 - 49 U.S.C. § 41705. Implementing Regulation: 14 CFR Part 382

·Americans with Disabilities Act of 1990 - 42 U.S.C. §§ 12101 et seq. Implementing Regulations: 29 CFR Parts 1630, 1602 (Title I, EEOC), 28 CFR Part 35 (Title II, Department of Justice), 49 CFR Parts 27, 37, 38 (Title II, III, Department of Transportation), 28 CFR Part 36 (Title III, Department of Justice), 47 CFR §§ 64.601 et seq. (Title IV, FCC)

·Architectural Barriers Act of 1968 - 42 U.S.C. §§ 4151 et seq. Implementing Regulation: 41 CFR Subpart 101-19.6

·Civil Rights of Institutionalized Persons Act - 42 U.S.C. §§ 1997 et seq.

·Fair Housing Amendments Act of 1988 - 42 U.S.C. §§ 3601 et seq. Implementing Regulation: 24 CFR Parts 100 et seq.

·Individuals with Disabilities Education Act - 20 U.S.C. §§ 1400 et seq. Implementing Regulation: 34 CFR Part 300

·National Voter Registration Act of 1993 - 42 U.S.C. §§ 1973gg et seq.

·Section 501 of the Rehabilitation Act of 1973, as amended - 29 U.S.C. § 791. Implementing Regulation: 29 CFR § 1614.203

·Section 503 of the Rehabilitation Act of 1973, as amended - 29 U.S.C. § 793 Implementing Regulation: 41 CFR Part 60-741

·Section 504 of the Rehabilitation Act of 1973, as amended - 29 U.S.C. § 794. Over 20 Implementing Regulations for federally assisted programs, including: 34 CFR Part 104 (Department of Education), 45 CFR Part 84 (Department of Health and Human Services), 28 CFR §§ 42.501 et seq. Over 95 Implementing Regulations for federally conducted programs, including: 28 CFR Part 39 (Department of Justice), Section 508 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794d

Telecommunications Act of 1996 - 47 U.S.C.
§§ 255, 251(a)(2)

Voting Accessibility for the Elderly and
Handicapped Act of 1984, 42 U.S.C. §§ 1973ee et
seq.



NOTAS

¹ Convención sobre la eliminación de todas las formas de discriminación racial (1963), Pacto Internacional de los Derechos civiles y políticos (1966), Pacto Internacional de Derechos económicos, sociales y culturales (1967), Convención sobre la eliminación de todas las formas de discriminación contra la Mujer (1982), Convención contra la Tortura y otros tratos o penal crueles, inhumanas o degradantes (1984), Convención sobre los Derechos del Niño (1989).

² «*Declaración de los Derechos del Retrasado mental*» aprobada por Resolución 2856 (XXVI) de 20 de diciembre de 1971, de la Asamblea General; «*Declaración de los Derechos de los Impedidos*» aprobada por Resolución 3447 (XXX) de 9 de diciembre de 1975 de la Asamblea General; «*Programa de Acción Mundial para las Personas con Discapacidad*» aprobado por Resolución 37/52 de 3 de diciembre de 1982 de la Asamblea General en la que se proclama la década 1983-1992 como la de las personas con discapacidad; y «*Normas Uniformes sobre la igualdad de oportunidades para las personas con discapacidad*» aprobadas por Resolución 48/96 de 20 de diciembre de 1993 de la Asamblea General.

³ PALACIOS, A. y BARIFFI, F., *La discapacidad como una cuestión de derechos humanos: Una aproximación a la Convención Internacional sobre los Derechos de las Personas con Discapacidad*, Colección Telefónica Accesible, Ediciones Cinca, 2007, Madrid.

⁴ QUINN, G., *Disability Discrimination Law in the European Union*, dentro de la obra «*Equality Law in an Enlarged European Union: Understanding the article 13 Directives*» coordinada por MEENAN, H., Universidad de Kingston, Surrey, 2007.

⁵ Artículo 12 - Igual reconocimiento como persona ante la ley

1. Los Estados Partes reafirman que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica.

2. Los Estados Partes reconocerán que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

3. Los Estados Partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

4. Los Estados Partes asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvaguardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de la persona, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas.

5. Sin perjuicio de lo dispuesto en el presente artículo, los Estados Partes tomarán todas las medidas que sean pertinentes y efectivas para garantizar el derecho de las personas con discapacidad, en igualdad de condiciones con las demás, a ser propietarias y heredar bienes, controlar sus propios asuntos económicos y tener acceso en igualdad de condiciones a préstamos bancarios, hipotecas y otras modalidades de crédito financiero, y velarán por que las personas con discapacidad no sean privadas de sus bienes de manera arbitraria.

⁶ «Derechos Humanos de las Personas con Discapacidad: La Convención Internacional de las Naciones Unidas». Miguel Angel Cabra de Luna, Francisco Bariffi y Agustina Palacios. ED. Ramón Areces. 2007

⁷ «El modelo social de discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad» Agustina Palacios. Colección Cermi.es n° 36. 2008.

⁸ Subcomisión compuesta por: Dr. Miguel Ángel Cabra de Luna. (Vocal en representación del CERMI del Real Patronato sobre Discapacidad, Portavoz de la Comisión de Expertos de Legislación sobre Discapacidad, Presidente de la Subcomisión de Expertos sobre la Convención de la ONU y Director de Relaciones Sociales e Internacionales de la Fundación ONCE.); D^a. Encarnación Blanco Egido (Vocal Asesora de la Dirección General de Coordinación de Políticas Sectoriales sobre Discapacidad) Ministerio de Trabajo; Antonio García Roger. (Oficina de Derechos Humanos del Ministerio de Asuntos Exteriores) Ministerio de Asuntos Exteriores; Stefan Trömel Sturmer. (Asesor del Foro Europeo de la Discapacidad (EDF)); D^a. Agustina Palacios. (Coordinadora del Área de Discapacidad de la Cátedra «Norberto Bobbio» sobre Igualdad y no Discriminación, Instituto de Derechos Humanos «Bartolomé de las Casas» de la Universidad Carlos III de Madrid); y Francisco Bariffi. (Miembro del Área de Derecho Internacional Público de la Universidad Carlos III de Madrid); D. José Javier Soto Ruiz (Notario, Presidente de la Fundación Tutelar de Extremadura) y D^a. Ana Peláez Narváez, Comisionada de Género del Comité Español de Representantes de Personas con Discapacidad (CERMI) y Consejera General de la ONCE

⁹ Informe elaborado por el Instituto de Derechos Humanos «Bartolomé de las Casas» en el marco del Proyecto de investigación «El impacto que la incorporación y ratificación de la Convención Internacional de los Derechos de las Personas con Discapacidad tiene en el Ordenamiento jurídico español» financiado por la FUNDACIÓN ONCE.



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