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Miscellaneous

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Miscellaneous

Miscellaneous; death, organ transplants

Health and Safety Code Chapter 3.7 (commencing with §7180) (new).

AB 3560 (Arnett); STATS 1974, Ch 1524
(Effective September 27, 1974)

Chapter 3.7 (commencing with §7180) has been added to the Health and Safety Code to permit a physician to pronounce a person dead upon a determination that there has been a total and irreversible cessation of brain function. Such a determination must be confirmed by another, independent physician. In the event that any organs of the patient are to be donated under the Uniform Anatomical Gift Act [CAL. HEALTH & SAFETY CODE ch. 3.5 (commencing with §7150)], both the physician making the original determination of death and the physician making the independent confirmation are prohibited by section 7189 from either participating in the removal or transplantation of the organs. Section 7180 does not establish a definition of the point in time when brain function is irreversible, but under section 7182 complete records are required to be kept of the patient's treatment, so that the criteria used by the two physicians will be accessible in the event a question arises as to whether or not the cessation was irreversible.

COMMENT

The traditional definition of death in California is "the total stoppage of the circulation of the blood and the cessation of the animal and vital functions of the body such as respiration and pulsation." [*In re Estate of Schmidt*, 261 Cal. App. 2d 262, 273, 67 Cal. Rptr. 847, 854 (1968)]. In a recent superior court case [*People v. Lyons*, Civil No. 56072 (Super. Ct., Alameda County, June 12, 1974)], the court was faced with the issue of whether a murder victim who had had his heart transplanted after a total cessation of brain waves had occurred, but while his heart was still functioning, had died as the result of the defendant's act or as the result of the transplant of the deceased's heart. The court instructed the jury to disregard the transplant as a cause of death, thereby implying that a person may be defined as dead if there has been a total cessation of brain waves. In response to *Lyons*, the

legislature has enacted chapter 1524 to expand the traditional definition of death beyond the cessation-of-bodily-functions definition. While the effect of chapter 1524 will be to statutorily enact the definition of death used in *Lyons*, it may also have the effect of increasing the number of organ transplants by permitting physicians to consider a patient as dead sooner than under the cessation-of-bodily-functions definition. It is the express purpose of the legislature in enacting chapter 1524 to reverse the recent dramatic decline in the availability of human kidney donors.

See Generally:

- 1) Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87 (1972).

Miscellaneous; relocation assistance

Code of Civil Procedure §690.8 (repealed); §690.8a (new); §690.8 (amended); Government Code §7266 (repealed); §§7266, 7269.1 (new); §7269 (amended); Welfare and Institutions Code §§17300, 17401, 17409 (amended).

AB 2212 (Chacon); STATS 1974, Ch 47
(Effective February 28, 1974)

Substantial legislation was enacted by the legislature in 1969, 1970, and 1971 providing for relocation assistance to any person, business, or farm operation displaced because of the acquisition of real property by a public entity for public use [CAL. STATS. 1969, c. 1489, at 3043; CAL. STATS. 1970, c. 983, at 1753; CAL. STATS. 1971, c. 1574, at 3154]. This assistance consists of advice, relocation assistance, and compensation. Chapter 47 makes further change in this area of relocation assistance.

Prior to its amendment by chapter 47, section 7266 of the Government Code provided that any person who disagreed with the decision of a public entity as to eligibility for, or amount of, relocation compensation could have the decision reviewed by that public entity. Now this section provides that any such decision by an agency other than a state agency having an appeals process may be appealed to a relocation appeals board if one has been established pursuant to the Community Redevelopment Law [See CAL. HEALTH & SAFETY CODE §33417.5] and authorized by a city ordinance to hear such appeals. Any determination may still be appealed to and reviewed by the public agency making the determination rather than a relocation appeals board, except when the determination has been made by a community

redevelopment agency in which case any appeals *must* be made by the relocation appeals board.

Section 7269.1 has been amended to provide that where a recipient of relocation benefits is also available for general assistance under a county aid and relief to indigents program [CAL. WELF. & INST. CODE §17000 *et seq.*], and two or more rent benefit or assistance schedules apply to the recipient, the highest schedule is to be applied for purposes of relocation compensation, and the difference between the two schedules is not to be counted as income or resources for general assistance purposes.

Section 690.8a has been added to the Code of Civil Procedure, and section 690.8 of that code has been amended, to provide that any relocation benefits or other compensation received from a public entity which acquires for public use a dwelling owned and occupied by a debtor, up to a certain limit, are to be exempt from attachment and execution. Further, chapter 47 amends sections 17300 and 17409 of the Welfare and Institutions Code to exempt those same benefits from the determination of financial ability of a responsible relative to support or contribute to a recipient under a county aid program and from the transfer and grant provisions of section 17109 of the Welfare and Institutions Code, and the attachment and the execution provisions of section 17403 of that code, relating to indigent county aid recipients. Section 17401 of the Welfare and Institutions Code has been amended to provide that whenever any home, upon which a lien for county hospital care has been imposed, is acquired by a public entity for public use, the lien is to be transferred to any new home acquired by the owner of the home against which the lien was originally imposed.

Prior to the enactment of chapter 47, the Code of Civil Procedure contained two sections numbered 690.8. This chapter repeals that section 690.8 which was added by chapter 822 of the statutes of 1972.

Miscellaneous; waiver of privilege of confidential communications

Evidence Code §919 (amended).

AB 2828 (McAlister); STATS 1974, Ch 227

Support: California Law Revision Commission; State Bar of California

Evidence Code §919 formerly provided that evidence of a prior disclosure of privileged information could not be used against the holder

of the privilege if: (1) such person was erroneously required to disclose the information after claiming the privilege of nondisclosure; or (2) the evidence was not excluded by the presiding officer as required by Evidence Code Section 916. The purpose of section 919 is to protect "a holder of a privilege from the detriment he would otherwise suffer in a later proceeding when, in a prior proceeding, the presiding officer erroneously overruled a claim of privilege and compelled revelation of the privileged information." [*Recommendation of the California Law Revision Commission Proposing an Evidence Code*, 7 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES 169 (1965)].

Chapter 227 has also amended section 919 to provide that where a person is privileged to withhold information but is erroneously required to reveal it, neither the person's failure to refuse to disclose the information nor the failure of such person to seek review of the order to disclose, will be construed to be a waiver of the privilege. The impact of chapter 227, therefore, is to negate the holding of the appellate court in *Markwell v. Sykes* [173 Cal. App. 2d 642, 343 P.2d 769 (1959)] which held that "[d]isclosure of a matter claimed to be privileged, when made pursuant to an unchallenged court order [that is, where the holder of the privilege does not refuse to disclose or seek review of the order compelling testimony] is an irrevocable thing . . ." and amounts to a waiver of the privilege [173 Cal. App. 2d 642, 649, 343 P.2d 769, 774 (1959)]. Under section 919 as amended, therefore, the testimony of a witness who is wrongfully ordered to testify despite a privilege to withhold testimony will not be admissible in a future proceeding against such witness merely because he failed to refuse to testify or seek review of the erroneous order.

Miscellaneous; psychosurgery and electric shock treatments

Welfare and Institutions Code §§5326.3, 5326.4, 5326.5 (new); §§5325, 5326 (amended).

AB 4481 (Vasconcellos); STATS 1974, Ch 1534

In 1973, section 5326 of the Welfare and Institutions Code was amended to prohibit a physician from performing lobotomies on mentally ill patients without first securing that patient's permission [CAL. STATS. 1973, c. 959]. Chapter 1534 is follow-up legislation which broadens the right of mentally ill patients to refuse potentially injurious forms of treatment. Section 5325 of the Welfare and Institutions Code

has been amended to include psychosurgery and shock treatment among the forms of treatment a person may refuse while committed to a state mental institution under the terms of the Lanterman-Petris-Short Act [CAL. WELF. & INST. CODE §5000 *et seq.*]. Under section 5326 the professional in charge of the facility is absolutely prohibited from overruling the patient's refusal to submit to psychosurgery (defined as including lobotomies, psychiatric surgery, and all other forms of brain surgery performed primarily for the purpose of modifying or controlling the person's thoughts, feelings, actions, or behavior, rather than to treat a known and diagnosed physical disease or defect of the brain) and may deny a person his right to refuse shock treatment only under the conditions specified in section 5326.4 (discussed *infra*).

Chapter 1534 also adds section 5326.3 to the Welfare and Institutions Code to require that the patient's informed consent (defined as a knowing, intelligent, voluntary, clear and explicit consent in writing) must be obtained prior to the performance of any psychosurgery or shock treatment and that the patient and a responsible relative, guardian, or conservator of the patient, must be informed of the following: (1) the procedures involved in the proposed treatment; (2) the benefits and risks of such treatment; (3) the seriousness of the patient's disorder; (4) reasonable alternative therapies; and (5) his right to revoke his consent at any time prior to or during the administration of such treatments.

Shock treatment or psychosurgery may thereafter be administered only if: (1) the patient's written informed consent has been given; (2) the patient is capable of giving his informed consent; (3) a responsible relative, guardian, or conservator of the patient has been given an oral explanation of the proposed treatment; (4) the physician gives adequate documentation entered in the patient's record of the reasons for the procedure, and showing that all other modes of treatment have been exhausted, and that the proposed treatment is critically needed for the patient's welfare; and (5) a review committee of three physicians (one appointed by the facility and two appointed by the local mental director, two of whom shall be certified psychiatrists or neurosurgeons) unanimously agree with the above mentioned determinations of the treating physician. Psychosurgery may never be performed until at least 72 hours after the patient has given his written consent (presumably to afford the patient an opportunity to change his decision), and shock treatments may never be given to a pa-

tient who is capable of giving his informed consent but refuses to do so. A patient who lacks the capacity to give his informed consent to shock treatment may nevertheless be administered such treatment if requirements (3), (4), and (5) above have been complied with (§§5326, 5326.4). Previously, a patient could be administered shock treatments for "good cause" even over his objections. Any person diagnosed as being mentally ill, mentally disordered, or abnormally or mentally defective shall not be deemed incapable of giving informed consent solely because of such a diagnosis. Penalties for failure to obtain such informed consent are provided for by the addition of section 5326.5 which makes the physician liable for a civil penalty of a fine of up to \$10,000, or revocation of license, or both. Such actions may be brought by the Attorney General in the superior court. Additionally, the individual who was treated may bring a civil suit for damages against the attending physician who administered the treatment, including court costs and reasonable attorney's fees.

See Generally:

- 1) Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).