CALIFORNIA JUDGES BENCHGUIDES

Benchguide 120

LPS PROCEEDINGS

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JUDICIAL COUNCIL
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I. [§120.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of court hearings under the Lanterman-Petris-Short Act (LPS Act) found in Welf & I C §§5000–5550. The LPS Act sets forth procedures for involuntary mental health evaluation and treatment. This benchguide includes procedural checklists for court hearings, a brief summary of the applicable law, sample forms, jury instructions, and two appended tables listing proof burdens and due process rights.

II. CHECKLISTS

A. [§120.2] Checklist: Court-Ordered Evaluation for 72 Hours (Welf & I C §§5200–5213)

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 2.831.*

(2) *Review the prepetition screening report prepared by the designated agency before the hearing.*

(3) *Review the petition to determine whether all the elements of Welf & I C §§5204 and 5205 are included.*

(4) *If the person who is the subject of the petition is present at the hearing, question the person and determine whether he or she is willing to accept voluntary treatment.*

(5) *If the person will not consent to voluntary treatment or is not present in court, make a finding as to whether there is probable cause to order a 72-hour evaluation.* Welf & I C §5206.

(6) *If no probable cause is found, dismiss the petition.*

(7) *If probable cause is found, direct the petitioner or clerk to prepare an order that complies with Welf & I C §5207.* The court should direct that the order be personally served on the person to be evaluated as soon as possible, and on the professional person in charge of the evaluation facility, by a peace officer, mental health counselor, or other person the court appoints. See Welf & I C §§5206, 5208.

B. [§120.3] Checklist: Court-Ordered Evaluation for Criminal Defendant Afflicted With Chronic Alcoholism or Drug Abuse (Welf & I C §§5225–5230)

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under Cal Rules of Ct 2.831.*

(2) *Advise the defendant of the right to continue immediately with the criminal proceeding, of the consequences of choosing an evaluation, and of the right to counsel at the proceedings where the choice is made.* Welf & I C §5226.

(3) *If ordering an evaluation, prepare an order in the form set forth in Welf & I C §5227 and direct that the order be personally served as soon as possible on the person to be evaluated and the professional person in charge of the evaluation facility.* See Welf & I C §5228; see §120.27.

(4) *Dismiss or suspend criminal proceedings until the evaluation, and, if applicable, the subsequent involuntary detention are completed.* Welf & I C §5226.1; see §120.27.

(5) *If the defendant is recommended for conservatorship during evaluation or involuntary detention, and if the criminal charge has not*

been dismissed, dispose of the criminal charge before initiation of conservatorship proceedings. Welf & I C §5226.1; see §120.28.

(6) *If appropriate, order the defendant detained in the evaluation or treatment facility until the day set to resume the criminal proceedings.* Welf & I C §5226.1.

C. [§120.4] Checklist: Certification Review Hearing After 14-Day Hold Ordered (Welf & I C §5254)

The hearing must be conducted by a court-appointed commissioner, a referee, or a certification review hearing officer who is a state-qualified administrative law hearing officer, a physician and surgeon, a lawyer, or a certified law student. The hearing officer may also be a registered nurse, licensed psychologist, clinical social worker, professional clinical counselor, or marriage and family therapist, with a minimum of 5 years of mental health experience. See Welf & I C §5256.1 (listing other requirements).

(1) *Determine whether the person certified has filed a habeas corpus petition.* If so, the person is not entitled to a certification review hearing. Welf & I C §5256.

(2) *Review the notice of certification and determine whether it has been signed by the person in charge of the evaluation facility or his or her designee, and a physician, licensed psychologist, registered nurse, or licensed clinical social worker who participated in the evaluation.* Welf & I C §5251.

(3) *Determine whether the notice has been properly served on the person and sent to his or her attorney (often the public defender) or advocate or any other person designated by the certified person.* Welf & I C §5253; see §120.30.

(4) *Determine whether the hearing is being held within 4 days of certification unless judicial review has been requested (see Welf & I C §§5275–5276), or the hearing has been postponed at the request of the person certified or his or her attorney or advocate.* See Welf & I C §§5254, 5256.

(5) *Ask the person certified whether he or she has met with an attorney or patient advocate and discussed the commitment process and any questions the person may have about the certification process and review hearing*. See Welf & I C §5255.

(6) *Determine whether the mental health facility has made reasonable efforts to notify family members or others designated by the certified person of the date and place of the hearing, or in the alternative, that the certified person has requested that this information not be provided to family members.* Welf & I C §5256.4(c).

(7) *Determine whether the certified person has recently taken any medication and, if so, the probable effects.* Welf & I C §5256.4(a)(5).

(8) *Consider evidence from the designee of the director of the medical facility and the district attorney or county counsel, if appropriate.* Welf & I C §5256.2.

(9) *Consider evidence presented from the certified person, including any written statements from family, friends, or others who indicate a willingness and ability to assist with the certified person's basic personal needs for food, clothing, or shelter.* See Welf & I C §5250(d)(1)–(2). Resistance to involuntary commitment alone does not indicate evidence of a mental disorder, danger to self or others, or grave disability. Welf & I C §5256.4(e).

(10) *At the end of the hearing, determine whether there is probable cause to believe that the person is gravely disabled or a danger to self or others.* Welf & I C §5256.6. If no probable cause is found, the court must either order the person released from involuntary detention, or, if the person consents, allow the person to remain voluntarily at the facility. See Welf & I C §5256.5.

(11) *If probable cause is found, order the person detained for involuntary treatment.* Welf & I C §5256.6.

D. [§120.5] Checklist: Establishment of LPS Conservatorship (Welf & I C §5350)

(1) *Before the hearing, appoint the public defender or other attorney for the proposed conservatee.* Welf & I C §5365 (appointment must be made within 5 days after the date of the petition).

(2) *Determine whether the proposed conservatee will consent to the conservatorship.*

(3) *If the proposed conservatee does not consent, determine if he or she waives attendance at the trial or hearing.* See Prob C §1825.

(4) *Determine whether there has been a demand for a jury or a court trial.* If the demand for a jury or a court trial is made before the date of the hearing, the demand constitutes a waiver of the hearing. Welf & I C §5350(d).

(5) *Determine whether, on advice of counsel, the proposed conservatee (a) waives the presence of the physician or other professional who recommended conservatorship under Welf & I C §5352, (b) waives the presence of any treating physician, and (c) stipulates to admission of recommendation and reports into evidence.* Welf & I C §5365.1.

(6) *If the proposed conservatee does not consent to the conservatorship, hear evidence on the issue of whether the proposed conservatee is gravely disabled.* Evidence may include

- The historical course of the mental disorder,
- Expert testimony based on hearsay, and
- Testimony or affidavits concerning third party assistance.

Evidence may not include speculation about future disability.

See §§120.68–120.76.

(7) *After a hearing, determine whether the proposed conservatee is gravely disabled by the "beyond a reasonable doubt" standard.* If grave disability is found, the judge must appoint a conservator; if not, the judge must dismiss the petition and order the person discharged from the facility if appropriate. *Conservatorship of Johnson* (1991) 235 CA3d 693, 696, 1 CR2d 46.

(8) *After a hearing, determine whether there has been a demand for a jury or a court trial.* The demand must be made within 5 days of the hearing. Welf & I C §5350(d).

(9) *Schedule a jury or court trial, if demanded, to begin within 10 days.* Welf & I C §5350(d).

(10) *If there has been a jury trial and a unanimous finding of grave disability beyond a reasonable doubt (or if the court makes this finding after a court trial), appoint a conservator and designate the conservator's powers.* If there has not been such a finding, the judge must dismiss the petition and order the person discharged from the facility, if appropriate.

III. APPLICABLE LAW

A. LPS Act—In General

1. [§120.6] Purposes

Generally, the legislative intent of the LPS Act (see Welf & I C §5001) is:

- To end the inappropriate, indefinite, and involuntary commitment of persons with mental health disorders, developmental disabilities, and chronic alcoholism, and to eliminate legal disabilities;
- To provide prompt evaluation and treatment of persons with mental health disorders or impaired by chronic alcoholism;
- To guarantee and protect public safety;

- To safeguard individual rights through judicial review;
- To provide individualized treatment, supervision, and placement services by a conservatorship program for persons who are gravely disabled;
- To encourage the full use of all existing agencies, professional personnel, and public funds to accomplish these objectives and to prevent duplication of services and unnecessary expenditures;
- To protect persons with mental health disorders and developmental disabilities from criminal acts;
- To provide consistent standards for protection of the personal rights of persons receiving services; and
- To provide services in the least restrictive setting appropriate to the needs of each person.

The LPS Act is intended to ensure that prompt, short-term, community-based intensive treatment is provided, without stigma or loss of liberty, to individuals with mental disorders who are either dangerous or gravely disabled. *Ford v Norton* (2001) 89 CA4th 974, 977, 107 CR2d 776. Another purpose of the LPS Act is to protect an individual from the consequences of his or her illness by providing remedial treatment. *Conservatorship of Rodney M.* (1996) 50 CA4th 1266, 1271, 58 CR2d 513. See also Welf & I C §5350.1 (purpose of conservatorship is to provide individualized treatment, supervision, and placement). The LPS Act represents a balance between prompt intervention for the purpose of treating gravely disabled people and protection of their rights not to be deprived of freedom without due process. *Conservatorship of Kevin M.* (1996) 49 CA4th 79, 89, 56 CR2d 765. It has been described as "scrupulously protect[ing] the rights of involuntarily detained mentally disordered persons." *Edward W. v Lamkins* (2002) 99 CA4th 516, 526, 122 CR2d 1. The LPS Act expressly guarantees these persons a number of legal and civil rights, and provides that involuntarily detained patients retain all rights not specifically denied under the Act. Welf & I C §§5325, 5327; 99 CA4th at 526.

Legislative intent strongly promotes family involvement in LPS proceedings and procedures to remedy historical barriers to the LPS system for many families of persons with serious mental illness and to ensure that families are a part of the system response. Health & S C §1374.51; Stats 2001, ch 506, §§1–2 (AB 1424).

The fact that a person has been taken into custody under the LPS Act may not be used in the determination of the person's eligibility for payment or reimbursement for mental health or other health care services for which he or she applied (or received) under the Medi-Cal program, any health care service plan licensed under the Knox-Keene Health Care

Service Plan Act (Health & S C §§1340 et seq), or any insurer providing health coverage doing business in this state. Welf & I C §5012.

Because the procedures for establishing, administering, and terminating an LPS conservatorship are largely the same as those provided in the Guardianship-Conservatorship Law (Prob C §§1400–3925), some of the procedures discussed in this benchguide are found in the statutes and rules governing probate conservatorships. See Welf & I C §5350, discussion in §120.59.

2. [§120.7] Standards for Appointment of Counsel

California Rules of Ct 7.1101(b) sets out qualifications for private attorneys appointed in conservatorship cases, and Cal Rules of Ct 7.1101(c) sets out requirements for public defenders. Educational requirements for attorneys are set out in Cal Rules of Ct 7.1101(f).

3. [§120.8] Exclusions From Act

Persons generally excluded from the LPS Act include mentally disordered sex offenders, persons with an intellectual disability, including those charged with a crime (see Pen C §§1001.20–1001.34), and mentally disordered criminal offenders, unless Pen C §4011.6 or other statutes specifically provide otherwise. See Welf & I C §5002(d). The primary difference in the powers between a Probate Code conservator and an LPS Act conservator is that the LPS conservator has the power to place a conservatee in a locked facility, and the Probate Code conservator does not. *People v Karriker* (2007) 149 CA4th 763, 780, 57 CR3d 412.

The initial 72-hour evaluation and treatment of minors is covered by the Children's Civil Commitment and Mental Health Treatment Act of 1988 (Welf & I C §§5585–5585.59). The LPS Act covers treatment and evaluation of minors after the initial 72-hour period. Welf & I C §§5585.20, 5585.53, 5585.55.

4. [§120.9] The LPS Assignment

Many judges believe that the LPS assignment differs from other judicial assignments in that it is appropriate for the judicial officer to take a more active role in questioning, while maintaining impartiality and ensuring that the patient is not asked questions that might lead to self-incrimination. See discussion in §120.77 on the proposed conservatee as witness. Some judges see part of their role as providing as positive an experience as possible for the proposed conservatee and family during difficult circumstances and as treating the proposed conservatee with dignity and respect.

☛ JUDICIAL TIP: Judicial officers should not be paternalistic in speaking to or about the proposed conservatee. Always address

> the proposed conservatee as Mr. or Ms., and do not speak in the third person. Be patient if the proposed conservatee is abusive, confused, incoherent, or rambling.

Even though judges may assume an active role, the court may not permit ex parte communications from a party or an attorney unless there has been a stipulation to the contrary by all the parties. Cal Rules of Ct 7.10(b). Nevertheless, a judge may hear certain ex parte communications regarding performance of fiduciaries or information regarding a conservatee in a case that has not yet been concluded by final discharge. Cal Rules of Ct 7.10(c). See also discussion in §120.25.

B. [§120.10] Procedural Overview

Under the LPS Act, a person who is dangerous or gravely disabled because of a mental disorder may be detained for involuntary treatment. These detentions, however, are implemented incrementally in accordance with the legislative purpose of preventing inappropriate, indefinite commitments of mentally disordered persons. *Conservatorship of Ben C.* (2007) 40 C4th 529, 541, 53 CR3d 856. The LPS Act provides for varying periods of detention in designated mental health facilities, depending on the nature and duration of the person's illness; it provides for a carefully calibrated series of temporary detentions for evaluation and treatment and limits involuntary commitment to successive periods of increasingly longer duration. *People v Allen* (2007) 42 C4th 91, 106, 64 CR3d 124.

Some of the detention periods involve court action, while others do not. Typically a person enters the mental health system by being placed on a 72-hour hold under Welf & I C §5150(a) either directly or from the criminal justice system under Pen C §4011.6. This may be followed by a 14-day hold (see Welf & I C §5250), which may be extended for an additional 30-day period for intensive treatment (see Welf & I C §5270.15). After an initial 72-hour detention, the 14-day and 30-day commitments each require a probable cause certification hearing before a hearing officer. A subsequent 180-day commitment based on dangerousness is possible by superior court order. *People v Allen, supra,* 42 C4th at 106-107, quoting *Conservatorship of Ben C., supra.* A court-ordered temporary conservatorship of 30 days is also possible (Welf & I C §5352.1), as well as a 1-year conservatorship initiated by a petition to the superior court (Welf & I C §§5350, 5361; Prob C §§1400 et seq). Once established, a conservatorship terminates automatically at the end of 1 year, unless a petition is filed to reestablish it at or before the end of the 1-year period. Welf & I C §§5361, 5362; *People v Allen, supra,* 42 C4th at 107. These involuntary placements may also be terminated before the expiration of the commitment period. Thus, the LPS Act assures a person

who has been properly detained of an opportunity for early release. *Ford v Norton* (2001) 89 CA4th 974, 979, 107 CR2d 776.

This table compares involuntary holds under the LPS Act:

	§5150	§5250	§5260	§5270.15
Time	Up to72 hours.	+14 additional days of intensive treatment.	+14 additional days if suicidal.	+30 additional days if authorized by county. Welf & I C §5270.12; see §120.40.
Party	Person is gravely disabled, or a danger to self or others. Welf & I C §5150(a).	Person is gravely disabled, or a danger to self or others. Welf & I C §5250(a).	Person presents an imminent threat of taking his or her own life. Welf & I C §5260(a); see §120.39.	Person is gravely disabled. Welf & I C §5270.15(a).
Hearing	No court action; hold based on probable cause of person taking into custody or treating. Welf & I C §5150(a); see §120.20.	Right to probable cause certification hearing. Welf & I C §5254; see §120.40. Professional's burden of proof. Welf & I C §5256.2.	No probable cause certification hearing.	Right to probable cause certification hearing. Welf & I C §5270.15(b). Professional's burden of proof. Welf & I C §5256.2

C. [§120.11] Definitions

Welfare and Institutions Code §5008 defines terms used in the LPS Act. Some of the more commonly used terms are defined below.

1. Gravely Disabled

a. [§120.12] General Definition

"Gravely disabled" is a condition where a person is unable to provide for his or her basic personal needs for food, clothing, or shelter as a result of a mental health disorder or impairment by chronic alcoholism. Welf & I C §5008(h)(1)(A), (2). It is not part of the meaning of grave disability that the person is unwilling to accept treatment voluntarily. For a good discussion of what constitutes inability to provide for food, clothing, or shelter, see *In re Carol K.* (2010) 188 CA4th 123, 134–136, 115 CR3d

343 (psychiatrist's testimony that proposed conservatee had lost community housing at least 10 times and refused to eat and drink, leading to hospitalizations, was substantial evidence she was unable to provide for her basic personal needs of shelter and food). Nondangerous, mentally ill persons can refuse treatment as long as they can provide for themselves. *Conservatorship of Walker* (1987) 196 CA3d 1082, 1093–1094, 242 CR 289.

☛ JUDICIAL TIP: It is important to adhere to the definition of "gravely disabled"; living on the streets or in a way that might be seen as dysfunctional is not synonymous with having a grave disability. Judicial officers need to resist the temptation to help a proposed conservatee who might benefit from treatment but whose condition does not meet the legal standard of "gravely disabled." See §§120.97–120.102 for a discussion of assisted outpatient treatment services.

In a proceeding to reestablish an LPS conservatorship under Welf & I C §5361 (see §120.91), the judge's instruction to the jury that the individual could be considered gravely disabled if the jury found that he would not take medication for a mental disorder, and that without his medication he would be unable to provide for his basic needs of food, clothing, and shelter, did not improperly create an alternative basis not contained in Welf & I C §5008(h)(1)(A) for a finding of grave disability. *Conservatorship of Guerrero* (1999) 69 CA4th 442, 445–446, 81 CR2d 541. If the evidence shows that the person is not currently gravely disabled, but may become so because of a failure to take medication, an LPS conservatorship cannot be established. 69 CA4th at 446. Likewise, a person cannot be found gravely disabled because he or she will not voluntarily accept treatment. 69 CA4th at 446. The proposed conservator must show that the proposed conservatee is currently gravely disabled, not that he or she may relapse and become gravely disabled in the future. 69 CA4th at 446. The instruction given in this case provided an appropriate framework for the jury to consider whether the conservatee was presently gravely disabled based on expert testimony that the conservatee did not believe he was ill, would not take his medication without supervision, could not provide for his basic needs without assistance, and that his condition would deteriorate without medication. 69 CA4th at 446–447.

A person is also "a danger to others or to himself or herself, or gravely disabled" under the LPS Act if he or she is a danger or gravely disabled as the result of using controlled substances. Any custody, evaluation, and treatment, or any procedures under the LPS Act must relate to and concern the problem of the person's use of controlled substances. Welf & I C §§5342, 5343.

☛ JUDICIAL TIP: Use the California Civil Jury Instructions (CACI) series 4200 samples at §120.109 to help identify evidence required and issues in the "gravely disabled" determination whether there is a court or jury trial.

Intellectually disabled persons are not gravely disabled solely because of their intellectual disability (Welf & I C §5008(h)(3)), although someone with a dual diagnosis of an intellectual disability and mental illness who has a primary diagnosis of mental illness may well be subject to the LPS Act. See §120.103 for a discussion of committing developmentally disabled persons under Welf & I C §§6500–6513.

b. [§120.13] Murphy Conservatorship

Under Welf & I C §5008(h)(1)(B), a person is gravely disabled when he or she has been found mentally incompetent under Pen C §1370, has been charged with a felony involving death, great bodily harm, or a serious physical threat to another, the indictment or information has not been dismissed, and because of a mental health disorder, the person cannot understand the nature and purpose of the proceedings and rationally assist counsel with a defense. The person must also be "currently dangerous as the result of a mental disease, defect, or disorder." *Conservatorship of Hofferber* (1980) 28 C3d 161, 178, 167 CR 854. A conservatorship based on this definition of grave disability is known as a Murphy conservatorship. *County of Los Angeles v Superior Court* (2013) 222 CA4th 434, 442, 166 CR3d 151. See §120.61 for a discussion of the applicability of the LPS Act to persons charged with a crime, including alleged violations of probation, mandatory supervision, postrelease community supervision, and parole.

c. [§120.14] Minors

For minors, "grave disability," for purposes of the initial 72-hour evaluation and treatment, is defined by Welf & I C §5585.25 as inability to use those elements of life that are essential to health, safety, and development, including food, clothing, and shelter, although provided by others. See Welf & I C §5585.20 (Children's Civil Commitment and Mental Health Treatment Act of 1988 procedures and definitions apply only to initial 72 hours of evaluation and treatment; evaluation and treatment of a minor thereafter must be pursuant to the LPS Act).

2. [§120.15] Evaluation

Evaluation consists of multidisciplinary, professional analyses of a person's medical, psychological, educational, social, financial, and legal conditions that may appear to constitute a problem. Welf & I C §5008(a). Providers of evaluation services must be properly qualified professionals

and may be full-time employees of an agency providing face-to-face, including telehealth, evaluation services, or may be part-time or contractual employees. Welf & I C §5008(a).

"Court-ordered evaluation" means an evaluation ordered by a superior court under Welf & I C §§5200–5213 (mental disorder) or §§5225–5230 (chronic alcoholism or drug abuse). Welf & I C §5008(b).

3. [§120.16] Intensive Treatment

Intensive treatment consists of hospital and other services as may be indicated by the person's condition; it must be provided by properly qualified professionals and carried out in qualified facilities. Welf & I C §5008(c).

D. [§120.17] 72-Hour Hold for Treatment and Evaluation (Welf & I C §§5150, 5200)

The LPS Act provides two methods by which a person may be held for treatment and evaluation for 72 hours in a county facility when there is probable cause to believe that the person, as a result of a mental disorder, is gravely disabled or a danger to self or others. The first method is initiated by personal observation by a police officer, mental health professional, or judicial officer (see Pen C §4011.6) under Welf & I C §5150, and the second by court-ordered evaluation under Welf & I C §5200.

1. [§120.18] 72-Hour Hold—No Court Intervention

Under Welf & I C §5150(a), a person may be held for assessment, crisis intervention, evaluation, and/or treatment for up to 72 hours in a county facility approved by the State Department of Health Care Services if there is probable cause to believe that the person, as a result of a mental health disorder, is gravely disabled or is a danger to self or others. See also Welf & I C §§5170, 5172 (similar procedure for those who are gravely disabled or a danger to self or others because of inebriation). There is no court involvement at this stage, although a person who is involuntarily detained retains the constitutional right to petition for a writ of habeas corpus. See US Const art I, §9; Cal Const art I, §11. See also Welf & I C §5275 (any person committed to state hospital has right to habeas corpus); Pen C §1473 (any person unlawfully restrained of his or her liberty may bring writ of habeas corpus to challenge restraint). For discussion of habeas corpus, see §§120.92–120.96.

a. [§120.19] Placing the Hold

A peace officer or other specified individual may place a person in a county designated mental health facility for up to 72 hours for assessment,

evaluation, and crisis intervention, or evaluation and treatment, without any court action, when that person is considered to be a danger to self or others, or is gravely disabled because of a mental health disorder. Welf & I C §5150(a).

The professional in charge of the facility or other designated individual must assess the person to determine if he or she can be properly served without being detained. Welf & I C §5150(b). If the professional finds that the person can be properly served without detention, the person must be provided evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis. Welf & I C §5150(b). All available alternative services, as determined by the county mental health director, must be offered. Welf & I C §5150(c).

If the person cannot be properly served without being detained, the admitting facility must require a written application stating how the person's condition was called to the peace officer's attention and that the peace officer has probable cause that the person is a danger to self or others, or gravely disabled, because of a mental health disorder. Welf & I C §5150(d). See §120.20 for a discussion of probable cause.

When a person is taken into custody for evaluation, or within a reasonable time, reasonable precautions must be taken to preserve and safeguard any personal property not in the possession of a responsible relative, guardian, or conservator. Welf & I C §5150(e). The individual taking the person into custody must furnish to the court a report describing any such personal property. Welf & I C §5150(e).

b. [§120.20] Probable Cause

When determining if probable cause exists to take a person into custody under Welf & I C §5150, available relevant information about the historical course of the person's mental disorder must be considered if this information has a reasonable bearing in determining whether the person is a danger to self or others, or gravely disabled, as a result of the mental disorder. Welf & I C §5150.05(a). The information to be considered includes evidence presented by the individual who has provided or is providing mental health or related support services to the person to be detained, evidence presented by the person's family members, and evidence presented by the person or anyone he or she has designated. Welf & I C §5150.05(b). If probable cause is based on the statement of a person other than the person authorized to take the mentally disordered person into custody, a member of the attending staff, or a professional person, the person making the statement may be liable in a civil action for intentionally giving any statement he or she knows to be false. Welf & I C §5150.05(c).

Probable cause for involuntary detention is satisfied if the authorized person knew of facts that would lead a person of ordinary care and

prudence to believe or entertain a strong suspicion that the detained person is gravely disabled or is a danger to self or others because of a mental disorder. *Heater v Southwood Psychiatric Ctr.* (1996) 42 CA4th 1068, 1080, 49 CR2d 880, citing *People v Triplett* (1983) 144 CA3d 283, 288, 192 CR 537. The facts must be specific and articulable, and taken together with rational inferences, must support the authorized person's belief or suspicion. 42 CA4th at 1080.

c. [§120.21] Assessment, Evaluation, and Treatment

Before admission to the county designated facility for the 72-hour period, the professional person in charge of the facility or his or her designee must assess the individual in person to determine the appropriateness of the involuntary detention. Welf & I C §5151. "Assessment" means the determination of whether a person is to be evaluated and treated under Welf & I C §5150. Welf & I C §5150.4. Thereafter, the person may be detained for evaluation and treatment for a period not to exceed 72 hours, excluding Saturdays, Sundays, and holidays if the Department of Health Care Services certifies (as to each facility) that services cannot reasonably be provided on those days. Welf & I C §5151. For a discussion of administering medication and providing other medical treatment, see §§120.41–120.48.

2. [§120.22] 72-Hour Hold—Court-Ordered Evaluation

Under Welf & I C §5200, any person may make an application to the responsible county agency or person (usually the public guardian or public conservator) and request an evaluation of a person thought to be gravely disabled. Welf & I C §5201. Anyone who knowingly makes a false application for a petition is guilty of a misdemeanor and may be held civilly liable for damages to the person against whom the petition is sought. Welf & I C §5203.

After the application is made, the responsible county entity (usually the court investigator) prepares a confidential prepetition screening report and determines whether there is probable cause to believe the allegations in the application. Welf & I C §5202. A reasonable investigation must be conducted and an attempt to interview the subject of the petition must be made to determine whether the person will voluntarily receive crisis intervention services or will allow an evaluation in the person's home or in an approved facility. Welf & I C §5202. The prepetition screening should also include an interview with the petitioner. See Welf & I C §5008(f).

After investigation, if the agency determines that there is probable cause to believe that the person, as a result of a mental illness, is gravely disabled or a danger to self or others and that the person will not voluntarily consent to receive services, it must file the petition with the

court along with the prepetition report. Welf & I C §5202. The required contents of the petition are set forth in Welf & I C §§5204 and 5205, and include the names of the petitioner and person alleged to have a mental disorder, the facts on which the allegations are based, and the names of those who are believed to be responsible for the care and support of the person who is the subject of the petition.

a. [§120.23] Order for Evaluation

If it appears to the superior court judge's satisfaction that the subject of the petition is, because of a mental disorder, a danger to self or others, or gravely disabled, and the person has refused to be evaluated, the court must order an evaluation. Welf & I C §5206. An evaluation order must be in substantially the same form as set forth in Welf & I C §5207. The order must be personally served as soon as possible on both the person to be evaluated and the professional person in charge of the evaluation facility. Welf & I C §5208. Service of the evaluation order must be made by a peace officer, mental health counselor, or other person appointed by the court who must dress in plain clothes and travel in an unmarked vehicle whenever possible. Welf & I C §§5206, 5212. Failure to effect service may render a subsequent detention unlawful. *Culbertson v Santa Clara County* (1968) 261 CA2d 274, 275, 67 CR 752.

If the person to be evaluated does not appear at the time designated in the order, the party serving the order must have the person detained under the order. Welf & I C §5208.

b. [§120.24] Evaluation and Treatment

The person must be evaluated as soon as possible, and cannot be detained longer than 72 hours, excluding Saturdays, Sundays, or holidays if treatment and evaluation services are not available on those days. Welf & I C §5213. If on evaluation the person is found to need treatment because of a mental disorder rendering that person a danger to self or others, he or she may be detained for treatment for 72 hours. Welf & I C §5213. See §§120.41–120.48 (discussing administering medication and providing other medical treatment).

Depending on the results of the evaluation, the person must be released, referred for care and treatment on a voluntary basis, certified for intensive treatment (see §§120.29–120.40), or recommended for LPS conservatorship (see §§120.57–120.91). Welf & I C §5206.

c. [§120.25] Confidentiality

All reports filed with the court are confidential, and any unauthorized disclosure may result in substantial civil penalties under Welf & I C §§5328, 5330. Confidential records, however, may be disclosed to the

court, as well as to the Youth Authority and Adult Correctional Agency, as necessary for the administration of justice. Welf & I C §§5328(f), 5328.02. A district attorney is also allowed access to an individual's treatment record information contained in an updated evaluation when that individual is charged under the Sexually Violent Predators Act (Welf & I C §§6600–6609.3). Welf & I C §5328.01; *Albertson v Superior Court* (2001) 25 C4th 796, 803–804, 107 CR2d 381.

A minor's confidential information and records may be disclosed to a county social worker, a probation officer, or any other person who is legally authorized to have custody or care of the minor, for the purpose of coordinating health care services and medical treatment. Welf & I C §5328.04; see CC §56.103.

Another important exception to the confidentiality of records applies when a patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim. In such a case, confidential records or information may be released to the potential victim and to law enforcement and county child welfare agencies as the psychotherapist determines is needed for the victim's protection. Welf & I C §5328(r).

There is an absolute discovery privilege for patient records under Welf & I C §5328, subject only to statutory exceptions. *Gilbert v Superior Court* (1987) 193 CA3d 161, 169–170, 238 CR 220.

Any person may bring an action against an individual who has willfully and knowingly released confidential information or records concerning the person in violation of these provisions, for damages in the amount of $10,000 or three times the amount of actual damages sustained, whichever is greater. Welf & I C §5330(a). Any person may bring an action against an individual who has negligently released such confidential information or records for the amount of actual damages sustained plus $1000. Welf & I C §5330(b). The person may also seek an injunction against the release of confidential information or records in the same action in which the person seeks damages. Welf & I C §5330(c). The plaintiff in such an action is also entitled to recover court costs and reasonable attorneys' fees as determined by the court. Welf & I C §5330(d).

After 30 years, the trial court clerk may destroy court records in an LPS case after notice of destruction and if there is no request and order for transfer of the records. Govt C §68152(c)(7).

If the court considers an ex parte communication (see discussion in §120.9), it must fully disclose the communication it considered to all parties and counsel, as well as any response. Cal Rules of Ct 7.10(c)(3). The court may find good cause to dispense with this disclosure requirement if nondisclosure is necessary to protect the conservatee from harm; it must make written findings in support of the good cause

determination. Cal Rules of Ct 7.10(c)(3). The court must then preserve its findings and the communication under seal, or otherwise secure their confidentiality. Cal Rules of Ct 7.10(c)(3).

3. [§120.26] Criminal Defendant Afflicted With Chronic Alcoholism or Drug Abuse (Welf & I C §§5225–5230)

A judge may order a 72-hour evaluation for a criminal defendant if the defendant appears to be a danger to self or others, or gravely disabled, as a result of chronic alcoholism or because of the use of narcotics or restricted dangerous drugs, and evaluation services are available in the county. Welf & I C §5225.

a. [§120.27] Requirements

The judge must advise the defendant of the right to continue immediately with the criminal proceeding or to choose the evaluation procedure. The judge must also fully apprise the defendant of the consequences of choosing an evaluation. Welf & I C §5226. In addition, the defendant has the right to counsel at the proceedings where the choice is made. Welf & I C §5226.

If an evaluation is ordered, the criminal proceedings pending in that court must be dismissed or suspended until the evaluation and any subsequent treatment are completed. Welf & I C §5226.1. At completion, the defendant is returned to court and the criminal proceedings are then resumed or dismissed. Welf & I C §5226.1. If, during evaluation or treatment, the defendant is recommended for conservatorship and the criminal charge has not been previously dismissed, the defendant must be returned to the court for disposition of the criminal charge before the conservatorship proceedings are initiated. Welf & I C §5226.1. The judge may order the defendant detained in the evaluation or treatment facility until the date set to resume the criminal proceedings. Welf & I C §5226.1

The order for evaluation must be in substantially the form as set forth in Welf & I C §5227. A copy of the order must be personally served soon as possible on the person to be evaluated and the professional person in charge of the evaluation and treatment facility named in the order. Welf & I C §5228.

b. [§120.28] Disposition

Under Welf & I C §5230, the defendant may be detained for evaluation and treatment for no longer than 72 hours, and then:

- Released to the sheriff's custody or further detained by a court order under Welf & I C §5226.1;

- Referred for further care and treatment on a voluntary basis, subject to the disposition of the criminal action;
- Certified for 14-day intensive treatment;
- Recommended for conservatorship, subject to disposition of the criminal charge; or
- Released if the criminal charge has been dismissed.

E. 14-Day Hold for Intensive Treatment (Welf & I C §5250)

1. [§120.29] In General

A person who has been detained for 72 hours under Welf & I C §5150, evaluated, and found to be dangerous to self or others, or gravely disabled, may be certified for an additional 14 days of intensive treatment in an approved facility if (1) he or she refuses or is unable to accept voluntary treatment, (2) the facility is capable of providing the required treatment, and (3) the facility agrees to accept the person. Welf & I C §5250. The person is entitled to a certification review hearing within 4 days of certification unless judicial review has been granted under Welf & I C §§5275 and 5276. Welf & I C §5256; see §§120.18–120.22. The purpose of the certification review hearing is to determine whether probable cause exists to detain the person for intensive treatment. Welf & I C §5254. Due process requires certification review hearings in every case; the possibility of habeas review alone is insufficient. *Doe v Gallinot* (1981) 657 F2d 1017, 1023–1024.

Suicidal patients may be certified for an additional 14 days of intensive treatment after the initial 14-day period, but must be released at the end of the 28 days unless they consent to voluntary treatment. Welf & I C §5260. The certified person must be advised of the right to judicial review by habeas corpus. Welf & I C §5262; see §120.39. The 14-day hold may be extended for an additional 30 days for persons who remain gravely disabled in counties whose board of supervisors so authorize by resolution. See Welf & I C §§5270.10–5270.65; see §120.40

2. [§120.30] Notice and Service of Certification

A notice of certification must be signed by two people: (1) the professional person in charge of the evaluation facility or his or her designee, and (2) a physician, licensed psychologist, registered nurse, or licensed clinical social worker who participated in the evaluation. Welf & I C §5251. A form of certification is set forth in Welf & I C §5252.

The notice must be personally served on the person certified and sent to the person’s attorney or advocate. Welf & I C §5253.

3. [§120.31] Prehearing Rights of Certified Person; Notification of Family Members

The person serving the notice must inform the person certified that he or she is entitled to a certification review hearing to be held within 4 days of the date on which the person is certified, unless judicial review is sought. Welf & I C §5254. The person serving the notice must also inform the certified person of the right to counsel at the certification review hearing, including court-appointed counsel under Welf & I C §5276, and of the right to judicial review by habeas corpus. Welf & I C §5254.1.

Any person who is held for treatment for more than 72 hours has a right to counsel, a qualified interpreter, and a hearing before a judge. If the person is unable to pay for a lawyer, one must be provided free of charge. See Welf & I C §5150(h)(1); *Phillips v Seely* (1974) 43 CA3d 104, 113, 117 CR 863 (legal services at public expense must be afforded in mental health proceedings if restraint of liberty is possible).

As soon as practicable after certification, an attorney or patient advocate must meet with the person certified to discuss the commitment process and to assist the person in preparing for the certification review hearing, or to answer questions or otherwise assist the person as appropriate. Welf & I C §5255. The hearing may be postponed at the request of the person certified or his or her attorney or advocate for a period of 48 hours or, in counties with populations of 100,000 or less, until the next regularly scheduled hearing date. Welf & I C §5256.

The mental health facility must make reasonable efforts to notify family members or any other person designated by the patient of the time and place of the hearing, unless the patient requests that the information not be provided. Welf & I C §5256.4(c). The facility must also advise the patient of the right *not* to have this information provided to family members. Welf & I C §5256.4(c).

4. [§120.32] Conduct of Hearing

Under Welf & I C §5256.1, the hearing must be conducted by either a court-appointed commissioner or a referee, or a certification review hearing officer who is either

- A state-qualified administrative law hearing officer,
- A physician and surgeon,
- A lawyer,
- A certified law student, or
- A registered nurse, licensed psychologist, clinical social worker, professional clinical counselor, or marriage and family therapist with a minimum of 5 years of experience in mental health.

Other qualifications for hearing officers are set forth in Welf & I C §5256.1.

The hearing must be conducted in an informal and impartial manner. Welf & I C §5256.4(b). Evidence in support of the certification decision must be presented by a person designated by the director of the facility. In addition, either the district attorney or the county counsel may present evidence. Welf & I C §5256.2. All relevant evidence on the question of whether the person certified is a danger to self or others, or gravely disabled due to mental disorder or alcoholism, must be admitted and considered by the hearing officer. Welf & I C §5256.4(d). The person conducting the hearing is not bound by judicial rules of procedure and evidence. Welf & I C §5256.4(b).

☛ JUDICIAL TIPS:

- The judicial officer who holds this and other hearings under the LPS Act should not hesitate to ask questions, if appropriate, and to be more active than bench officers usually permit themselves to be.
- In an appropriate case, a judge may wish to encourage a conservatee to continue with the treatment plan by noting the progress the conservatee has made from the time of the previous hearing.

The person conducting the hearing must be advised of any medication recently taken by the person certified and its probable effects. Welf & I C §5256.4(a)(5). For a discussion of the right to refuse medication, see §§120.41–120.46.

5. [§120.33] Location of Hearing

The hearing must be held in a location compatible with and least disruptive of the treatment being provided to the person certified. Welf & I C §5256.1. If the hearing is conducted by a certification review officer, it must be held at an appropriate place at the facility in which the person certified is receiving treatment. See Welf & I C §5256.1.

6. [§120.34] Evidence

Evidence in support of certification must be presented at the hearing by the designee of the director of the medical facility and by the district attorney or county counsel if either so desires. Welf & I C §5256.2.

A person is not gravely disabled if he or she can survive safely without involuntary detention with the help of responsible family, friends, or others who have indicated in writing their willingness and ability to help provide for the person's basic personal needs for food, clothing, and shelter. Welf & I C §5250(d)(1)–(2). The purpose of requiring that the

information be submitted in writing is to avoid the need for family, friends, and others to state publicly that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs. Welf & I C §5250(d)(3). See §§120.12–120.14 and §§120.74–120.76 for definitions relevant to finding grave disability.

Resistance to involuntary commitment, by itself, does not indicate evidence of a mental disorder, danger to self or others, or grave disability. Welf & I C §5256.4(e).

7. [§120.35] Hearing Rights of Certified Person

At the hearing, the person certified has (Welf & I C §5256.4(a)(1)–(4))

- The right to the assistance of an attorney or other advocate,
- The right to present evidence on his or her behalf and also to question persons presenting evidence in support of certification, and
- The right to reasonably request attendance of facility employees at the hearing who have knowledge of or who have participated in the certification decision.

8. [§120.36] Ruling After Hearing

If the hearing officer determines that there is no probable cause to believe that, as a result of a mental disorder or chronic alcoholism, the person certified is gravely disabled or a danger to self or others, that person must be released from involuntary detention, although he or she may remain at the facility on a voluntary basis. Welf & I C §5256.5. If the person had been a prisoner referred under Pen C §4011.6, he or she may be re-imprisoned. See Pen C §4011.6. If there is a finding of no probable cause, the person may also be given appropriate referral information by the facility regarding mental health services. Welf & I C §5256.5.

If a determination is made that there is probable cause to detain the person certified, the person may be detained for involuntary treatment under Welf & I C §§5250 and 5270.15 (certification for additional treatment). See Welf & I C §5256.6.

At the conclusion of the hearing, the person certified must be given oral notice of the decision, with written notification given to the attorney or advocate for the person certified, as well as to the director of the facility. Welf & I C §5256.7. Written notice must include a statement of evidence relied on and reasons for the decision. Welf & I C §5256.7. A copy of the decision and certification made under Welf & I C §5250 or §5270.15 must be submitted to the superior court. Welf & I C §5256.7.

9. [§120.37] Disposition After 14-Day Hold

Under Welf & I C §5257(b), the person certified must be released at the end of the 14-day period of intensive treatment unless the patient

- Agrees to accept further treatment on a voluntary basis,
- Is certified for an additional 14 days of intensive treatment under Welf & I C §§5260 et seq (danger to self) (see §120.39),
- Is certified for an additional 30-day period of intensive treatment under Welf & I C §§5270.10 et seq (see §120.40),
- Is subject to a conservatorship petition filed under Welf & I C §5350 or a temporary conservatorship under §5352.1 (see §§120.57–120.87), or
- Is the subject of a Petition for Postcertification of an Imminently Dangerous Person for up to 180 days filed under Welf & I C §§5300 et seq (danger to others) (see §§120.49–120.51).

If, during the 14-day treatment period, the psychiatrist directly responsible for the person's treatment believes, based on personal observations, that the person is no longer either a danger to self or others, or is no longer gravely disabled, the person must be released. Welf & I C §5257(a).

If both a psychiatrist and a psychologist have personally evaluated or examined a person undergoing intensive treatment, and there is a collaborative treatment relationship between the psychiatrist and the psychologist, either the psychiatrist or psychologist may authorize the release of the person, but only after they have consulted with one another. In the event of a clinical or professional disagreement regarding early release of a person undergoing intensive treatment, the person may not be released unless the facility's medical director overrules the decision of the psychiatrist or psychologist opposing the release. Both the psychiatrist and psychologist must enter their findings, concerns, or objections into the person's medical record. Welf & I C §5257(a).

If any other professional person who is authorized to release the person believes the person should be released during the 14-day treatment period, and the psychiatrist directly responsible for the person's treatment objects, the matter must be referred to the medical director of the facility for a final decision. If the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. Welf & I C §5257(a). The person is not prohibited from remaining at the facility on a voluntary basis, and the facility may provide the person with appropriate referral information about mental health services. Welf & I C §5257(a).

After involuntary detention has begun, the total period of detention, including any voluntary treatment, must not exceed the maximum period during which the person could have been involuntarily detained. Welf & I

C §5258. In any event, the involuntary detention period for gravely disabled persons held under Welf & I C §§5150, 5250, and 5170 must not exceed 47 days unless a continuance is granted. Welf & I C §5352.3.

If the person had entered the mental health system through the criminal justice system under Pen C §4011.6, release may mean re-imprisonment. See Pen C §4011.6.

10. [§120.38] Immunity for Action by Released Person

If the provisions of Welf & I C §5257 have been met concerning the person's release, then the professional person in charge of the facility providing intensive treatment, his or her designee, the professional person designated by the county, the medical director of the facility or his or her designee, and the psychiatrist directly responsible for the person's treatment, or the psychologist must not be held civilly or criminally liable for any action by a person released before or at the end of the 14-day treatment period. Welf & I C §5259.3(a)–(b). In addition, the attorney or advocate representing the person, the court-appointed commissioner or referee, the certification review hearing officer conducting the certification review hearing, and the peace officer responsible for detention of the person are not criminally or civilly liable for actions by a person released at or before the end of the 14-day period. Welf & I C §5259.3(c).

The immunity granted under Welf & I C §5259.3 to the professional who authorizes the person's release assumes that the professional "is acting in good faith." *Bragg v Valdez* (2003) 111 CA4th 421, 433, 3 CR3d 804. If it is proved that the treating professional based a release decision on the person's lack of insurance, rather than on the person being no longer dangerous, then the treating professional loses immunity under Welf & I C §5259.3.111 CA4th at 433.

11. [§120.39] Additional 14-Day Hold for Suicidal Persons (Welf & I C §5260)

At the end of the initial 14-day hold, if the detained person continues to present an imminent threat of suicide because of mental disorder or chronic alcoholism, a second 14-day period of intensive treatment is authorized under Welf & I C §5260. This second notice for certification must be signed by the professional person in charge of the facility. Welf & I C §5261. Copies of this second notice must be given to the person certified, his or her attorney, the district attorney, the public defender (if applicable), and to the facility providing the treatment. Welf & I C §5263. The notice must include advice of the detained person's legal right to judicial review. Welf & I C §5262. At the end of this second 14-day period, the person must be released unless he or she consents to voluntary

treatment or is recommended for conservatorship under Welf & I C §§5350–5371 because of grave disability. See Welf & I C §5264(b).

Further intensive treatment of a person who has been certified to be gravely disabled may be ordered only under the following conditions (Welf & I C §5260):

- The professional facility staff has determined that the person poses an imminent threat of suicide;
- The person has not accepted the voluntary treatment of which he or she has been advised;
- The facility, which can provide treatment, is designated as such by the county and is willing to admit the person; and
- The person has threatened suicide during the period of intensive treatment due to a mental disorder or chronic alcoholism or is detained for evaluation and treatment because of a threat of or attempt at suicide.

☛ JUDICIAL TIP: Judges should be careful of cases in which conservatorship is recommended after the end of the second 14-day hold if grave disability had not been a basis of the prior certifications.

12. [§120.40] Additional 30-Day Period for Intensive Treatment

In some counties in which the board of supervisors has authorized further treatment, a person may be detained for intensive treatment for an additional 30 days if the professional treating staff determines that the person is still gravely disabled and will not accept voluntary treatment. Welf & I C §§5270.12, 5270.15. A person detained for this additional period must be given a certification review hearing in accordance with Welf & I C §5256 unless judicial review by writ of habeas corpus has been sought under Welf & I C §5275. Welf & I C §5270.15.

☛ JUDICIAL TIP: When a gravely disabled person forgoes a certification hearing and files a writ of habeas corpus, the writ is known colloquially as a bypass writ.

The purpose of this additional intensive treatment is to reduce the number of gravely disabled persons for whom conservatorship petitions are filed, and who are placed under temporary conservatorship simply to obtain an additional period of treatment when the petitioner does not believe that a conservator is actually needed and does not intend to proceed further on the conservatorship petition. Welf & I C §5270.10.

If it is contemplated that a gravely disabled person may need to be detained beyond the 14-day period, the professional person in charge of

the treating facility must cause an evaluation to be made, based on the patient's current condition and past history, as to whether it appears that the person is likely to qualify for appointment of a conservator even after a period of up to 30 days of additional treatment. Welf & I C §5270.55(a). This evaluation must be made before proceeding with an additional 30-day certification. Welf & I C §5270.55(a). If the appointment of a conservator appears likely, the conservatorship referral must be made during the 14-day period of intensive treatment. Welf & I C §5270.55(a). If it appears that with up to 30 days of additional treatment the appointment of a conservator will not be necessary, the person may be certified for the additional 30-day period. Welf & I C §5270.55(b).

If a conservatorship referral has not been made during the 14-day period and, during the 30-day period, it appears that the person is likely to require the appointment of a conservator, a conservatorship referral must be made to allow sufficient time for a conservatorship investigation and other related procedures. Welf & I C §5270.55(c). If a temporary conservatorship is obtained, it must run concurrently with the 30-day certification period, as a gravely disabled person may not be held involuntarily for more than 47 days. Welf & I C §5270.55(c). The conservatorship hearing must be held by the end of that period. Welf & I C §5270.55(c).

F. Medications and Medical Procedures

1. [§120.41] Antipsychotic Medication

Persons detained for evaluation and treatment who are receiving medication for their mental illness must be given written and oral information about the probable effects and side effects of the medication as soon as possible after detention. Welf & I C §5152(c). The following information must be given orally to the patient (Welf & I C §5152(c)):

- The nature of the mental illness or behavior that is the reason for the medication being given or recommended;
- The likelihood of improving or not improving without the medication;
- Reasonable alternative treatments available; and
- The name, type, frequency, amount, and method of dispensing the medication, and the likely duration of taking the medication.

A detained person has the right to refuse treatment with antipsychotic medication, which is any medication customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders (Welf & I C §5008(*l*)). Welf & I C §5325.2. See also Welf & I C §§5150, 5250, 5260, 5270.15. Thus, antipsychotic medications may not be administered in nonemergency situations without the patient's

consent unless there has been a judicial determination of incapacity. Welf & I C §5332(b); *Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303, 1320, 271 CR 199. See also Welf & I C §5331 (no presumption of incapacity solely because of voluntary or involuntary treatment for mental disorder or alcoholism).

In an emergency situation (treatment necessary to preserve life or prevent serious harm when it is impracticable to obtain consent (Welf & I C §5008(m)), a detained person may be treated with antipsychotic drugs over his or her objection before a capacity hearing is held. Welf & I C §5332(e). See §120.45. Emergency treatment must be limited to medication required to treat the emergency condition and only in the manner least restrictive to the patient's personal liberty. Welf & I C §5332(e); see *Heater v Southwood Psychiatric Ctr.* (1996) 42 CA4th 1068, 1081, 49 CR2d 880 (administration of tranquilizer to person on 72-hour hold was authorized as practical measure to protect patient when he was struggling and highly agitated, and there was no evidence that medication was antipsychotic drug). For intervention to take place, it is not necessary that harm has occurred or become unavoidable. Welf & I C §5332(e).

The agency or facility providing the treatment must obtain the patient's medication history, if possible. Welf & I C §5332(d).

The requirement that there be a judicial determination of incapacity under the LPS statutory scheme before the involuntary administration of psychotropic medication extends to prisoners. *Keyhea v Rushen* (1986) 178 CA3d 526, 542, 223 CR 726. See *In re Greenshields* (2014) 227 CA4th 1284, 1290, 174 CR3d 482 (violates equal protection to give defendant found not guilty by reason of insanity antipsychotic medication in a nonemergency situation without separate determination that he or she "is incompetent to refuse treatment" or has "recently committed a dangerous act"). The LPS Act's requirement of a judicial determination of incapacity also applies to prisoners determined to be mentally disordered offenders under the Mentally Disordered Offender Act (MDO Act), Pen C §§2960 et seq. *In re Qawi* (2004) 32 C4th 1, 24–25, 7 CR3d 780.

a. [§120.42] Capacity (*Riese*) Hearing

If a patient refuses antipsychotic medication and the medical staff has determined that treatment alternatives to involuntary medication are unlikely to meet his or her needs, the medication may be administered only after a hearing and determination that the person is incapable of refusing treatment. Welf & I C §5332(b). This hearing, which is called a capacity or *Riese* hearing, is triggered by a petition filed in superior court by the director of the treatment center or his or her designee. Welf & I C §5333(c).

Once the petition has been filed, the hearing must be held within 24 hours of that filing whenever possible. Welf & I C §5334(a). Although a hearing may be postponed for hardship or because a party needs additional time to prepare, it may not be postponed beyond 72 hours from the filing of the petition. Welf & I C §5334(a). A patient has a right to be present at the capacity hearing. See *People v Fisher* (2009) 172 CA4 1006, 1013–1014, 91 CR3d 609 (conducting hearing on motion to involuntarily administer psychotropic medication without mentally disordered offender present violated due process right to fair hearing where there was neither personal waiver of right to be present nor inability to attend hearing). The hearing must be held at the treatment facility and must be conducted by a superior court judge or a court-appointed commissioner, referee, or hearing officer. Welf & I C §5334(b)–(c) (judicial or hearing officer must be appointed from list of attorneys). There is no right to a jury trial on the issue of administering involuntary antipsychotic medication. *People v Fisher*, *supra*, 172 CA4th at 1015.

☛ JUDICIAL TIPS:

- At the hearing, it may be appropriate for the judge to question the doctor concerning the effect of medications and whether there are alternative drugs available.
- Judicial officers should learn as much as they can about the different types of medications and their side effects. Although judges should not try to second guess doctors, they should at least be aware of alternatives. In addition, judges should be aware that what seem like symptoms of a mental disorder (shuffling gait, slurred speech, tremors, spasms, and falling asleep) might instead be the side effect of a medication.

b. [§120.43] Findings

The court must determine the patient's capacity to consent, focusing on whether the patient

- Is aware of his or her situation;
- Is able to understand the risks, benefits, and alternatives to the proposed treatment; and
- Is able to understand and knowingly and intelligently evaluate the information that is required to be given when informed consent is sought and to otherwise use rational thought processes to participate in the treatment decision.

Riese v St. Mary's Hosp. & Med. Ctr. (1987) 209 CA3d 1303, 1322–1323, 271 CR 199. See also Welf & I C §5326.5 (definition of informed consent).

The court must make a finding of incapacity by clear and convincing evidence. 209 CA3d at 1322. In making its decision, the court must *not* decide medical questions, such as whether the proposed treatment is necessary or the least drastic alternative. 209 CA3d at 1322.

c. [§120.44] Notification

The patient must be given verbal notification of the results of the capacity hearing at the conclusion of the hearing. Welf & I C §5334(d). This must be followed by written notice to both the patient and the patient's advocate or attorney and the director of the mental health facility. Welf & I C §5334(d). A copy of the determination must be submitted to the superior court. Welf & I C §5334(d).

d. [§120.45] Effect of Determination

If the court finds that the patient has the capacity to give informed consent to antipsychotic drugs, the patient may refuse consent to the drugs. *Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303, 1323, 271 CR 199. If the court finds that the patient is incapable of giving informed consent, one of two things may happen under *Riese v St. Mary's Hosp. & Med. Ctr., supra*:

- When the confinement will be for fewer than 14 days under Welf & I C §5150 or §5250, the patient may be required to take the medication with or without consent.
- When confinement will be for *more* than 14 days, the patient is required to take the medication only after a guardian, responsible relative, or conservator gives consent.

Any determination of incapacity to refuse treatment remains in effect only until the earliest of the following events occurs:

- The detention period under Welf & I C §§5150 and/or 5250 comes to an end,
- Capacity has been restored according to standards developed under Welf & I C §5332(c), or
- Capacity has been restored according to court determination. Welf & I C §5336.

☛ JUDICIAL TIPS:

- If there is a new holding period, a new capacity hearing must be held.
- If incapacity is found, and the petition requests it, judges should consider including orders for testing blood levels of medication in their orders to monitor the effects of medication and to rule out

pregnancy or other conditions for which medication might be contraindicated.

e. [§120.46] Appeals

The patient may appeal the determination of capacity to the superior court or the court of appeal (Welf & I C §5334(e)(1)), or he or she may file a writ of habeas corpus (Welf & I C §5334(e)(4)). The person who filed the original petition (usually the treating psychiatrist) may request the county counsel or district attorney to appeal the determination to the superior court or the court of appeal on behalf of the state. Welf & I C §5334(e)(2). Appeals to the superior court (often to a judicial officer when the original hearing was heard by a hearing officer) are subject to de novo review. Welf & I C §5334(f).

2. [§120.47] Electroconvulsive Therapy (ECT)

Several conditions must be met before convulsive treatment may be administered to an involuntary patient under an LPS Act conservatorship. The patient's attending or treating doctor must adequately document in the patient's treatment record "the reasons for the procedure, that all reasonable treatment modalities have been carefully considered, and that the treatment is definitely indicated and is the least drastic alternative available for this patient at this time." Welf & I C §5326.7(a). The attending and treating doctor(s) must sign this statement in the patient's treatment record. Welf & I C §5326.7(a). A committee of two doctors, one appointed by the facility and the other by the local mental health director, and both of whom must be board-certified or board-eligible psychiatrists or neurologists, must unanimously agree with the treating doctor. Welf & I C §5326.7(b). At least one of the doctors on the committee must have personally examined the patient, and both must sign documentation in the treatment record indicating agreement with the recommendation for convulsive treatment. Welf & I C §5326.7(b). "[A] responsible relative of the person's choosing and the person's guardian or conservator, if there is one," must be given the oral explanation required to constitute voluntary informed consent under Welf & I C §5326.2. Welf & I C §5326.7(c). This requirement need not be complied with if the patient does not want to inform a relative or the chosen relative is unavailable. Welf & I C §5326.7(c). The patient must also give written informed consent "for a specified maximum number of treatments over a specified maximum period of time not to exceed 30 days"; such consent is revocable orally or in writing at any time, effective immediately. Welf & I C §5326.7(d). Additional treatments, for no longer than 30 days, require renewed written informed consent. Welf & I C §5326.7(d). The patient's attorney, or a court-appointed public defender if the patient does not have an attorney,

must agree that the patient has capacity or incapacity to give written informed consent, and that the patient who has capacity has given written informed consent. Welf & I C §5326.7(e).

☛ JUDICIAL TIP: Some judges determine whether a patient's doctors have met the technical requirements necessary to treat the patient with ECT as part of adjudicating the petition. Others believe it is the duty of administrative regulatory agencies to monitor compliance with the requirements.

If a patient's doctor or attorney believes that the patient does not have the capacity to give written informed consent to necessary shock treatments, that person must file a petition in superior court for an evidentiary hearing on the patient's capacity to give written informed consent. Welf & I C §5326.7(f). The hearing must be held within 3 judicial days after the petition is filed. Welf & I C §5326.7(f). The court must provide appropriate notice to the patient, who must be present at the hearing and must be represented by counsel. Welf & I C §5326.7(f). See *Conservatorship of Pamela J.* (2005) 133 CA4th 807, 823–826, 35 CR3d 228 (trial court reversibly erred in determining conservatee's capacity to give informed consent to electroconvulsive treatment in her absence after refusing her counsel's requests to grant continuance to obtain her presence or to conduct hearing at location where she was detained).

☛ JUDICIAL TIP: A patient's presence at the ECT hearing cannot be waived. The court should be prepared to conduct the hearing at the treating medical facility if the patient cannot come to the courthouse.

If the patient's attorney is the one who filed the petition or is one whom the court otherwise determines to have a conflict of interest with the patient, that attorney must not represent the patient at the hearing. See Welf & I C §5326.7(f).

At the hearing, the court must determine whether the patient is able to understand and to knowingly and intelligently act on information related to the electroconvulsive therapy. Welf & I C §5326.5(c). The determination that the patient does not have the required capacity must be made by clear and convincing evidence. *Lillian F. v Superior Court* (1984) 160 CA3d 314, 324, 206 CR 603.

In making this determination, the court should focus primarily on the same three factors assessed in *Riese* capacity hearings: (1) whether the patient is aware of his or her situation; (2) whether the patient is able to understand the benefits and risks of, as well as alternatives to, the proposed intervention; and (3) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given patients whose informed consent is sought and to otherwise

participate in the treatment decision through rational thought processes. *Conservatorship of Pamela J., supra*, 133 CA4th at 824, citing *Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303, 1322–1323, 271 CR 199; see §120.46. In addition, the court must consider medical evidence regarding the patient's condition and prognosis as it relates to capacity to consent in making this determination; the court must not consider whether electroconvulsive therapy is definitely needed or is the least drastic alternative available. *Conservatorship of Waltz* (1986) 180 CA3d 722, 728, 227 CR 436.

If the court determines that the patient does not have the capacity to provide informed written consent, electroconvulsive therapy may be performed after obtaining consent from a conservator, guardian, or responsible relative. Welf & I C §5326.7(g).

☛ JUDICIAL TIP: Some judges recommend that an order authorizing ECT impose limits on the number of treatments, as the patient's "consent shall be for a specified maximum number of treatments over a specified maximum period of time not to exceed 30 days." Welf & I C §5326.7(d); see also 9 Cal Code Regs §849(a) (ECT considered excessive if a patient receives more than 15 treatments in 30 days or more than 30 within a year). It is also recommended that the conservator be present at the capacity hearing so that he or she will have heard all the information provided by doctors and the conservatee and his or her attorney or advocate concerning the risks and benefits of this kind of therapy.

See Welf & I C §5326.8 for conditions to perform ECT on minors.

3. [§120.48] Other Types of Treatment

Psychosurgery may be performed only with the patient's written consent and after other stringent safeguards have been met. See Welf & I C §5326.6. A conservator who does not have express authority to require medical treatment unrelated to the mental disorder may seek a court order for that treatment under Welf & I C §5358.2. If the conservatee contests the request for the order, the court must hold a hearing on the request. Welf & I C §5358.2.

G. 180-Day Postcertification Treatment for Person Determined To Be Danger to Others

1. [§120.49] Requirements

A person presenting a demonstrated danger of inflicting substantial physical harm on others as a result of a mental disorder or defect may be confined for up to 180 days of additional treatment after expiration of the

14-day period of intensive treatment. Welf & I C §5300. A petition for postcertification treatment must be filed in the superior court of the county in which the facility providing treatment is located. Welf & I C §5301(a). See *Conservatorship of Ben C.* (2007) 40 C4th 529, 541, 53 CR3d 856 (a 180-day commitment requires superior court order). The format of the petition is mandated by Welf & I C §5301(c). This petition must summarize the facts that support the contention that the person falls within the standard set forth in Welf & I C §5300. Welf & I C 5301(a). It must be supported by affidavits describing in detail the behavior that indicates that the person falls within the standard set forth in Welf & I C §5300. Welf & I C §5301(a). The petition and supporting affidavits must be served on the person on the same day they are filed. Welf & I C §5301(b).

The hearing must begin within 4 judicial days after the petition is filed or, if a jury trial is demanded, within 10 judicial days. Welf & I C §5303. Continuances may be for a maximum of 10 additional days. Welf & I C §5303. The person is entitled to be represented by counsel who must explain his or her rights to the person in relation to the proceeding. Welf & I C §5302. The person also has the right to a jury trial and a unanimous jury verdict. Welf & I C §§5302–5303. But the person generally has no Fifth Amendment right to refuse to testify. *Conservatorship of Bones* (1987) 189 CA3d 1010, 1017, 234 CR 724.

2. [§120.50] Findings

Under Welf & I C §5304(a), the court must find that the patient presents a demonstrated danger of inflicting substantial physical harm because of a mental disorder and must also find that the patient has:

- Attempted, inflicted, or threatened substantial physical harm after having been taken into custody (Welf & I C §5304(a)(1));
- Attempted or inflicted physical harm, resulting in his or her being taken into custody (Welf & I C §5304(a)(2)); or
- Seriously threatened substantial physical harm up to 7 days before being taken into custody, that threat having at least in part resulted in being taken into custody (Welf & I C §5304(a)(3)).

☛ JUDICIAL TIP: Many judges think the best practice is to make the finding of dangerousness to others under Welf & I C §5300 by proof beyond a reasonable doubt because the person will be subject to confinement. See generally *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424 (in establishing LPS conservatorship, finding of grave disability must be by proof beyond reasonable doubt).

3. [§120.51] Subsequent Petitions

The individual can be held for one 180-day period only, unless the district attorney or county counsel files a new petition for postcertification treatment on the grounds that the hospitalized person attempted, inflicted, or made a substantial threat of physical harm to another during the 180-day period. Welf & I C §5304(b).

Failure to file a timely petition for an extension beyond the 14-day period under Welf & I C §5300 will result in the release of the committed person, not dismissal of the petition; there is no bar to filing a late petition as long as the person has a right to release. *People v Superior Court (Finch)* (1988) 200 CA3d 1546, 1551, 248 CR 23. The time is computed by the method provided in CCP §12, excluding the first day and including the last day, unless it is a holiday. 200 CA3d at 1551.

4. [§120.52] Outpatient Status

The person may be placed on outpatient status if the professional person in charge of the licensed health facility finds that he or she will no longer be a danger to the health and safety of others while on outpatient status, and will benefit from being an outpatient. Welf & I C §5305(a)(1). The county mental health director must agree the person will benefit, and identify an appropriate supervision and treatment program. Welf & I C §5305(a)(2). The public officer, person's attorney, court, and county mental health director must receive notice, and the outpatient treatment plan becomes effective within 5 judicial days unless a noticed party requests a court hearing. Welf & I C §5305(b). If a hearing is requested, it must be held within 5 judicial days of the notice, and release on outpatient status will not take effect until approved by the court after a hearing. Welf & I C §5305(b).

When a person is placed on outpatient status at least 3 months, the outpatient treatment supervisor must submit at 90-day intervals to the court and specified parties, a report setting forth the person's status and progress. Welf & I C §5305(d).

At any time the county mental health director may file a written request to revoke outpatient status based on the opinion of the outpatient treatment supervisor that the person requires extended inpatient treatment or refuses to accept further outpatient treatment. Welf & I C §5306.5(a). The court must hold a hearing on the request within 15 judicial days, and either approve or disapprove the request. Welf & I C §5306.5(b).

If at any time the designated public officer believes the person is a danger to the health and safety of others as an outpatient, the officer may petition the court for a hearing to determine if the person must be continued on outpatient status. Welf & I C §5307. The court must calendar

the case for further proceedings within 15 judicial days and notice specified parties. Welf & I C §5307.

H. Weapons and Detained Persons

1. [§120.53] Confiscation of Weapons

When a person is detained or apprehended for examination of his or her mental condition, admitted to a facility for inpatient treatment and a doctor thinks he or she is a danger to self or others as specified under Welf & I C §§5150, 5250, or 5300, or adjudicated by a court of any state to be a danger to others because of a mental disorder, any law enforcement agency or peace officer must confiscate and retain custody of any firearm or other deadly weapon possessed by or under the control of the person. Welf & I C §8102(a). The confiscating agency or officer must issue a receipt describing the weapon(s) and notifying the person of the procedure for the return, sale, transfer, or destruction of the weapon(s). Welf & I C §8102(b)(1). Upon the person's release, the confiscated weapon(s) must be returned unless the law enforcement agency, within 30 days, files a petition for a court hearing to determine if returning the weapon(s) is likely to endanger the person or others, and notices the person of the right to a hearing. Welf & I C §8102(c), (d). See *City of San Diego v Boggess* (2013) 216 CA4th 1494, 1503–1506, 157 CR3d 644; *Rupf v Yan* (2000) 85 CA4th 411, 420–428, 102 CR2d 157; and *People v One Ruger .22-Caliber Pistol* (2000) 84 CA4th 310, 313–314, 100 CR2d 780 (upholding constitutionality of this procedure).

At this hearing, the court may allow the psychiatrist who examined the person during confinement to testify on the issue of whether the person is a danger to self or others. *People v One Ruger .22-Caliber Pistol*, *supra*, 84 CA4th at 314–315 (Evid C §1024 affords exception to patient-psychotherapist privilege when psychotherapist has reasonable cause to believe that patient is dangerous to self or others, and that disclosure of otherwise privileged communication is necessary to prevent threatened danger). The court may also admit testimony of the detaining officer regarding his or her observations of the person or consider the officer's report. See *Rupf v Yan*, *supra*, 85 CA4th at 428–432 (assuming, without deciding, that hearing is subject to rules of evidence applicable in civil cases and not to more relaxed evidentiary rules used in administrative proceedings). The court may consider whether the circumstances leading to the 72-hour hold might occur again, and whether possession or control of the confiscated weapon(s) in this event would pose a risk of danger to the detained person or others. 85 CA4th at 424.

The law enforcement agency that possesses the weapons that were confiscated from the owner due to mental illness must initiate the proceeding for forfeiture of the weapons and bears the burden of proof.

People v Keil (2008) 161 CA4th 34, 38, 73 CR3d 600. See *City of San Diego v Boggess*, *supra*, 216 CA4th at 1503 n5 (Welf & I C §8102 requires preponderance standard of proof that return of firearms likely to result in endangering owner or others).

2. [§120.54] Five-Year Ownership Prohibition

A person who has been taken into custody under Welf & I C §5150, or certified for intensive treatment under Welf & I C §§5250, 5260, or 5270.15, shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for 5 years. Welf & I C §8103(f)(1), (g)(1). If the person previously taken into custody under Welf & I C §5150 requests a hearing for an order permitting firearm ownership, the government must show by a preponderance of the evidence that the person would not be likely to use the weapon in a safe and lawful manner. Welf & I C §8103(f)(5), (f)(6); *People v Jason K.* (2010) 188 CA4th 1545, 1558–1559, 116 CR3d 443 (requiring clear and convincing evidence would increase possibility of injury or death if government failed to meet rigorous proof burden). Similarly, if a person previously certified for intensive treatment files a petition for a court order allowing firearm ownership, and "[i]f the court finds by a preponderance of the evidence that the person would be likely to use firearms in a safe and lawful manner," then the person is not subject to the 5-year prohibition. Welf & I C §8103(f)(4). See §120.86 (discussing weapon possession while under conservatorship and notice court must give).

I. [§120.55] Liability for Exercise of Authority

Persons and entities, such as hospitals and clinics, authorized to detain a mentally disordered person for a 72-hour period, certify a person for intensive treatment, or file a petition for post-certification treatment may not be held criminally or civilly liable for exercising this authority in accordance with the law. Welf & I C §5278; *Cruze v National Psychiatric Servs., Inc.* (2003) 105 CA4th 48, 56–58, 129 CR2d 65 (applying immunity to institutions and agencies with which health care professionals are associated, affiliated, or employed). If the provisions of Welf & I C §5152 have been met, the professional person in charge of the facility providing the 72-hour treatment and evaluation, the medical director of the facility (or their designees), the psychiatrist who is directly responsible for the person's treatment, or the psychologist may not be held civilly or criminally liable for any action by the person after an early release. Welf & I C §5154(a); *Coburn v Sievert* (2005) 133 CA4th 1483, 1504–1505, 35 CR3d 596 (psychiatrist who released patient early from involuntary commitment was immune from liability for patient's actions after release in absence of evidence that psychiatrist had an inappropriate reason for

granting early release or any reason other than an honest, though perhaps negligent, belief that patient no longer needed evaluation or treatment). Similarly, such persons and entities may not be held civilly or criminally liable for actions committed by a person who has been released at the end of the initial 72-hour commitment. Welf & I C §5154(b). See §120.38.

In enacting the immunity provided by Welf & I C §5278, the Legislature did not intend to exonerate health care providers from all liability. *Jacobs v Grossmont Hosp.* (2003) 108 CA4th 69, 79, 133 CR2d 9. The scope of immunity under Welf & I C §5278 extends to claims based on facts that are inherent in an involuntary detention under Welf & I C §5150. If there is probable cause for the detention, the statute provides immunity for the decision to detain as well as for the detention and its inherent attributes. *Bias v Moynihan* (9th Cir 2007) 508 F3d 1212, 1220; *Jacobs v Grossmont Hosp., supra,* 108 CA4th at 78. This immunity, however, does not extend to negligent acts, intentional torts, or criminal wrongs committed during the course of a detention, evaluation, or treatment. 108 CA4th at 78–79; see *Gonzalez v Paradise Valley Hosp.* (2003) 111 CA4th 735, 737, 742, 3 CR3d 903 (clarifying that immunity of Welf & I C §5278 does not extend to any negligent acts; inclusion of word "other" in *Jacobs* was unintended). Thus, for example, a hospital is not immune from a patient's professional negligence claim or premises liability claim arising from a patient's slip and fall during an otherwise valid 72-hour hold. See *Jacobs v Grossmont Hosp., supra,* 108 CA4th at 72–73, 80.

J. [§120.56] Conservatorship for Gravely Disabled Persons

Conservatorship is an additional means by which a patient may be involuntarily committed for psychiatric treatment. *Edward W. v Lamkins* (2002) 99 CA4th 516, 526, 122 CR2d 1. At any time during the short-term periods of confinement for treatment and evaluation, if a person is considered to be gravely disabled because of a mental disorder or chronic alcoholism, the mental health professional in charge of the facility may file a petition to establish a conservatorship of the person that may extend for 1 year. See Welf & I C §§5352, 5361. After the conservatorship is established, the person may be held for treatment on the authorization of the court-appointed conservator. Welf & I C §5358. The conservatee may petition for rehearing of his or her status; however, once a petition for rehearing is filed, 6 months must elapse before another petition may be filed. Welf & I C §5364. A petition to reestablish a conservatorship may be filed by the conservator at or before the 1-year termination date. Welf & I C §5362.

1. [§120.57] Grounds for Appointment of Conservator (Welf & I C §5350)

A conservator of the person, the estate, or both may be appointed for anyone who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism and who is unwilling to accept or incapable of accepting voluntary treatment. Welf & I C §5350. Grave disability must be found beyond a reasonable doubt. See *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424; §120.77.

2. [§120.58] Appointment of Conservator for Minor

A minor who is gravely disabled may also be subject to conservatorship proceedings. Welf & I C §5350(a). If the minor is a ward of the court under Welf & I C §602, the juvenile court may retain jurisdiction over that minor during the pendency of the LPS proceedings; however, if the minor is detained in a mental health facility as a result of the LPS proceedings and the person in charge of the facility determines that continuing the delinquency process would be harmful, the juvenile court should temporarily suspend its jurisdiction. *In re Patrick H.* (1997) 54 CA4th 1346, 1359, 63 CR2d 455. In some counties, the same process applies to dependent minors.

3. [§120.59] General Procedures; Comparison With Probate Code Conservatorships

Because a conservatorship under the grave disability provisions of the LPS Act threatens a massive curtailment of the conservatee's liberty and personal autonomy, strict compliance with the statutory procedures designed to protect the conservatee is required. *Edward W. v Lamkins* (2002) 99 CA4th 516, 531, 533–534, 122 CR2d 1. Under Welf & I C §5350, the procedure for establishing, administering, and terminating an LPS conservatorship is the same as that provided in the Guardianship-Conservatorship Law, Prob C §§1400–3925. *In re Conservatorship of Martha P.* (2004) 117 CA4th 857, 867–868, 12 CR3d 142. One difference is that LPS conservatorship proceedings can be initiated only on recommendation of the professional person in charge of the treatment facility, and the officer providing conservatorship investigation is the only party who may petition to establish the conservatorship. Welf & I C §5352. Other differences are shown in the following table:

LPS Act Conservatorship	Probate Code Conservatorship
Mental disorder required. Welf & I C §5350.	No mental disorder required. See Prob C §1801(a) (must be unable to provide for personal

LPS Act Conservatorship	**Probate Code Conservatorship**
	needs or manage financial resources).
Purpose is to treat disorder. See generally Welf & I C §5358.	Purposes are to protect conservatee's rights, provide for assessment, meet health and psychosocial needs, etc. Prob C §1800.
Conservator may place conservatee in locked mental health facility. See Welf & I C §5358(a), (c).	There is no similar option. But see Prob C §2356.5 (probate conservator may place person with dementia in locked facility after obtaining court order).
1-year duration. Welf & I C §5361.	Indefinite duration. See Prob C §1860.
Minors may be conservatees. Welf & I C §5350(a).	Minors may not be conservatees. Prob C §1800.3 (exception for married or formerly married minors).
Burden of proof of grave disability: Beyond reasonable doubt. *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424.	Burden of proof: Clear and convincing evidence. Prob C §1801(e).
Appointment of conservator may not be subject to list of priorities in Prob C §1812 if investigator recommends otherwise to the court. Welf & I C §5350(b)(1). In appointing LPS conservator, court must consider protection of public as well as treatment of conservatee. Welf & I C §5350(b)(2).	Appointment of conservator is subject to list of priorities in Prob C §1812(b) (*i.e.*, spouse, domestic partner, adult child, parent, etc.).
No LPS conservatorship of estate when there is probate conservator-ship of estate. Welf & I C §5350(c). If probate conservatorship of person already exists, LPS conservatorship runs concurrently and is superior. Welf & I C §5350(c). Notice of LPS proceedings must be given to probate guardian or conservator. Welf & I C §5350(g).	Probate conservatorship of estate is permitted even when there is LPS conservatorship of person. See Welf & I C §5350(c).

4. [§120.60] Initiation of Proceedings

LPS conservatorship proceedings for an involuntary detainee are initiated when the person in charge of the facility providing evaluation or treatment recommends conservatorship to the officer providing conservatorship investigation in the county in which the detainee resided before admission. Welf & I C §5352. In the case of a person not involuntarily detained, the professional person in charge of any agency providing evaluation or treatment services may recommend conservatorship under Welf & I C §5352 when the professional person or designee has

- Examined and evaluated the person and determined that the person is gravely disabled; and
- Determined that future examination on an inpatient basis is not necessary for a determination that the person is gravely disabled.

If the investigator concurs with the recommendation, he or she must petition the superior court in the county of residence of the patient to establish conservatorship. Welf & I C §5352.

☛ JUDICIAL TIP: Many county investigators will not recommend a conservatorship unless the person has been detained for evaluation and treatment pursuant to an LPS Act hold.

The county investigator is the only person authorized to initiate LPS conservatorship proceedings. *Kaplan v Superior Court* (1989) 216 CA3d 1354, 1360–1361, 265 CR 408 (improper for spouse of proposed conservatee to file petition after public guardian refused to do so). If a court refers a criminal defendant for initiation of conservatorship under Pen C §1370, the public conservator, in the role of conservatorship investigator, is required to investigate the matter and retains full discretion as to whether to file a petition for conservatorship. *People v Karriker* (2007) 149 CA4th 763, 777-778, 57 CR3d 412. But a public guardian abuses that discretion by refusing to seek an LPS conservatorship when the statutory requirements are met. See *County of Los Angeles v Superior Court* (2013) 222 CA4th 434, 447–451, 453–454, 166 CR3d 151 (public guardian incorrectly found dementia not a mental disorder within the meaning of Welf & I C §5008(h)(1)(B)).

5. [§120.61] Applicability to Persons Found Incompetent Before Trial or After Conviction

Persons who are serving supervision terms after criminal convictions may be subject to the LPS Act, including

- Parolees;
- Persons on post release community supervision;

- Persons on felony or misdemeanor probation; and
- Persons on mandatory supervision.

A mentally incompetent person cannot be tried or punished, or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked. Pen C §1367(a). A defendant is mentally incompetent if, because of a mental disorder or developmental disability, he or she cannot understand the nature of the criminal proceedings or rationally assist counsel with a defense. Pen C §1367(a).

The procedures in Pen C §1370 apply to a person who is charged with a felony or allegedly violated felony probation or mandatory supervision, and who is incompetent because of a mental disorder. Pen C §1367(b). If after competency restoration treatment a defendant who has not regained competency appears to the court to be gravely disabled, the court must order the commitment county's conservatorship investigator to initiate LPS Act conservatorship proceedings. Pen C §1370(c)(2). Likewise, a person against whom felony charges are dismissed before the person recovers competence is subject to applicable LPS Act provisions. Pen C §1370(a)(6)(A), (e).

The procedures in Pen C §1370.01 apply when a person is charged with a misdemeanor or misdemeanors only, or a violation of informal or formal probation for a misdemeanor, and there is reason to believe the defendant is mentally disordered, and may as a result be incompetent to stand trial. Pen C §1367(b). If the defendant cannot be restored to competence and appears to be gravely disabled, the court must order the commitment county's conservatorship investigator to initiate LPS Act conservatorship proceedings. Pen C §1370.01(c)(2). A court may dismiss any pending misdemeanor charges against a mentally incompetent person. Pen C §1370.2. If misdemeanor charges are dismissed before the person recovers competence, he or she is subject to applicable LPS Act provisions. Pen C §1370.01(a)(5), (e).

A court may refer a parolee or person under postrelease community supervision found incompetent during the revocation process to the public conservator for establishment of an LPS Act conservatorship if there are no reasonable alternatives to meet the person's mental health needs. If a defendant is found incompetent during a postrelease community supervision or parole revocation hearing, the court must dismiss the pending revocation matter and return the defendant to supervision, and may, using the least restrictive option to meet the defendant's mental health needs, "[r]efer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings" under the LPS Act. Pen C §1370.02(b)(3). See Pen C §1370.02(b)(1)–(b)(2) for the court's non-LPS Act options.

The court must order specified parolees found to be mentally incompetent to undergo competency restoration treatment. Pen C §1370.02(c)(1). If the parolee is not restored to competency and the court dismisses the revocation, the court may, using the least restrictive option to meet the parolee's mental health needs, refer the matter to the public guardian to initiate conservatorship proceedings under the LPS Act. Pen C §1370.02(c)(1), (c)(2)(C). See Pen C §1370.02(c)(2)(A)–(c)(2)(B) for a discussion of the court's non-LPS Act options.

In both cases the court must order the matter to the public guardian "only if there are no other reasonable alternatives to the establishment of a conservatorship to meet the mental health needs" of the defendant or parolee, and "[t]he public guardian must investigate all available alternatives to conservatorship." Pen C §1370.02(b)(3), (c)(2)(C).

6. [§120.62] Service and Notice

The LPS Act does not expressly describe the requirements for notice to a proposed conservatee, but does provide that, with specified exceptions, the procedure for establishing a conservatorship under the Act is the same as that provided in Prob C §§1400–3925. Welf & I C §5350; *Edward W. v Lamkins* (2002) 99 CA4th 516, 526, 122 CR2d 1. The Probate Code requires that a proposed conservatee be served with notice of the petition at least 15 days before the hearing on the petition. Prob C §§1822–1824.

The conservatorship investigation report must be mailed directly to the proposed conservatee and his or her attorney. *Conservatorship of Ivey* (1986) 186 CA3d 1559, 1566, 231 CR 376. But the failure to serve the conservatorship investigation report along with the petition and citation does not deprive the court of jurisdiction. *Conservatorship of Isaac O.* (1987) 190 CA3d 50, 54, 235 CR 133.

If there is no prior relationship between the proposed conservator and conservatee, and the proposed conservator is not nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice must be mailed to the public guardian of the county in which the petition is filed. Prob C §1822(f).

Notice must also generally be mailed to the spouse or domestic partner, and to family members. See Prob C §1822(b). Family members, however, need not be notified if the proposed conservatee requests no notification and the proposed conservator is not a family member. Otherwise the county mental health program must make reasonable attempts to notify family members and others designated by the proposed conservatee. Welf & I C §5350.2.

A proposed conservatee is entitled to notice of any application for a temporary conservatorship in accordance with Prob C §2250(e)(2). *Edward W. v Lamkins, supra,* 99 CA4th at 541–545 (notice may be

dispensed with only on showing of good cause, *i.e.,* individualized showing of exigent circumstances).

An affidavit of service is sufficient to prove personal service. *Conservatorship of Forsythe* (1987) 192 CA3d 1406, 1410–1411, 238 CR 77.

7. [§120.63] Temporary Conservatorship

When temporary conservatorship is indicated, the fact must be alternatively pleaded in the petition. Welf & I C §5352. On or after the filing of a petition for appointment of a conservator, any person entitled to petition for appointment of the conservator may file a petition for appointment of a temporary conservator of the person or estate or both. Prob C §2250.2.

If the court is satisfied that the temporary conservatorship is needed based on the comprehensive report of the officer conducting the investigation or the affidavit of the professional person who recommended the conservatorship, it may appoint a temporary conservator for up to 30 days. Welf & I C §5352.1(a). Either the officer conducting the investigation or another person designated by the county must act as the temporary conservator. Welf & I C §5352.

☛ JUDICIAL TIP: Because 30 days may elapse between the date the petition for conservatorship is filed and the date a conservator is appointed (see Welf & I C §5365), appointment of a temporary conservator is sometimes used to exercise the authority to detain the patient beyond the statutory period for intensive treatment. If the proposed conservatee's condition improves sufficiently that he or she may be released, the temporary conservatorship may be terminated before the petition is heard.

If the proposed conservatee demands a trial on the issue of whether he or she is gravely disabled, the court may extend the temporary conservatorship until the date of disposition of the issue by trial, provided that the extension does not exceed a period of 6 months. Welf & I C §5352.1(c).

When a temporary conservatorship is sought, the proposed conservatee must be given at least 5 days' notice of the proposed appointment, unless the court, for good cause, orders otherwise. Prob C §2250.2(c). Good cause for purposes of waiving the 5-day notice requires an individualized showing of exigent circumstances in a particular case. A blanket statement of reasons offered as a matter of routine policy does not constitute good cause. *Edward W. v Lamkins* (2002) 99 CA4th 516, 529, 541–545, 122 CR2d 1.

Thus, a public guardian's practice of requesting a waiver of this notice in all applications for temporary conservatorships was held to

violate potential conservatees' right to notice and right to due process. 99 CA4th at 529, 543–545. The appointment of a temporary conservator affects a conservatee's personal autonomy and dignity interests in being informed of and making medical decisions. 99 CA4th at 530, 533–535, 538–539. There is also a substantial risk of erroneous ex parte decision making in the mental health context. When a temporary conservatorship is established without notice to the proposed conservatee, the court will often be acting on incomplete information, because the proposed conservatee is given no opportunity to present his or her side of the story. 99 CA4th at 535–536. Finally, the costs associated with providing notice in most cases are minimal. 99 CA4th at 544.

a. [§120.64] Powers of Temporary Conservator

The powers of the temporary conservator are those delineated in the court order of appointment, but in no event are they to be broader than those granted a permanent conservator. Welf & I C §5353. Generally, under Welf & I C §5353, a temporary conservator must:

- Provide arrangements for food, shelter, and care pending the determination of conservatorship; and
- Give preference to arrangements permitting the person to return home or stay with family or friends; or
- Require the person to be detained in a facility providing intensive treatment or other state-licensed facility.

The court must order the temporary conservator to take reasonable measures to preserve the status quo with respect to the conservatee's place of residence. Welf & I C §5353. The temporary conservator may not sell or relinquish any real or personal property interest on the part of the conservatee unless the court finds (by a preponderance of the evidence) that failure to do so would cause irreparable harm to the conservatee. Welf & I C §5353 (*e.g.*, property is vacant and cannot reasonably be rented, and it is impossible or impractical to obtain fire or liability insurance).

b. [§120.65] Review by Habeas Corpus

A conservatee held in a treatment facility under the authority of a temporary conservatorship may seek review by habeas corpus, under the procedures set forth in Welf & I C §§5275–5278. Welf & I C §5353. The county or government agency has the burden of proving by a preponderance of the evidence the legality of a detention without any presumption of regularity; the standard of proof ensures that society's interests in public safety and in the concept of parens patriae are protected. *In re Lois M.* (1989) 214 CA3d 1036, 1041, 263 CR 100. For discussion of habeas corpus, see §§120.92–120.96.

c. [§120.66] Additional Detention Period Pending Petition for Temporary Conservatorship

The proposed conservatee may be detained in a treatment facility for not more than 3 days beyond the designated period for intensive treatment (see §§120.29–120.40 for discussion of detention for intensive treatment) if the additional time is necessary for filing a petition for and establishing a temporary conservatorship. Welf & I C §5352.3. Unless there has been a continuance, there is a 47-day limit for involuntary detention under Welf & I C §§5150, 5250, and 5170. Welf & I C §5352.3.

d. [§120.67] Expiration of Temporary Conservatorship

The temporary conservatorship automatically expires in 30 days, unless the court conducts a hearing on whether the person is gravely disabled within the meaning of Welf & I C §5008(h) before the 30-day period expires. Welf & I C §5352.1(b). But if the person demands a court or jury trial on the petition for conservatorship, the temporary conservatorship may be extended until the court disposes of the issue, but in no event may the extension exceed 6 months. Welf & I C §5352.1.

8. [§120.68] Hearing/Trial

The proposed conservatee has a right to a hearing on the issue of grave disability. See Welf & I C §5365 (hearing must be held on all petitions within 30 days). In addition, he or she may demand either a court or jury trial on the issue of grave disability instead of or after a hearing. Welf & I C §5350(d); *Conservatorship of Manton* (1985) 39 C3d 645, 651–652, 217 CR 253. There is no right to both a court trial and a jury trial on the issue of grave disability. *In re Conservatorship of Joseph W.* (2011) 199 CA4th 953, 967–969, 131 CR3d 896 (proposed conservatee waived right to jury trial by appearing with counsel at and fully participating in court trial held because court misinterpreted hearing request). In LPS Act matters, entitlement to a jury trial may not be conditioned on payment of jury fees because "it is reasonable to require the public to fund such proceedings when public interests are advanced." *Conservatorship of John D.* (2014) 224 CA4th 410, 422, 168 CR3d 739.

☛ JUDICIAL TIP: Some judges suggest stating the purpose of every LPS Act appearance on the record at the beginning of the proceeding. For example, "this matter is on calendar today for a court trial on the conservatorship petition, and a *Riese* hearing." This makes a clear record for later review by the court, the parties, or an appellate court.

The court is required to conduct an on-the-record voir dire of the proposed conservatee regarding the nature of the proceeding and the effect

of the proceeding on a conservatee's basic rights. Prob C §1828; *Conservatorship of Christopher A.* (2006) 139 CA4th 604, 611, 43 CR3d 427. A court may not accept a stipulated judgment on issues such as the proper placement of the conservatee, the disabilities to impose, and the duties and powers of the conservator without first consulting the conservatee and obtaining on the record the conservatee's express consent. *Conservatorship of Christopher A., supra.*

The proposed LPS conservatee must be notified of the right to a jury trial. *Conservatorship of Benvenuto* (1986) 180 CA3d 1030, 1038, 226 CR 33. The demand for a trial must be made within 5 days following the hearing on the petition, and if made before the date the petition is heard, the demand constitutes a waiver of the hearing. Welf & I C §5350(d). The deadline for requesting a jury trial is mandatory and the court may not adopt procedures that attempt to preserve the right to trial beyond those deadlines. *Conservatorship of Kevin M.* (1996) 49 CA4th 79, 93, 56 CR2d 765.

Once the demand for a court or jury trial has been made, the trial must begin within 10 days unless the proposed conservatee requests a continuance; in that case, the court must continue the trial date for not more than 15 days. Welf & I C §5350(d). The same procedures apply in subsequent proceedings to reestablish conservatorship. Welf & I C §5350(d); see §120.91. A trial delayed because of circumstances beyond anyone's control will not divest the court of jurisdiction. *Conservatorship of James M.* (1994) 30 CA4th 293, 299, 35 CR2d 567 (Welf & I C §5350(d) is directory not mandatory).

Waiver of a jury trial may be made by counsel or by the proposed conservatee; this waiver may be made orally in open court and then must be entered in the minutes or docket. *Conservatorship of Isaac O.* (1987) 190 CA3d 50, 56, 235 CR 133. Counsel validly waives a jury trial by telling the court the proposed conservatee does not want to attend the hearing and does not oppose the conservatorship. *In re Conservatorship of Person of John L.* (2010) 48 C4th 131, 154, 105 CR3d 424. A court may not presume that a person found gravely disabled or treated for a mental disorder is incompetent to waive his or her trial rights. 48 C4th at 154. But see *People v Blackburn* (2015) 61 C4th 1113, 191 CR3d 458 (court must personally advise mentally disordered offender of right to jury trial before extending commitment and may hold bench trial only if defendant personally waives jury trial; counsel may waive jury trial only if substantial evidence shows lack of capacity to make knowing and voluntary waiver); and *People v Tran* (2015) 61 C4th 1160, 191 CR3d 251 (same holding for extending involuntary commitment of defendant who originally plead not guilty by reason of insanity).

☛ JUDICIAL TIP: The hearing or trial needs to have as much formality and dignity as possible even if it is held in a room in a local mental health facility, as is often the case. The room should have all the trappings of a courtroom, such as a flag, and the judge should wear a robe.

a. [§120.69] Time and Place

A hearing must be held on a petition to establish a conservatorship within 30 days after the date of the petition. Welf & I C §5365. The hearing may be held whenever and wherever the parties agree. Welf & I C §5118. In practice, hearings are often held at state- or county-designated mental health facilities, with the public excluded. There is no First Amendment right of public access to LPS Act proceedings, including trials and other hearings. *Sorenson v Superior Court* (2013) 219 CA4th 409, 436, 443, 451, 161 CR3d 794 (all LPS Act proceedings are presumptively nonpublic under Welf & I C §5118, and court erred by giving media access to trial transcripts). Any party may, however, demand that the hearing be held in the same location as civil actions, and that it be public and held in a place suitable for public attendance. Welf & I C §5118. The party must affirmatively demand a public LPS Act proceeding; that a courtroom was open to the public and after the trial a judge lifted the admonition against jurors discussing the case does not indicate the parties effectively demanded a public trial. *Sorenson v Superior Court*, *supra*, 219 CA4th at 448–450.

b. [§120.70] Appointment of Counsel

The court is required to appoint the public defender or other attorney for the proposed conservatee within 5 days after the date of the petition. Welf & I C §5365. The court must also give notice to the proposed conservatee that it may, after the hearing, require the conservatee to pay his or her attorney fees after determining ability to pay. *Conservatorship of Rand* (1996) 49 CA4th 835, 839–840, 57 CR2d 119; see Pen C §987.8(f). In determining ability to pay, the court must consider the factors listed in Pen C §987.8(g)(2). 49 CA4th at 841.

This right to counsel is a statutory right to effective assistance of counsel, and not a Sixth Amendment constitutional right to counsel, because LPS proceedings are civil in nature, not criminal. *Conservatorship of Estate of David L.* (2008) 164 CA4th 701, 710, 79 CR3d 530. Because a prospective conservatee has this statutory right to effective assistance of counsel, he or she must be provided a *Marsden* hearing upon request for substitute counsel. 164 CA4th at 711.

A proposed conservatee does not have a constitutional or a statutory right to represent himself or herself at civil commitment proceedings

under the LPS Act. *Conservatorship of Joel E.* (2005) 132 CA4th 429, 440–441, 33 CR3d 704. The judge does have discretion to permit a prospective conservatee to represent himself or herself in civil commitment hearings. *Conservatorship of Joel E., supra,* 132 CA4th at 441. However, the complexity of the case and the proposed conservatee's condition may properly limit the exercise of such discretion. See *Conservatorship of Joel E., supra* (judge properly refused to allow proposed conservatee to represent himself when investigation report stated that he had "paranoid ideations," the judge noted that he lacked coherence at times in court, and the judge expressed concern that jury would "translate that into the notion that he's gravely disabled").

☛ JUDICIAL TIP: When appointing counsel, some judges include an order granting counsel the right to review medical records of the proposed conservatee. Without such an order, counsel might not have access to the records if, as is often the case, the conservatee is distrustful and therefore unwilling to sign any document providing for access.

In an appeal of a conservatorship, the conservatee is also entitled to appointed counsel. *Conservatorship of Ben C.* (2007) 40 C4th 529, 542, 53 CR3d 856. See Appendix B for a comparison of due process rights at LPS Act and mental health trials.

c. [§120.71] Attendance at Hearing

The proposed conservatee must attend the hearing, unless he or she (see Prob C §1825):

- Is out of state when served and is not the petitioner;
- Is medically unable to attend; or
- Is unwilling to attend, does not contest the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator.

Waiver of appearance by the attorney and proposed conservatee acts as a concession that facts will not be contested and that the conservatee does not oppose conservatorship. *Conservatorship of Pollock* (1989) 208 CA3d 1406, 1413, 257 CR 14. See *In re Conservatorship of Person of John L.* (2010) 48 C4th 131, 154, 105 CR3d 424 (hearing appearance waived based on counsel's statements that proposed conservatee does not want to attend hearing and does not oppose conservatorship).

If the proposed conservatee attends the hearing, he or she may not be shackled unless the court follows the procedures set out in *People v Duran* (1976) 16 C3d 282, 288–291, 127 CR2d 618 (person must be unrestrained when appearing before jury unless there is a manifest need; when

restraints are used, they must be as unobtrusive as possible). *Conservatorship of Warrack* (1992) 11 CA4th 641, 647, 14 CR2d 99. These procedures also apply to the use of an electronic stun belt, even if it is not visible to the jury. *People v Lomax* (2010) 49 C4th 530, 559, 112 CR3d 96. In addition, when a potential conservatee appears in visible restraints, he or she is entitled to a cautionary instruction that the restraints are not evidence of the person's disability and the jury should not speculate on the reasons for the restraints. *Conservatorship of Warrack*, *supra*, 11 CA4th at 648. However, a court has no sua sponte duty to revisit the issue of restraints. *People v Montes* (2014) 58 C4th 809, 843, 169 CR3d 279.

9. [§120.72] Evidence

The historical course of the proposed conservatee's mental disorder must be considered if it has a direct bearing on the determination of whether the person is gravely disabled. Welf & I C §5008.2(a). The historical course includes evidence presented by those who have provided mental health or related support services to the patient, the patient's medical and psychiatric records presented to the court, or evidence presented voluntarily by family members, the patient, or any other person designated by the patient. Welf & I C §5008.2(a). The court may exclude evidence deemed irrelevant because of remoteness of time or dissimilarity of circumstances. Welf & I C §5008.2(a). These provisions do not limit the application of Welf & I C §5328 (confidentiality of information and records; see §120.25) or the patient's right to respond to evidence presented to the court. Welf & I C §5008.2(b).

The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt, and the verdict must be issued by a unanimous jury. *Conservatorship of Ben C.* (2007) 40 C4th 529, 541, 53 CR3d 856. See Appendix A for a comparison of proof burdens at mental health hearings.

A finding that the proposed conservatee is unable or unwilling to accept treatment is not required to establish an LPS conservatorship. *Conservatorship of Symington* (1989) 209 CA3d 1464, 1469, 257 CR 850.

Expert testimony on the relationship between the mental disorder and the proposed conservatee's inability to care for himself or herself may be based on hearsay. *Conservatorship of Torres* (1986) 180 CA3d 1159, 1162, 226 CR 142. The trier of fact is not bound by expert testimony regarding an alleged conservatee's abilities as long as the trier of fact does not act arbitrarily. *Conservatorship of Amanda B.* (2007) 149 CA4th 342, 350, 56 CR3d 901.

The exclusionary rule for Fourth Amendment violations is not applicable in a trial of a proposed conservatee's grave disability under the

LPS Act. *Conservatorship of Susan T.* (1994) 8 C4th 1005, 1008, 36 CR2d 40.

a. [§120.73] Investigation Report Not Admissible at Trial

Although the conservatorship investigation report is required to be filed with the court before a hearing to appoint a conservator (see Welf & I C §5354(a)), it is not admissible at a contested jury trial on the issue of grave disability to the extent it contains inadmissible hearsay. *Conservatorship of Manton* (1985) 39 C3d 645, 652, 217 CR 253.

☛ JUDICIAL TIP: Judges will often read these reports as background. They are not a substitute for evidence, however, and findings may not be based solely on allegations contained in them. On the other hand, some judges choose not to read the report if there is a hearing or trial in which live testimony is presented on the issues covered in the report.

b. [§120.74] Bizarre Behavior and Mental Disorder Not Same as Grave Disability

When a proposed conservatee is not incapacitated, does not show signs of poor health or neglect, and is able to carry out transactions necessary for survival, he or she cannot be found to be gravely disabled despite bizarre behavior and refusal to seek shelter. *Conservatorship of Smith* (1986) 187 CA3d 903, 909–910, 232 CR 277 (bizarre or eccentric behavior only warrants conservatorship when behavior renders individual helpless in providing for food, clothing, or shelter).

c. [§120.75] Only Present Condition Relevant

In considering whether a person is "gravely disabled," the court is limited to a review of the person's present condition and cannot consider the likelihood of future deterioration. *Conservatorship of Murphy* (1982) 134 CA3d 15, 19, 184 CR 363. For example, medical testimony to the effect that the conservatee is likely to stop taking his or her medicine if released and, therefore, will become gravely disabled in the future does not justify a finding of present grave disability under the LPS Act. *Conservatorship of Benvenuto* (1986) 180 CA3d 1030, 1034, 226 CR 33. But if the conservatee lacks insight into his or her mental illness, does not believe there is a need for medication, and would not take the medication on a voluntary basis, the person may indeed be considered to be gravely disabled. *Conservatorship of Walker* (1989) 206 CA3d 1572, 1577, 254 CR 552. But consider the jury instruction at §120.109.

A jury may be instructed to consider evidence of a proposed conservatee's past failure to take medication and lack of insight into his or

her mental condition to reach a finding of present grave disability. *Conservatorship of Guerrero* (1999) 69 CA4th 442, 443, 81 CR2d 541. This instruction does not expand the statutory definition of gravely disabled, but follows *Walker*. 69 CA4th at 446.

d. [§120.76] Third Party Assistance Considered

A person is not gravely disabled for purposes of an LPS conservatorship if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter. Welf & I C §5350(e)(1); *Conservatorship of Early* (1983) 35 C3d 244, 254, 197 CR 539; *Conservatorship of Neal* (1987) 190 CA3d 685, 689, 235 CR 577.

☛ JUDICIAL TIP: Some judges recommend evaluating such offers to help carefully to make sure the offeree is neither being pressured by the person needing care, nor being unrealistic about that person's condition.

Unless they specifically indicate in writing their willingness and ability to help, family, friends, or others are not considered willing or able to provide this help. Welf & I C §5350(e)(2). The purpose of this provision is to avoid the need for, and the harmful effects of, requiring family, friends, and others to state publicly, and requiring the court to find, that no one is willing or able to help provide for the person's basic needs. Welf & I C §5350(e)(3). The person who is willing and able to help the proposed conservatee may testify in court instead of putting the offer in writing. *Conservatorship of Johnson* (1991) 235 CA3d 693, 699 n5, 1 CR2d 46.

Neither the provider of a board and care home (*Conservatorship of Law* (1988) 202 CA3d 1336, 1341, 249 CR 415) nor the Department of Corrections and Rehabilitation (*Conservatorship of Jones* (1989) 208 CA3d 292, 256 CR 415) qualifies as a third party providing assistance to a proposed conservatee. Moreover, even when a close relative or other person is willing to provide a home and ensure that the potential conservatee will receive treatment, a finding of grave disability may be proper if the prospective caregiver would be unable to provide the kind of structured care needed. *Conservatorship of Johnson, supra,* 235 CA3d at 698.

10. [§120.77] Witnesses

A proposed conservatee does not have a Fifth Amendment right to refuse to testify. *Conservatorship of Baber* (1984) 153 CA3d 542, 550, 200 CR 262. The *Baber* court held that there is a need for the trier of fact

to assess the proposed conservatee's relevant physical and mental characteristics, because of the significant public interest concerns and liberty interests at stake. A proposed conservatee, however, may not be compelled to answer questions that might incriminate him or her in a criminal matter. 153 CA3d at 550.

The presence of the physician or other professional who recommended conservatorship may be waived by the proposed conservatee on the advice of counsel. Welf & I C §5365.1. In those cases, recommendations and records may be received in evidence by stipulation. Welf & I C §§5276.1, 5303.1. Failure to use the waiver procedure in Welf & I C §5365.1, however, does not create an affirmative right at trial to the presence of a treating physician. *Conservatorship of Scharles* (1990) 220 CA3d 247, 254, 269 CR 398. The court in *Scharles* also noted that, even in the absence of the treating physician's testimony, grave disability must be established beyond a reasonable doubt, and a proposed conservatee may subpoena the treating physician to controvert testimony at trial that supports grave disability. 220 CA3d at 255.

11. Jury Issues

a. [§120.78] Selection

Proposed conservatees are entitled to the six peremptory challenges available to any civil litigant (see CCP §231(c)) rather than to the ten provided to criminal defendants. *Conservatorship of Gordon* (1989) 209 CA3d 364, 368–371, 257 CR 365.

b. [§120.79] Instructions

The court is required to instruct that the proposed conservatee must be found to be both gravely disabled and unwilling or unable to accept treatment. *Conservatorship of Baber* (1984) 153 CA3d 542, 552, 200 CR 262. But it is error to instruct that the proposed conservatee must be able to survive independently with or without help *and* that he or she must be willing to accept treatment voluntarily. *Conservatorship of Walker* (1987) 196 CA3d 1082, 1093, 242 CR 289. It is also error to instruct that the jury may find no grave disability only if the proposed conservatee can provide for his or her own needs without assistance. *Conservatorship of Early* (1983) 35 C3d 244, 254–255, 197 CR 539. The court has no sua sponte obligation to instruct the jurors that they must find present, rather than future, grave disability. *Conservatorship of Law* (1988) 202 CA3d 1336, 1342, 249 CR 415. Also, because conservatorship proceedings are civil in nature, the court has no sua sponte duty to instruct on general principles of relevant law, as would be the case in a criminal trial. *Conservatorship and Estate of George H*. (2008) 169 CA4th 157, 162, 86 CR3d 666.

Despite the fact that some safeguards given to criminal defendants have been applied in conservatorship hearings, a conservatorship hearing is civil in nature; therefore, there is no duty to give criminal jury instructions in conservatorship proceedings. *Conservatorship of McKeown* (1994) 25 CA4th 502, 506, 30 CR2d 542. The *McKeown* court held that while BAJI 2.40 regarding expert witness testimony is generally correct in a conservatorship case, the statement that uncontradicted expert testimony is "conclusive and binding" on jurors should not be used in this context. 25 CA4th at 508. BAJI 2.40 was modified to respond to concerns raised by *McKeown.* However, CACI jury instructions should now be used instead of the older BAJI jury instructions. CACI 219 is related to BAJI 2.40.

See §120.109 for sample CACI jury instructions.

c. [§120.80] Burden of Proof/Jury Verdict

Proof of grave disability beyond a reasonable doubt and a unanimous jury verdict are required before a conservatorship may be established. See *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424; *Conservatorship of Margaret L.* (2001) 89 CA4th 675, 679, 107 CR2d 542, overruled on other grounds in 40 C4th at 541. In fact, jury unanimity is required on all issues relevant to establishing the conservatorship (*Conservatorship of Davis* (1981) 124 CA3d 313, 329, 177 CR 369).

☛ JUDICIAL TIP: The jury decides only the issue of whether the proposed conservatee is gravely disabled. Issues of placement, appointment of the conservator, and disabilities to be imposed under Welf & I C §5357 are for the judge to decide. See generally Welf & I C §5354 (referring only to the court as deciding issues of placement and appointment); see §§120.81–120.86.

Jury unanimity is not required for a finding that a proposed conservatee is not gravely disabled. *Conservatorship of Rodney M.* (1996) 50 CA4th 1266, 1268, 58 CR2d 513 (finding may be made by a three-quarters majority). See §§120.72–120.76 for evidentiary considerations relevant to making findings of grave disability.

Jury unanimity is also not required to terminate a conservatorship—a vote of nine of twelve jurors is sufficient. *Conservatorship of Margaret L., supra,* 89 CA4th at 679 n4, overruled on other grounds in 40 C4th at 541. See Appendix B for a comparison of due process rights at LPS Act and mental health trials.

12. [§120.81] Orders/Disposition

If grave disability is not found, the person must be released. But if the finder of fact concludes that the person is gravely disabled, the court may

appoint a conservator and designate the amount of the bond, if any; if a conservator is appointed, the court must separately determine the duties and powers of the conservator, the disabilities imposed on the conservatee, and the appropriate level of placement. See Welf & I C §5355 (no bond for conservatorship of person other than official bond required of public guardian), Welf & I C §5357 (general powers of conservator and disabilities of conservatee), Welf & I C §5358 (placement of conservatee); see also *Conservatorship and Estate of George H.* (2008) 169 CA4th 157, 165, 86 CR3d 666 (noting that the court must make separate determinations because under Welf & I C §5005, a conservatee does not forfeit any legal right or suffer legal disability merely by virtue of being gravely disabled). A conservatee has a right to a court hearing to make these separate determinations. *Conservatorship of Christopher A.* (2006) 139 CA4th 604, 612, 43 CR3d 427. A court may not accept a stipulated judgment that waives a conservatee's right to a court hearing on these issues without instructing the conservatee on the consequences of the stipulation and obtaining the express consent of the conservatee. 139 CA4th at 613. Generally, a conservator must accommodate the desires of the conservatee, except when doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate. Prob C §2113. Within 10 days of the establishment of a conservatorship, unless the court has found that treatment is not appropriate, the staff of the mental health facility, together with the conservatee and the family, must establish a treatment plan with the goal of eliminating the behavioral manifestations of grave disability. Welf & I C §5352.6.

a. [§120.82] Appointment of Conservator

The court may not appoint the public guardian as conservator over objection without determining whether there are family members who might be willing to serve. *Conservatorship of Walker* (1987) 196 CA3d 1082, 1101, 242 CR 289. The appointment of a conservator is subject to the list of priorities set forth in Prob C §1812(b), unless the conservatorship investigator recommends otherwise. Welf & I C §5350(b)(1). Under Prob C §1812(b), preference is to be given in the following order: (1) to the spouse or domestic partner; (2) to an adult child; (3) to a parent; (4) to a brother or sister; and (5) to any other eligible person or entity. The court must appoint the public guardian as conservator if the court finds that no other person or entity is willing and able to serve as conservator. Welf & I C §5356.

b. [§120.83] Placement of Conservatee

Placement must be in a facility that is the least restrictive alternative, taking into account the conservatee's inability to provide for his or her own food, clothing, or shelter because of a mental health disorder. Welf & I C §§5358(a)(1)(A), 5358(c)(1), 5008(h)(1)(A). For a conservatee who is gravely disabled by virtue of being found incompetent under Pen C §1370(a), the placement must achieve the dual goals of treatment and public protection. Welf & I C §§5358(a)(1)(B), 5008(h)(1)(B); see Welf & I C §5358(c)(2) (court must determine most appropriate placement).

☛ JUDICIAL TIP: Judicial officers should learn as much as they can about the facilities in which conservatees might be placed. On beginning the LPS assignment, some judges will visit a number of the placements, including locked facilities, halfway houses, and board and care homes. This familiarity will help in deciding on the least restrictive alternative.

c. [§120.84] Imposition of Disabilities

All conservators of the estate have specified general powers, and the court may designate additional powers. See Welf & I C §5357. Disabilities may also be imposed on a conservatee, prohibiting him or her from possessing a driver license, entering into contracts, voting, consenting to medical treatment, and possessing a firearm. Welf & I C §5357(a)–(f). The party seeking to impose special disabilities on a conservatee has "the burden of producing evidence to support the special disabilities." *Conservatorship of Walker* (1989) 206 CA3d 1572, 1578, 254 CR 552; see Appendix A. The fact of grave disability alone does not justify imposition of special disabilities on the conservatee under Welf & I C §5357. *Conservatorship of Walker*, *supra*. At any time, the conservatee may petition the court for a hearing to contest the rights denied to the conservatee or the powers granted to the conservator. Welf & I C §5358.3. See §120.104 for a sample order for conservatorship.

d. [§120.85] Medical Treatment

The order may also give the conservator the right to require the conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee's grave disability, or to require the conservatee to receive routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee's grave disability. Welf & I C §5358(b). Before a conservatee is denied the right to refuse or consent to routine, nonemergency medical treatment related to his or her grave disability under Welf & I C §5357(d), there must be a judicial determination of decisional incapacity. *K.G. v Meredith* (2012)

204 CA4th 164, 178–179, 138 CR3d 645. The conservatee must "lack the mental capacity to rationally understand the nature of the medical problem, the proposed treatment, and the attendant risks." 204 CA4th at 180. It violates due process to impose medical decisional disabilities on conservatees ex parte without adequate notice and the opportunity to be heard. 204 CA4th at 181, 185.

Except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery or invasive medical treatment may be performed on the conservatee without his or her prior consent or a court order specifically authorizing the surgery. Welf & I C §§5358(b), 5358.2. When a court authorizes a conservator to consent to nonroutine, nonemergency medical treatment, it must find based on admissible evidence that the conservatee lacks the capacity to consent and the treatment is medically necessary. *Scott S. v Superior Court* (2012) 204 CA4th 326, 331, 341–342, 138 CR3d 730 (public guardian's request to consent to toe amputation on conservatee's behalf could not be granted based only on doctor's inadmissible hearsay declaration).

e. [§120.86] Weapon Possession by Conservatee

A person who has been placed under LPS Act conservatorship because he or she is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism cannot purchase or receive, attempt to purchase or receive, or possess any firearm or other deadly weapon while under conservatorship, if the court ordering the conservatorship finds that such possession would present a danger to the safety of the conservatee or others. Welf & I C §8103(e)(1). The court must notify the conservatee if it prohibits firearm or other deadly weapon possession upon placing him or her under conservatorship. Welf & I C §8103(e)(1).

If the court places a person under conservatorship and issues an order prohibiting weapon possession, it must notify the Department of Justice "as soon as possible, but not later than 1 court day after placing the person under conservatorship." Welf & I C §8103(e)(2). Notice must include the dates of conservatorship imposition and scheduled termination. Welf & I C §8103(e)(2). If the conservatorship is terminated before the noticed date, or the court later finds that weapon possession by the conservatee no longer presents a danger, the court must notify the Department of Justice "as soon as possible, but not later than 1 court day after terminating the conservatorship." Welf & I C §8103(e)(2). See §§120.53–120.54 (discussing confiscating detained person's weapons and 5-year ownership prohibition after release).

13. [§120.87] Continuing Jurisdiction/Change of Placement

The court has continuing jurisdiction over the conservatorship for a 1-year period; if proceedings are commenced within that period for reestablishment of the conservatorship, the court continues to retain jurisdiction even though a jury trial for reestablishment did not begin until after the end of the 1-year period. *Conservatorship of McKeown* (1994) 25 CA4th 502, 505, 30 CR2d 542. Generally, a temporary interruption in the chain of conservatorship will not extinguish jurisdiction. *In re Gandolfo* (1984) 36 C3d 889, 896 n5, 206 CR 149.

A conservator must notify the court of all changes of placement if the conservatee is gravely disabled under Welf & I C §5008(h)(1)(B) (conservatee found incompetent under Pen C §1370). Welf & I C §5358(d)(2). For all other conservatees, however, notification is required only if the placement is more restrictive. Welf & I C §5358(d)(1).

☛ JUDICIAL TIP: A placement under a Murphy conservatorship should not be changed without special notice to the public agency that filed the initial petition. This notice will ensure that a private conservator does not move a dangerous conservatee out of a locked facility without notice to those who may oppose the move because of public safety.

The court may not approve a less restrictive placement for a gravely disabled conservatee if it is shown by a preponderance of the evidence that the placement poses a risk to public safety or the safety of the conservatee or anyone else. Welf & I C §5358(d)(3).

14. [§120.88] Appeal of Judgment

The conservatorship must continue pending appeal unless execution of the judgment is stayed by the appellate court. Welf & I C §5352.4.

On appeal, a conservatee is entitled to counsel, including appointed counsel, if necessary. *Conservatorship of Ben C.* (2007) 40 C4th 529, 542, 53 CR3d 856. The court of appeal is required to evaluate an attorney's qualifications for appointment and adhere to other requirements to ensure active advocacy on appeal. *Conservatorship of Ben C., supra*; Cal Rules of Ct 8.300.

If appellate counsel finds no arguable issues, he or she should inform the court and file a brief setting out applicable facts and law; such a brief will provide an adequate basis for the court to dismiss the appeal on its own motion. *Conservatorship of Ben C., supra*.

15. [§120.89] Termination of Conservatorship

A conservatorship automatically terminates a year from the appointment of the conservator, not including the period of service of a

temporary conservator. Welf & I C §5361. Sixty days before the date of termination, the clerk of the superior court must notify each conservator and his or her conservatee, as well as the person in charge of the facility, of the date that the conservatorship will expire. Welf & I C §5362(a) (containing notice form). If there is no petition for reestablishment of the conservatorship, the court must issue a decree terminating the conservatorship. Welf & I C §5362(b). The decree must contain the language specified in Welf & I C §5368 (to the effect that the person who has been a conservatee must not be presumed to be incompetent) and sent by first-class mail to the conservator and conservatee. Welf & I C §5362(b). See §120.108 for a sample form for an order terminating conservatorship.

The court may also terminate an LPS conservatorship if the goals of the treatment plan have been reached and the conservatee is no longer gravely disabled. Welf & I C §5352.6.

16. [§120.90] Petition for Rehearing

Once the conservatee files a petition for rehearing, he or she must wait 6 months before filing another. Welf & I C §5364. But courts interpreting Welf & I C §5364 have reached different conclusions about whether the conservatee may file an initial rehearing petition at any time, or must wait 6 months from the conservatorship hearing or trial. See *Conservatorship of Amanda B.* (2009) 173 CA4th 1380, 1385–1386, 93 CR3d 817 (Welf & I C §5364 permits conservatee to file initial rehearing petition at any time despite 6-month wait to file second request, making it possible to file up to two rehearing petitions during 1-year conservatorship); but see *Henreid v Superior Court* (1976) 59 CA4th 552, 555, 130 CR3d 892 (conservatee must wait 6 months to file initial rehearing petition, and then wait another 6 months to file second petition). The court must appoint counsel for the conservatee within 5 days of the petition's filing, and hold a hearing within 30 days of filing. Welf & I C §5365. But the conservatee is not entitled to a jury trial on a petition for rehearing. *Baber v Superior Court* (1980) 113 CA3d 955, 965, 170 CR 353. The conservatee has the burden of proving by a preponderance of the evidence that he or she is no longer gravely disabled. 113 CA3d at 966. The public guardian need not prove that the conservatee's situation has not changed. *Conservatorship of Everette M.* (1990) 219 CA3d 1567, 1573, 269 CR 182. See Appendix A for a comparison of proof burdens at mental health hearings.

If a conservatee seeks an independent forensic psychiatric examination for a rehearing, the court must not deny this request without first determining if the conservatee is indigent and whether the examination is needed for evidentiary purposes. *Conservatorship of Scharles* (1991) 233 CA3d 1334, 1342–1343, 285 CR 325 (conservatee

had private pro bono attorney, rather than public defender). See §120.106 for a sample form for an order granting or denying a rehearing.

17. [§120.91] Petition for Reappointment of Conservator

A reapplication for conservatorship may be filed by the conservator before the 1-year termination date. Welf & I C §5362. The petition must include the opinion of two physicians or qualified licensed psychologists stating that the conservatee is still gravely disabled. Welf & I C §5361; *Conservatorship of Guerrero* (1999) 69 CA4th 442, 446, 81 CR2d 541. The conservator may petition the court for appointment of these experts. Welf & I C §5361. Although the medical professionals need not have personally examined the patient (see *Conservatorship of Torres* (1986) 180 CA3d 1159, 1162, 226 CR 142 (expert testimony may be based on hearsay)), whether they have done so will affect the weight the opinions should be given at the hearing. *Conservatorship of Delay* (1988) 199 CA3d 1031, 1036, 245 CR 216. The court should consider issuing an order requiring an unwilling conservatee to submit to a mental examination. See *Conservatorship of G.H.* (2014) 227 CA4th 1435, 1441–1442, 174 CR3d 536 (reappointing conservator without holding evidentiary hearing as terminating sanction against conservatee who repeatedly refused to be examined was improper when court never ordered conservatee to submit to examination).

☛ JUDICIAL TIP: Judges often accord greater weight to the treating psychiatrist than to a mental health professional who has only cursorily examined the patient. But it is not uncommon for a treating psychiatrist to decline to testify if doing so requires taking a position adverse to the patient. The psychiatrist may not want to jeopardize his or her treatment alliance with the patient.

Personal service of documents for reestablishment of a conservatorship is not required; service by mail is sufficient. *Conservatorship of Wyatt* (1987) 195 CA3d 391, 396, 240 CR 632.

If requested, there must be a court hearing or a jury trial on the issue of whether the conservatee is still gravely disabled and in need of conservatorship. Welf & I C §§5350(d), 5362(a); *Conservatorship of Guerrero, supra*, 69 CA4th at 446. Subject to this request for a hearing or jury trial, the judge may accept or reject the conservator's petition on his or her own motion. Welf & I C §5362(b).

To grant a petition for reappointment, there must be a current showing of grave disability that must be proved beyond a reasonable doubt. See Welf & I C §5361; 69 CA4th at 446; *Conservatorship of Johnson* (1991) 235 CA3d 693, 696, 1 CR2d 46. It is not enough for the court to determine there is a likelihood that a conservatee will return to alcoholism, for example (see *Conservatorship of Murphy* (1982) 134

CA3d 15, 18–19, 184 CR 363), or that the evidence shows the propensity of the conservatee to avoid taking necessary medication (see *Conservatorship of Benvenuto* (1986) 180 CA3d 1030, 1034, 226 CR 33). But propensity for not taking medication may be considered in determining whether the conservatee continues to be gravely disabled. See §120.12; see also §120.109.

A conservatee who waives his or her presence and the presence of counsel at the hearing essentially admits that he or she does not oppose reestablishment of the conservatorship. A brief and pro forma hearing is not necessary; an ex parte review is sufficient. See *Conservatorship of Pollock* (1989) 208 CA3d 1406, 1413, 257 CR 14. Even when there is no formal hearing or jury trial, when the petition for reappointment incorporates information regarding the conservatee's rights and the consequences of reappointment of the conservator, due process is satisfied. *Conservatorship of Moore* (1986) 185 CA3d 718, 727–728, 229 CR 875.

A public conservator, as the plaintiff for purposes of an LPS Act proceeding, has discretion to voluntarily dismiss a petition to reestablish a conservatorship under CCP §581(b)(1) before the other party seeks affirmative relief. *In re Conservatorship of Martha P.* (2004) 117 CA4th 857, 869–870, 12 CR3d 142. To curtail the plaintiff's privilege of dismissing an action or special proceeding voluntarily, the defendant must clearly and specifically request affirmative relief before the voluntary dismissal is tendered as required under CCP §581(i). *In re Conservatorship of Martha P., supra*. A petition for hearing filed by the conservatee's "common law husband" that merely requested reestablishment of the conservatorship with a different conservator did not present an allegation of new matter attacking reestablishment of the conservatorship and therefore did not qualify as a specific request for affirmative relief precluding dismissal of the petition under CCP §581(i). 117 CA4th at 870.

K. [§120.92] Writ of Habeas Corpus

A petition for habeas corpus may be filed to gain release of the proposed conservatee from a medical facility pending resolution of the petition for conservatorship. See Welf & I C §5275. It is also used to enforce rights under Welf & I C §§5325 and 5325.1, including the right to

- Wear his or her own clothes, and keep and use personal possessions, including money for small purchases;
- Have access to individual storage space for private use;
- See visitors daily and have access to a telephone;
- Mail and receive unopened correspondence;

- Exercise religious freedom and practice;
- Participate in social interaction, physical exercise, and appropriate programs of publicly supported education;
- Receive the services of a patient advocate;
- Receive treatment in ways that are least restrictive of liberty;
- Receive treatment that is aimed toward promoting independent functioning; and
- Be treated with dignity, humanity, and privacy.

Habeas relief is available to a person

- Certified for 14 days of intensive treatment under Welf & I C §5250.
- Certified for an additional 14 days as suicidal under Welf & I C §5260.
- Certified for an additional 30 days of intensive treatment under Welf & I C §5270.10.
- Detained under a temporary conservatorship under Welf & I C §5352.1.

Welf & I C §§5275, 5353. See §120.16 for a definition of intensive treatment.

☛ JUDICIAL TIP: While no authority explicitly authorizes a person detained for an initial 72-hour hold to file a habeas corpus petition, the ability to file a writ is likely constitutionally required. See US Const art I, §9; Cal Const art I, §11. There probably will not be time for a court hearing during the 72-hour hold. A similar timing issue can arise if, for example, a person certified for 14 days of intensive treatment files a habeas corpus petition near the end of the treatment period. If, by the time the habeas hearing is held, the person has been certified for 30 additional days of intensive treatment or has been temporarily conserved, it is a good practice for the court to state that it treats the hearing as challenging the current hold.

Habeas relief is not ordinarily available to challenge status as a conservatee, placement, or the conservator's powers; the hearings built into the LPS Act will generally be adequate for resolving these questions. *In re Gandolfo* (1984) 36 C3d 889, 899 n5, 206 CR 149. Habeas relief, however, might be appropriate if the conservatee is illegally deprived of liberty, or the statutory review mechanisms are not working properly. 36 C3d at 898.

1. [§120.93] Initiating the Proceeding

The procedure to be followed is for the patient or patient's representative to make a request for release to a staff member of the facility in which the patient is detained. Welf & I C §5275. Under Welf & I C §§5275 and 5276, the staff member must promptly:

- Present this writing to the patient, or to the person who is making the request on behalf of the patient, for signature, or for a mark instead of a signature;
- Inform the patient of the right to counsel;
- Inform the patient that family members or other designated persons will be notified of the time and place of any court hearings, unless the patient requests that they not be notified;
- Deliver the signed writing to the professional person in charge of the facility or to that person's designee; and
- Notify the superior court of the county in which the facility is located as soon as possible.

Judicial Council form MC-265, Petition for Writ of Habeas Corpus—LPS Act, is available for use by detained persons.

2. [§120.94] Hearing

Unless the court orders the patient released, the court must hold an evidentiary hearing within 2 judicial days after the petition is filed. Welf & I C §5276. Larger courts hold writ calendars every day while others hold hearings more sporadically.

The treatment facility has the burden of proving the legality of the detention by a preponderance of the evidence, without the benefit of any presumption of regularity. *In re Azzarella* (1989) 207 CA3d 1240, 1246–1247, 1250, 254 CR 922. The facility must demonstrate the existence of grave disability or danger to self or others, the fact that the person has refused voluntary treatment, and the fact that appropriate treatment is available in the facility. See Welf & I C §5276.

☛ JUDICIAL TIPS:

- In conducting a habeas proceeding, judges should be especially patient and gentle. It is important not to argue with the patient or to dispute his or her beliefs, no matter how odd. Some judges have found that the habeas hearing can be a good forum in which to encourage the patient to follow the treatment plan.
- This and other LPS hearings may have a therapeutic effect; the proposed conservatee has an opportunity to experience the court as

an impartial arbiter that may provide recourse from the doctor's decisions.

- The patient is often more at ease testifying from the counsel table instead of the witness stand. Allowing this accommodation may help the hearing proceed more smoothly for all involved.

3. [§120.95] Disposition

Under Welf & I C §5276, the court must order the person released if any one of the following is true:

- The person is not gravely disabled or a danger to self or others,
- The person was not advised of voluntary treatment,
- The person accepted voluntary treatment,
- The facility is not staffed or equipped to provide treatment, or
- The facility is not designated by the county to provide intensive treatment.

See §120.105 for a sample writ of habeas corpus.

4. [§120.96] Use of Findings

A finding made in a habeas corpus proceeding under Welf & I C §5276 is not admissible in evidence in any other proceeding, whether civil or criminal, without the consent of the person who filed the habeas petition. Welf & I C §5277.

L. Assisted Outpatient Treatment

1. [§120.97] When Available

In any county that provides assisted outpatient treatment services under the Assisted Outpatient Treatment Demonstration Project Act of 2002 ("Laura's Law") (Welf & I C §§5345–5349.5), a court may order a person who is the subject of a petition filed under the LPS Act to obtain assisted outpatient treatment if the court finds, by clear and convincing evidence, that the facts stated in the verified petition are true and establish that all of the requisite criteria for this treatment are met, including, but not limited to, the following (Welf & I C §5346(a)):

- The person is at least 18 years of age.
- The person is suffering from a mental illness as defined by Welf & I C §5600.3(b)(2), (3).
- There has been a clinical determination that the person is unlikely to survive safely in the community without supervision.

- The person has a history of failing to comply with treatment for his or her mental illness, and this mental illness has been a substantial factor in necessitating the person's hospitalization at least twice in the last 36 months or has resulted in the person committing one or more acts of serious and violent behavior toward himself or herself or another in the last 48 months.
- The person has been offered an opportunity to participate in a treatment plan by the local mental health department, but continues to fail to engage in treatment.
- The person's condition is deteriorating substantially.
- Participation in the assisted outpatient treatment program is the least restrictive placement necessary to ensure the person's recovery and stability.
- The person needs this treatment to prevent a relapse or deterioration that is likely to result in grave disability or serious harm to self or others as defined in Welf & I C §5150.
- It is likely that the person will benefit from this treatment.

Any county that provides assisted outpatient treatment services under the LPS Act must also offer the same services on a voluntary basis. Welf & I C §5348(b).

2. [§120.98] Petition

A petition for an order authorizing assisted outpatient treatment may be filed by the county mental health director or his or her designee, only if requested by specified persons (including family members of the mentally ill person and treatment providers), and only after the director investigates the appropriateness of filing a petition. Welf & I C §5346(b)(1)–(3). The petition must be accompanied by an affidavit of a licensed mental health treatment provider who has examined the person who is the subject of the petition no more than 10 days before submission of the petition, or who has attempted to do so but has been unsuccessful in persuading the person to submit to an examination. Welf & I C §5346(b)(5).

The petition must be filed in the superior court in the county in which the person who is the subject of the petition is present or is reasonably believed to be present. Welf & I C §5346(b)(1). The petition and notice of hearing must be personally served on the person who is the subject of the petition. Copies must also be sent to the county office of patient rights and to the current health care provider (if known) appointed for the person. Welf & I C §5346(d)(1).

3. [§120.99] Hearing

A hearing on the petition must be held within 5 days after it is received by the court, excluding Saturdays, Sundays, and holidays. Welf & I C §5346(d)(1). The hearing may be continued only for good cause. In granting any continuance, the court must consider the need for further examination by a physician or the potential need to provide outpatient treatment expeditiously. Welf & I C §5346(d)(1).

The hearing is limited to the facts and grounds stated in the petition to ensure adequate notice to the person who is the subject of the petition and his or her counsel. Welf & I C §5346(b)(4)(B). The person has the right to be represented by counsel at all stages of the proceedings, and the court must appoint the public defender or other attorney to represent the person if he or she has not retained counsel. Welf & I C §5346(c), (d)(4)(C).

At the hearing, the court must hear testimony, and may examine the person in or out of court, if the person is available. Welf & I C §5346(d)(1). The person has the right to be present at the hearing, to present evidence, to call witnesses on his or her behalf, and to cross-examine witnesses. Welf & I C §5346(d)(4)(E)–(H). The court may conduct the hearing in the person's absence if appropriate attempts to secure his or her attendance have failed, but must set forth the factual basis for conducting the hearing without the person's presence. Welf & I C §5346(d)(1).

The court may not order assisted outpatient treatment unless an examining licensed mental health treatment provider, who has personally examined and reviewed the available treatment history of the person within 10 days before the filing of the petition, testifies in person at the hearing. Welf & I C §5346(d)(2). If the person refuses to be examined and the court finds reasonable cause to believe that the allegations in the petition are true, the court may order the person taken into custody and transported to a hospital for examination by a licensed mental health treatment provider as soon as practicable. Welf & I C §5346(d)(3). Detention may not exceed 72 hours. Welf & I C §5346(d)(3).

4. [§120.100] Order

If, after hearing all relevant evidence, the court finds that the person does not meet the criteria for assisted outpatient treatment (see §120.97), the court must dismiss the petition. Welf & I C §5346(d)(5)(A). If the court finds that the person *does* meet the criteria for assisted outpatient treatment and there is no appropriate and feasible less restrictive alternative, the court may order the person to receive this treatment for an initial period of up to 6 months. Welf & I C §5346(d)(5)(B). The order must state the categories of treatment set forth in Welf & I C §5348 that

the person is to receive. Welf & I C §5346(d)(5)(B). The court may only order treatment that has been recommended by the examining licensed mental health treatment provider and included in a written treatment plan. Welf & I C §5346(d)(5)(B), (e).

If the person ordered to undergo assisted outpatient treatment was not present at the hearing at which the order was issued, he or she may immediately petition the court for a writ of habeas corpus, and treatment under the order may not begin until the petition is resolved. Welf & I C §5346(j).

Involuntary medication is allowed only under a separate order made under Welf & I C §§5332–5336 (see §§120.41–120.45). Welf & I C §5348(c).

5. [§120.101] Subsequent Proceedings

If the person who is the subject of a treatment order refuses to participate in the treatment, the court may order the person to meet with the assisted outpatient treatment team designated by the director of the treatment program. Welf & I C §5346(d)(6). The person may be subject to a 72-hour hold if the treatment team attempts to gain the person's cooperation with treatment ordered by the court, but is unable to do so. Welf & I C §5346(d)(6). Any involuntary detention beyond the 72-hour period must be made under Welf & I C §5150. Welf & I C §5346(f). See §120.17. If at any time during the 72-hour period the person is determined not to meet the criteria of Welf & I C §5150, and does not agree to stay in the hospital as a voluntary patient, he or she must be released, and any subsequent involuntary detention in a hospital must be made under that section. Welf & I C §5346(f). The person's failure to comply with an order for assisted outpatient treatment, by itself, is not grounds for an involuntary civil commitment or a finding that the person is in contempt of court. Welf & I C §5346(f).

The director of the outpatient treatment program must file an affidavit with the court at least every 60 days during the period of the order, affirming that the person continues to meet the criteria for this treatment. Welf & I C §5346(h). If the person disagrees with the director's affidavit, he or she has the right to a hearing on whether the criteria for the ordered treatment are met. Welf & I C §5346(h). At the hearing, the burden of proof is on the director. Welf & I C §5346(h).

If the person believes he or she is being wrongfully retained in the assisted outpatient treatment program against his or her wishes, the person may file a petition for a writ of habeas corpus, thus requiring the director to prove that the person continues to meet the criteria for the treatment. Welf & I C §5346(i).

If the director determines that the person's condition requires further assisted outpatient treatment, the director must apply to the court, before

the expiration of the period of the initial treatment order, for an order authorizing continued treatment for a period not to exceed 180 days from the date of the order. Welf & I C §5346(g). The same procedures must be followed as are required for an initial order, and the period of any further involuntary treatment authorized by any subsequent order may not exceed 180 days from the date of the order. Welf & I C §5346(g).

6. [§120.102] Settlement Agreements

Any person whom the court determines meets the criteria for assisted outpatient treatment under Welf & I C §5346(a) (see §120.97) may voluntarily enter into an agreement for treatment services. Welf & I C §5347(a). After a petition for an order for assisted outpatient treatment is filed, but before the conclusion of the hearing on the petition, the person who is the subject of the petition, or the person's legal counsel with the person's consent, may waive the right to a hearing for the purpose of obtaining treatment under a settlement agreement, as long as an examining licensed mental health treatment provider states that the person can survive safely in the community. Welf & I C §5347(b)(1).

The settlement agreement must be agreed to by all parties and may not be for a period of more than 180 days. Welf & I C §5347(b)(1). The agreement must be in writing, approved by the court, and include a treatment plan developed by the community-based program that will provide services that provide treatment in the least restrictive manner consistent with the person's needs. Welf & I C §5347(b)(2). Either party may ask the court to modify the treatment plan at any time. Welf & I C §5347(b)(3). Such an agreement has the same force and effect as a treatment order. Welf & I C §5347(b)(5).

The court must designate the appropriate county department to monitor the person's treatment under, and compliance with, the settlement agreement. Welf & I C §5347(b)(4). If the person fails to comply with treatment, the designated county department must notify the counsel designated by the county and the person's counsel. Welf & I C §5347(b)(4). At the hearing on the noncompliance, the written statement of noncompliance submitted is prima facie evidence that a violation of the agreement has occurred. Welf & I C §5347(b)(6). If the person denies any of the facts set forth in the statement, he or she has the burden of proving by a preponderance of the evidence that the alleged facts are false. Welf & I C §5347(b)(6).

M. [§120.103] Civil Commitment of Developmentally Disabled Persons

Developmentally disabled persons who are a danger to themselves or others may be civilly committed under Welf & I C §§6500–6513. For a

person to be developmentally disabled for purposes of a commitment proceeding, the evidence must show that the person has significantly subaverage general intellectual functioning, that this functioning exists concurrently with deficits in adaptive behavior, and that both of these deficits appeared in the developmental period. *In re Krall* (1984) 151 CA3d 792, 797, 199 CR 91 (expert testimony required to support jury finding of developmental disability). There must be substantial evidence that a person's developmental disability is a substantial factor in causing the person serious difficulty in controlling his or her dangerous behavior. *People v Cuevas* (2103) 213 CA4th 94, 105–108, 151 CR3d 880. The "danger" described in Welf & I C §6500 "must involve conduct that presents the likelihood of serious physical injury." *People v Hartshorn* (2012) 202 CA4th 1145, 1153–1154, 136 CR3d 464. There must be evidence of current dangerousness; merely alleging that the person committed a violent felony is insufficient under Welf & I C §6500. *In re O.P.* (2012) 207 CA4th 924, 934, 143 CR3d 869.

The district attorney or county counsel, if delegated the authority by the board of supervisors, files the petition. Welf & I C §§6500(b)(5). The petition may be filed in the county in which the person is physically present, and can be requested by the person's parent, guardian, or conservator, or another specified party. Welf & I C §6502. See *In re Teeter* (1977) 73 CA3d 932, 938, 141 CR 103 (hospitalization in county not conclusive as to venue; court may take into account convenience of forum when determining residence). A hearing must be set no more than 60 days after the petition is filed, and the allegedly developmentally disabled person must be given notice and has a right to counsel. Welf & I C §§6500(b)(5), 6503, 6504.

A person who is allegedly developmentally disabled and a danger to self or others has a right to be present at his or her commitment hearing "[i]n the absence of an affirmative showing that a patient is physically unable to attend or has waived personal attendance." *In re Watson* (1979) 91 CA3d 455, 462, 154 CR 151. A proposed committee's attorney may not waive his or her client's presence at the commitment hearing, without consulting that person and against the person's expressed desire to be present. *People v Wilkinson* (2010) 185 CA4th 543, 546, 110 CR3d 776.

The person is also entitled to a jury trial. *People v Barrett* (2012) 54 C4th 1081, 1096, 144 CR3d 661. Neither judicial advice nor personal waiver of the right to jury trial by a person alleged to be developmentally disabled is required. 54 C4th at 1105–1106, 1109. A jury trial must be affirmatively and timely requested by defense counsel, who has sole control over whether to waive a jury trial. 54 C4th at 1105. If counsel does not request a jury trial on the record, the right is implicitly waived. *People v Cuevas*, *supra*, 213 CA4th at 105.

If the court finds the person is developmentally disabled and a danger to self or others, it may order the person committed to the Department of Developmental Services "for suitable treatment and habilitation services," defined as "the least restrictive residential placement necessary to achieve the purposes of treatment." Welf & I C §6509(a).

For civil commitments under Welf & I C §§6500–6513 where the first hearing was held on or after July 1, 2012, the initial commitment period is limited to 6 months; the commitment may be extended if the committee continues to be in "acute crisis," as long as the total commitment does not exceed 1 year. Welf & I C §6500(c)(2). See *People v Rosalinda C.* (2014) 224 CA4 1, 12–15, 168 CR3d 294 (legislative reduction of initial commitment period from 1 year to 6 months does not violate equal protection).

A developmentally disabled person committed to a state hospital or private institution under the Lanterman Developmental Disabilities Services Act (Welf & I C §§4500–4869) is likewise entitled to judicial review of his or her commitment. When a developmentally disabled woman's mother had her committed to a state hospital under Welf & I C §4825, she was "entitled to a judicial hearing on the question of whether, because of developmental disability she is gravely disabled or a danger to herself or others and whether placement in a state hospital is warranted." *In re Hop* (1981) 29 C3d 82, 93–94, 171 CR 721 ("We analogize her situation to that of proposed conservatees under the Lanterman-Petris-Short Act," and conclude "she is entitled to the same congeries of rights including the right to a jury trial on demand").

IV. SAMPLE FORMS

A. [§120.104] Written Form: Order for Conservatorship—Court Trial

The petition of [*name of proposed conservatee*] for appointment of [*name*] as conservator of the [*person and/or estate*] of [*name of proposed conservatee*] was regularly heard on [*date*], in Department ____, Judge [*name*] presiding.

[*Name*] appeared as attorney for Petitioner and [*name*] appeared as attorney for [*name of proposed conservatee*] who was [*present/unable to be present*] at the hearing. [*The reason for* [*name of proposed conservatee*]*'s absence was* [*state reasons*].]

After reviewing the petition and hearing the evidence, the court finds that:

1. Notices concerning the hearing [*have/have not*] been given as required by law.

2. The facts alleged in the petition [*are/are not*] true in that [*specify facts*].

3. [*Name of proposed conservatee*] [*is/is not*] gravely disabled as a result of [*a mental health disorder/chronic alcoholism*].

Note: Grave disability must be proved beyond a reasonable doubt. Some judges also make a finding, if applicable, that no suitable alternative to conservatorship is available.

It is hereby ordered that:

[*Name*] is appointed conservator of the person [*and estate*] of [*name of proposed conservatee*].

Letters of conservatorship will be issued when [*he/she*] has taken the oath or executed the written affirmation required by law.

[*or*]

The petition for appointment of [*name*] as conservator of the person [*and estate*] of [*name of proposed conservatee*] is denied.

[*When bond required*]

[*Name of proposed conservator*] is required to post a bond of $_____.

[*When no bond required*]

No bond is required of [*name of proposed conservator*].

[*Add if another person is appointed conservator of estate*]

[*Name*] is appointed conservator of the estate of [*name of proposed conservatee*].

Letters of conservatorship will be issued when [*he/she*] has taken the oath or executed the written affirmation required by law.

[*When bond required*]

[*Name of proposed conservator*] is required to post a bond of $____.

[*When no bond required*]

No bond is required of [name of proposed conservator].

The conservator shall have the power to place the conservatee in the [*name of facility*] Treatment Facility or in one of the facilities set out in Welfare and Institutions Code section 5358(a).

The court finds that [*name of facility*] is the least restrictive and most suitable available facility. On any change of placement, the following persons shall be notified in addition to the conservatee's attorney and the county patients' rights advocate: [*List names*].

[*Add if appropriate*]

The conservator of the estate shall have the following powers: [*List appropriate powers. See Prob C §2591*].

The conservatee, [*name*], [*shall/shall not*]:

1. Possess a license to operate a motor vehicle.

2. Enter into [*contracts/transactions exceeding $____*].

3. Have the right to vote.

4. Have the right to refuse treatment related to the grave disability.

5. Have the right to refuse routine medical treatment unrelated to remedying or preventing the recurrence of the grave disability.

6. Have the right to possess a firearm.

This conservatorship shall automatically terminate on [*date*].

B. [§120.105] Written Form: Writ of Habeas Corpus

To the director of [*name of LPS treatment facility*]:

The petition alleging that [*the petitioner's confinement in the above-named facility is unlawful/the petitioner's rights in the above-named facility have been denied without good cause*] having been considered by this court,

YOU ARE COMMANDED to produce the petitioner at an evidentiary hearing to be held in this matter at the following time and place: [*Specify*].

YOU ARE FURTHER COMMANDED to show cause at that hearing why the petitioner should not be released from that confinement.

LET THIS WRIT ISSUE.

C. [§120.106] Written Form: Order Granting/Denying Rehearing

After consideration of the petition for rehearing as to status as conservatee, by [*name of conservatee*], the court [*grants/denies*] the petition.

[*If granted, add*]

The new hearing is set for [*date and time*] in [*Department/Division/ Room*] ____ of this court at _____, California.

D. [§120.107] Written Form: Notification of Impending Termination (Welf & I C §5362)

The 1-year conservatorship established for [*name*] under Welfare and Institutions Code section _____ on [*date*] will terminate on [*date*]. If the conservator, [*name*], wishes to reestablish conservatorship for another year, he or she must petition the court by [*date*]. Subject to a request for a court hearing by jury trial, the judge may, on his or her own motion, accept or reject the conservator's petition.

If the conservator petitions to reestablish conservatorship, the conservatee, the professional person in charge of the facility in which he or she resides, the conservatee's attorney, and, if the conservator is a private party, the county mental health director and the county officer providing conservatorship investigation shall be notified. If any of them request it, there shall be a court hearing or a jury trial, whichever is requested, on the issue of whether the conservatee is still gravely disabled and in need of conservatorship. If the private conservator does not petition for reappointment, the county officer providing conservatorship investigation may recommend another conservator. Such a petition shall be considered a petition for reappointment as conservator.

Clerk of the Superior Court by

_____

Deputy

E. [§120.108] Written Form: Order Terminating Conservatorship After Rehearing

The rehearing on the status of [*name*], conservatee, came on regularly for hearing on [*date*].

Conservatee appeared and was accompanied by [*e.g., counsel /advocate*].

[*or*]

Conservatee appeared by [*e.g., name of counsel/advocate*].

After reviewing the petition and hearing the evidence, the court finds that [*name of conservatee*] is no longer gravely disabled and that a conservatorship is no longer required for [*him/her*].

[*Optional*]

Conservatee was at no time declared to be incompetent and no presumption of incompetence arises from the establishment of a conservatorship.

IT IS HEREBY ORDERED THAT:

The conservatorship of the [*person and estate/person/estate*] of [*name of conservatee*] is terminated.

[*or*]

The conservatorship of the [*person and estate/person/estate*] of [*name of conservatee*] is terminated, subject to accounting and distribution of the conservatorship estate.

F. [§120.109] Written Form: Jury Instructions

Note: This form reproduces several jury instructions from the Judicial Council of California, Civil Jury Instructions (CACI) in the 4000 series for the Lanterman-Petris-Short Act. The series in its entirety should be reviewed before a trial on the issue of whether a respondent is gravely disabled.

CACI 4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following*:] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[*insert other*]] [is/are] not enough, by [itself/themselves], to find that [*name of respondent*] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]

[*Add next two paragraphs if the facts warrant*]

[If you find [*name of respondent*] will not take [his/her] prescribed medication without supervision and that a mental disorder makes [him/her] unable to provide for [his/her] basic needs for food, clothing, or shelter without such medication, then you may conclude [*name of respondent*] is presently gravely disabled.

In determining whether [*name of respondent*] is presently gravely disabled, you may consider evidence that [he/she] did not take prescribed medication in the past. You may also consider evidence of [his/her] lack of insight into [his/her] mental condition.]

In considering whether [*name of respondent*] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

CACI 4004. Issues Not to Be Considered

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is established.

CACI 4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

Appendix A: Burdens of Proof at Mental Health Hearings

Petition Type	Who Must Meet What Burden of Proof	Finding
Temporary LPS Act conservatorship. Welf & I C §5352.1.	Party seeking conservatorship. Preponderance of the evidence.	Proposed conservatee gravely disabled.
LPS Act conservatorship. Welf & I C 5350. Reestablishment of conservatorship. Welf & I C §5362.	Party seeking conservatorship. Beyond a reasonable doubt. *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 425.	Proposed conservatee gravely disabled; unable to provide food, clothing, or shelter. Welf & I C §5008(h)(1)(A).
LPS Act Murphy conservatorship. Welf & I C §5008(h)(1)(B).	Party seeking conservatorship. Preponderance of the evidence (Pen C §1370 incompetence). Beyond a reasonable doubt (all other factors). *Conservatorship of Hofferber* (1980) 28 C3d 161, 179–180, 167 CR 854.	Person incompetent under Pen C §1370; serious felony charge pending; cannot understand nature and purpose of proceedings or rationally assist with defense, and is dangerous because of mental disorder. *Conservatorship of Hofferber*, *supra*, 28 C3d at 176–177.
Writ of habeas corpus. Welf & I C §§5275, 5353.	Treatment facility. Preponderance of the evidence. See §120.92.	Detention legal because person danger to self or others, or gravely disabled.
Electroconvulsive therapy. Welf & I C §5326.7.	Treatment facility. Clear and convincing evidence. *Lillian F. v Superior Court* (1984) 160 CA3d 314, 324, 206 CR 603; see §120.55.	Person lacks capacity to consent to or refuse treatment.
Post-certification hold of dangerous person. Welf & I C § 5300.	Party seeking hold. Beyond a reasonable doubt.	Person presents demonstrated danger of substantial physical harm to others. See §120.49.
Rehearing by conservatee. W&I § 5364.	Conservatee. Preponderance of the evidence.	Conservatee no longer gravely disabled. See §120.90.
Challenge to placement by conservatee. Welf & I C§5358.7.	Conservatee. Preponderance of the evidence.	Conservatee not in the least restrictive placement.
Disabilities of conservatee. Welf & I C §§5357(a) (right to drive), (b) (right to enter into contracts), and (c) (right to vote).	Party seeking to impose disability. Undecided if preponderance of the evidence or clear and convincing evidence. *Riese v St. Mary's*	Disabilities to be imposed.

Petition Type	**Who Must Meet What Burden of Proof**	**Finding**
	Hospital & Medical Center (1987) 209 CA3d 1303, 1322, 271 CR 199; *In re Conservatorship of Christopher A.* (2006) 139 CA4th 604, 612 n5, 43 CR3d 427.	
Disability of conservatee. Welf & I C §5357(d) (right to refuse or consent to medical treatment *related* to grave disability, including *Riese* hearings).	Party seeking to impose disability. Clear and convincing evidence.	Court must make determination of decisional incapacity. *K.G. v Meredith* (2012) 204 CA4th 164, 178–179, 138 CR3d 645.
Disability of conservatee. Welf & I C §5357(e) (right to refuse or consent to routine medical treatment *unrelated* to grave disability).	Party seeking to impose disability. Undecided if preponderance of the evidence or clear and convincing evidence; query whether relates to type of treatment. See *People v Jason K.* (2010) 188 CA4th 1545, 1557, 116 CR3d 443.	Court must make determination of decisional incapacity. *K.G. v Meredith*, *supra*.

Appendix B: Due Process Rights at LPS Act and Mental Health Trials

Constitutional Right	LPS Act or Murphy Conservatorship	§5300 Imminently Dangerous	§6500 Dangerousness
Jury trial.	Yes.	Yes.	Yes.
Counsel.	Yes.	Yes.	Yes.
Effective assistance of counsel.	Yes. Statutory right. Entitled to *Marsden* hearing. *In re Conservatorship of Estate of David L.* (2008) 164 CA4th 701, 710–711, 79 CR3d 530.		Yes. See *People v Quinn* (2001) 86 CA4th 120, 1295, 103 CR2d 915.
Self-representation.	No constitutional or statutory right, but judge has discretion to allow. *Conservatorship of Joel E.* (2005) 132 CA4th 429, 441, 33 CR3d 704.		
Appointed counsel on appeal.	Yes. *Conservatorship of Ben C.* (2007) 40 C4th 529, 542, 53 CR3d 856.		
Public proceedings.	No. Non-public unless a party demands they be public. *Sorenson v Superior Court* (2013) 219 CA4th 409, 450, 161 CR3d 794.	No. Non-public unless a party demands they be public. *Sorenson v Superior Court*, *supra*.	No. Non-public unless a party demands they be public. *Sorenson v Superior Court*, *supra*.
Jury unanimity.	Yes, for gravely disabled. 9 of 12 jurors for not gravely disabled. *Conservatorship of Rodney M.* (1996) 50 CA4th 1266, 1268, 53 CR2d 513.	Yes.	Yes. *Michelle K. v Superior Court* (2013) 221 CA4th 409, 426, 164 CR3d 232.
Peremptory challenges.	6. CCP §231(c). *Conservatorship of Gordon* (1989) 209 CA3d 364, 368–370, 257 CR 365.	6	6
Be present.	Yes.	Yes.	Yes.
Refuse to testify.	No, but has privilege against self-incrimination. *Conservatorship of Baber* (1984) 153 CA3d 542, 550, 200 CR 262.	No, but has privilege against self-incrimination. *Conservatorship of Bones* (1987) 189 CA3d 1010, 1015–1016, 234 CR 724.	No, but has privilege against self-incrimination. *In re Watson* (1979) 91 CA3d 455, 460, 154 CR 151.
Have jury fees paid.	Yes, by county. *Conservatorship of John D.* (2014) 224 CA4th 410, 422, 168 CR3d 739.	Yes, by county.	Yes, by county.

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