CHAPTER 7: Legal Status – Lanterman-Petris-Short Act

VOLUNTARY PATIENTS

LEGAL STANDARD FOR VOLUNTARY PATIENT STATUS

All patients committed under the LPS Act have the right to be considered for treatment on a voluntary basis Therefore, it is necessary that the facility make an initial determination of the appropriateness of voluntariness in all cases. This determination must also be evaluated on a continuing basis. (California Welfare and Institution Code (WIC) Sections 5003, 5150(c))

Voluntary patients have the right to discharge themselves from a facility at any time!

The significance of a voluntary patient's right to leave any time is emphasized by the fact that it is specifically stated in four separate sections of the LPS Act and again in the implementing regulations. (WIC Sections 6000(b), 6002, 6005, 6006; Title 9, California Code of Regulations (CCR) Section 865(d)).

Title 9, CCR Section 865 states a facility has an affirmative obligation to inform a voluntary patient of the right to be discharged on his or her own choice. This information must be given at the time of admission.

The statute makes clear neither the physician nor any other staff person possesses the authority to override the exercise of the patient's right to depart so long as the patient is voluntary. The patient need only give notice of the desire to depart in order to invoke the right. The responsible staff member(s) must allow the patient to leave or risk liability for false imprisonment.

The legal standard for voluntary treatment of a patient is that the patient is "willing and able to accept treatment on a voluntary basis." (WIC Section 5250(c))

Patients may be voluntary because of one of the following:

1. They are neither dangerous to themselves, dangerous to others, nor gravely disabled and they request treatment or,
2. They are dangerous to themselves or others or gravely disabled but they are willing and able to accept treatment. (WIC Section 5250(c))

In both cases, the patient fails to meet the criteria for involuntary commitment, but for different reasons.

As Patients' Rights Advocates, it is important to keep in mind that voluntary status is frequently misunderstood. Voluntary status is erroneously not offered to eligible patients or is revoked when the patient exercises voluntary rights. At times, voluntary status has been used to circumvent due process procedures.

Since voluntary patients do not have the same due process protections as involuntary patients (i.e., certification review hearings, judicial review), it is especially important that voluntary status be actual and meaningful, and that voluntary patients understand the meaning and implications of the status.

An advocate must be watchful that voluntary status is not being used to bypass the involuntary commitment review process, and is not revoked unjustifiably once the patient exercises their voluntary rights.

On the other hand, psychiatric inpatient services should be conditioned on medical necessity—an individual should not be forced into an involuntary admission status merely for payment/reimbursement reasons. A hospital is prohibited from requiring a person who voluntarily seeks care to be in custody as a danger to himself or herself or others or gravely disabled as a condition of accepting a transfer of that person. (Health and Safety Code (HSC) 1317(f))

FACTORS TO BE CONSIDERED WHEN ASSESSING "VOLUNTARINESS"

Assessments of "willingness and ability" to accept treatment voluntarily should include a review of the patient's awareness of the situation, the need for assistance and the patient's plans for addressing the problems.

The patient's expressed desire for treatment should be presumed to be credible and should be given great weight. Any progress already made by the patient at the facility or changes in circumstances that precipitated the hospitalization are important to note. Compliance with medication regimen, participation in facility activities, and general cooperativeness are relevant (although not dispositive, especially when the patient has a reasonable explanation for non-compliance or alternative activities).

In general, the determination should focus on willingness and ability as it relates to the hospital treatment immediately proposed, and not focus on the patient's plans for or willingness to accept treatment in the more distant future.

THE LEGAL STANDARD FOR CHANGING THE STATUS OF A VOLUNTARY PATIENT TO AN INVOLUNTARY PATIENT

The legal standard for changing a patient from voluntary to involuntary status is that the patient manifests behavior at the time of the proposed change that constitutes a danger to self, others, or a grave disability as a result of a mental disorder and that the patient is unwilling or unable to accept treatment voluntarily. (WIC Section 5250)

FACTORS TO BE CONSIDERED IN EVALUATING THE APPROPRIATENESS OF A CHANGE FROM VOLUNTARY TO INVOLUNTARY STATUS

In documenting a change from voluntary to involuntary status, it is important to detail the behavior constituting danger to self or others or grave disability, and give specific factual descriptions of what has changed about the patient's condition. Clinical conclusions should be substantiated by examples of observed behavior and other facts about the patient. Behavior should be described to include frequency, severity and proximity in time to the determination. Additionally, it is necessary to document why the patient is evaluated as no longer willing or able to be voluntary.

In short, the same principles of documentation should be followed in status changes as are required for initiating steps in the commitment process.

THE RIGHT TO REFUSE TREATMENT

Voluntary patients have an explicit right to accept or refuse treatment after being fully informed of the risks and benefits or such treatment. Title 9, CCR Section 850-856 sets out the specific criteria which must be met in order for facilities to meet their duty to properly inform voluntary patients of the risks and benefits of a proposed treatment plan.

THE RIGHT NOT TO BE IN SECLUSION AND/OR RESTRAINT ABSENT AN EMERGENCY

The law intends that voluntary patients not be subject to seclusion and restraint. Any use of seclusion and restraint must meet the legal criteria for emergency and be accompanied by an evaluation of appropriate legal status.

INVOLUNTARY PATIENTS

LEGAL STANDARD FOR INVOLUNTARY DETENTION (THE 72-HOUR HOLD)

The person who takes an individual into custody under WIC Section 5150 can be a peace officer, member of the hospital staff, a member of a "mobile crisis team", or any professional person designated by the county's board of supervisors. Only designated personnel may initiate 5150 proceedings.

PROBABLE CAUSE

A person may be involuntarily detained only if there is probable cause to believe that, as a result of a mental disorder, the person is a danger to self, danger to others or gravely disabled. Such persons may be detained involuntarily for psychiatric evaluation and/or treatment. If there is no probable cause at the outset, the detention is invalid under statute. (WIC Section 5150).

An appellate court has defined "probable cause" pursuant to WIC Section 5150 as follows:

"To constitute probable cause to detain a person pursuant to WIC Section 5150, a state of facts must be known that would lead a person of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person detained is mentally disordered and is a danger to himself or to others or is gravely disabled."

"In justifying a particular detention, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his belief or suspicion." (People v. Triplett, 144 Cal. App. 3d 283 (1983))

For people signing a 5150 application, the most important phrase in the definition above is "specific articulable facts." What is required on the 5150 application are factual accounts of the action and behaviors of the person, or statements the person makes, that indicate a mental disorder which impedes the ability to provide food, clothing, and shelter or which implies immediate dangerousness to self or others.

MENTAL DISORDER

An equally important concept in commitment law is the link between condition and behavior. In order to be detained under WIC Section 5150, the person must be, "as a result of" a mental disorder, a danger to self or others or gravely disabled. Danger to self or others without a mental disorder does not meet the standard. Likewise, inability to provide food, clothing and shelter without a mental disorder is not enough. Further, there must be an articulable connection between the mental disorder and dangerousness and the inability to provide for oneself.

For example, a mental health client may find themselves unable to provide for food, clothing and shelter for reasons unrelated to their mental disorder, such as the loss of a job, recent divorce, etc.

DANGER TO SELF

This criteria may be either a deliberate intention to injure oneself (i.e. overdose) or a disregard of personal safety to the point where injury is imminent (i.e. wandering about in heavy traffic). The danger must be present, immediate, substantial, physical, and demonstrable.

Documentation should include some or all of the following:

- Words or action showing intent to commit suicide or bodily harm.
- Words or actions indicating gross disregard for personal safety.
- Words or action indicating a specific plan for suicide.
- Means available to carry out suicide plan (i.e. pills, firearms present or available).

DANGER TO OTHERS

Danger to others should be based on words or actions that indicate the person in question either intends to cause harm to a particular individual or intends to engage in dangerous acts with gross disregard for the safety of others.

Documentation should include some or all of the following:

- Threats against particular individuals.
- Attempts to harm certain individuals.
- Means available to carry out threats or to repeat attempts? (i.e. firearms, or other weapons).
- Expressed intention or attempts to engage in dangerous activity.

GRAVE DISABILITY

The LPS Act defines gravely disabled as "a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing or shelter."

The person must be unable to provide for basic personal needs as a result of a mental disorder. Mere inability to provide for needs is not sufficient. Nor is refusal

of treatment evidence of grave disability. Note also that, regardless of the person's past, the question is whether they are presently gravely disabled. Furthermore, even if a person cannot take care of his/her basic personal needs by himself/herself, he/she is not gravely disabled if family members or others are willing to help him/her and if, with their help, he/she can take care of his/her needs.

Documentation should include some or all of the following:

- Signs of malnourishment or dehydration.
- Inability to articulate a plan for obtaining food.
- No food available in the house or at hand if not in a house.
- Irrational beliefs about food that is available (i.e. it's poisoned, inedible, etc.)
- Destruction or giving away of clothing to the point where the person cannot clothe themselves.
- Inability to formulate a reasonable plan to obtain shelter.

ADVISEMENTS

ADVISEMENT AT DETENTION

At the time the person is first taken into custody, the officer must orally, in a language or modality accessible to the person, explain to the person why he is being taken into custody, that he is not under arrest, but that he will be taken in for a mental examination. If the person is detained at home, he must be told that he can bring a few personal items subject to approval and that he may make a phone call and/or leave a note to tell family or friends where he has been taken. If the person cannot understand an oral advisement, the information must be provided in writing. (WIC Section 5150(g))

ADVISEMENT OF LEGAL STATUS

Notice of legal status at the time of admission must be given both orally and in writing in a language or modality accessible to the person. It must set forth the reasons for detention and advise him/her of his/her right to an attorney (free, if he/she is unable to pay), to an interpreter, and to an automatic hearing before a judge if he/she is to be held longer than 72 hours. The person's chart must include documentation of the notice. If notice is not completed, the documentation must state a "good cause" why it was not completed. (WIC Section 5150).

MEDICATION INFORMATION

Patients detained for evaluation and treatment, who are receiving medications must be given, as soon as possible after detention, written and oral information about the probable effects and possible side effects of the medication including:

- The nature of the mental illness, or behavior, that is the reason the medication is being given or recommended;
- The likelihood of improving or not improving without medications.
- Reasonable alternative treatments available.
- The name and type, frequency, amount, and method of dispensing the medications, and the probable length of time medications will be taken.

PATIENTS' RIGHTS HANDBOOK

Upon admission to a facility each patient must immediately be given a copy of a patients' rights handbook. (WIC Section 5325(i))

LEGAL STANDARDS FOR CONTINUED INVOLUNTARY TREATMENT (14 - DAY HOLD)

If the facility clinicians conclude that the person is in need of additional treatment beyond the 72 hours, they may certify the person for an additional 14 days of treatment but only if the person has first been offered voluntary treatment and has refused it. The requirement that the person be given the option of voluntary treatment continues through all later stages of the involuntary detention. (WIC Section 5250(c))

TIMING OF CERTIFICATION

The client may be certified on or before the expiration of the 72 - hour hold. (The 72-hour hold is computed in terms of hours rather than days). The client may also be certified during an intervening period of voluntariness that occurs after the 72-hour hold. WIC Sections 5152, 5172).

CERTIFICATION FORM

AUTHORIZED PERSONS

For a person to be certified, the notice of certification must be signed by two people. The first person must be the professional person, or his/her designee, in charge of the facility providing evaluation services. The designee must be a physician or licensed psychologist with a psychology doctorate and five years

postgraduate experience in mental health. The second person must be person must be a physician or psychologist who participated in the patient's evaluation. If the first person who signed also performed the evaluation, then the second person may be another physician or psychologist, unless one is unavailable, in which case a licensed clinical social worker, licensed marriage and family therapist, licensed professional clinical counselor, or registered nurse who participated in the evaluation shall sign (WIC Section 5251).

CONTENT

The notice of certification must state the factual basis for the 14-day hold. The factual basis must be specific and list observed behaviors which lead the facility to determine that the person is gravely disabled, or a danger to self or others, as a result of a mental disorder. Conclusory statements (e.g., "lacks insight and judgment") are insufficient and do not meet the statutory or constitutional notice requirements. (WIC Section 5252).

NOTICE OF CERTIFICATION

PATIENT

The patient must be personally served with a copy of the completed Notice of Certification at the time it is issued. (WIC Code Section 5253)

Whomever delivers the Notice of Certification to the patient shall inform him/her of his/her rights relating to certification. (WIC Section 5254 and 5254.1)

FAMILY

Reasonable attempts shall be made by the mental health facility to notify family members or any other person designated by the patient, of the time and place of the certification hearing, unless the patient requests that this information not be provided. The facility must obtain the patient's consent in order to notify family or other designees of the hearing or any other confidential information. (WIC Section 5256.4(c); see also Section 5328, et. seq.)

RELEASE

As with the 72-hour hold, the psychiatrist directly responsible for treatment has the option of releasing the individual before the 14 days are up. (WIC Section 5257).

DUE PROCESS RIGHTS DURING 14-DAY CERTIFICATION

CERTIFICATION REVIEW HEARING

Within the first four days of the 14-day hold, a hearing must be conducted before a hearing officer to determine whether adequate legal grounds exist for continued detention. The hearing is called a "certification review" hearing. It is not the same as a habeas corpus hearing. In some counties, Patients' Rights Advocates represent clients in certification review hearings. In other counties, public defenders, court appointed counsel or private attorneys provide representation.

The hearing officer at the certification review hearing cannot be an employee of the county mental health program or of a facility designated for 72 hour holds. The individual has the right to be present at the hearing, to be represented by an attorney or advocate and to present evidence. In addition, the individual has the right to cross-examine witnesses, to make reasonable requests that the staff members be present as witnesses, to have the hearing officer informed of the fact that the individual is receiving medication and the possible effect of the medication on his/her behavior at the hearing, and to have family members or friends notified (or, if the client prefers, not notified) of the hearing. (WIC Sections 5256.1, 5256.4)

HABEAS CORPUS / JUDICIAL REVIEW

A client has recourse to state court at any point during his detention to contest the legality of his confinement by means of a "habeas corpus" or writ hearing. There is both a constitutional right to habeas corpus during each period of detention, as well as statutory right when detained under WIC Sections 5250, 5260 or 5270.10 (WIC Section 5275)

The care provider must forward all habeas corpus requests to the state court. At any time during the first 14-day certification period, the person may request release by presenting his/her request to any member of the staff or to the person who delivered to him his notice of certification. The staff member must then forward the request for release to the director of the facility or his/her designee, who in turn must then "as soon as possible" inform the superior court of the request. Intentional failure to do so is a misdemeanor. If a patient asks to file a petition for a writ of habeas corpus, hospital staff must assist the patient, and may not deny the right to file it on the grounds that a certification review hearing is pending. (WIC Section 5275)

A state superior court judge must hold a hearing within two judicial days of filing of the habeas corpus petition. The judge must decide whether there is probable cause to believe that the patient is gravely disabled, a danger to self or others. The client has the right to be represented by an attorney. If the client cannot afford an attorney, the public defender will represent him without cost. While judicial review is pending, the individual may not be transferred out of the county. (WIC Section 5276).

AMENDMENT OF CERTIFICATION

If the professional staff of a designated facility has analyzed a certified person's condition and has found the person is, as a result of mental disorder or impairment by chronic alcoholism, certifiable on one or more additional legal grounds (grave disability and/or a danger to self or others) for which he/she was not originally certified, two professional staff, who meet the same requirements specified in WIC Section 5251, may amend the certification.

The amended form shall include the amended ground(s), the date of the amendment, dated signatures of the certifying staff members and the starting date of the original certification. In no case shall the 14-day hold endure longer than 14 days from the start date of the original certification.

The patient must be advised of the amendment to the certification and documentation of the advisement entered into the medical record. If the amendment is made before the certification review hearing, the patient and the Patients' Rights Advocate must be notified of this amendment as soon as possible but no later than one hour prior to the certification review hearing.

LONGER-TERM HOLDS

ADDITIONAL CERTIFICATION

A limited number of counties, by resolution of their board of supervisors, have adopted an additional commitment status for use following the 14-day certification. Upon completion of the 14-day period of intensive treatment, a patient may be certified for an additional period of not more than 30 days of intensive treatment if the person remains gravely disabled and remains unwilling or unable to accept voluntary treatment voluntarily. The second certification is initiated in a manner consistent with 5250 procedures; the patient is entitled to a second certification review hearing and/or judicial review of the additional certification. The person's condition shall be analyzed at intervals, not to exceed

ten days to determine if the person meets criteria for certification. If the person does not meet the criteria, he/she must be released. (WIC Section 5275)

ADDITIONAL INTENSIVE TREATMENT OF SUICIDAL PERSONS

If the individual is a "danger to himself/herself," he/she can be held for a second 14-day period, but no longer. Thus, a person judged a danger to himself can be held for a 72 hour hold, followed by 14 days of certification and 14 more days of re-certification -31 days in all. After that, he/she must be released (unless he/she is reclassified as a danger to others or gravely disabled). (WIC Section 5264)

Re-certification requires a second notice of certification. (WIC Section 5261) "Danger to self" is carefully defined for purposes of re-certification: the individual must have "threatened or attempted to take his own life" either during the present detention or as part of the events bringing about the detention. He/she must continue to "present an imminent threat of taking his/her own life." Again, the individual must have been advised of, but not accepted, voluntary treatment. (WIC Section 5260).

POST-CERTIFICATION

If an individual is a danger to others, he/she can be held for an additional 180-day post-certification period. Thus, a person judged a danger to others can be held for the initial 72-hour hold, followed by 14 days of certification, followed by 180-day renewable periods of post-certification. (WIC 5300 et seq.)

The decision to commit a person for post-certification treatment must be made by a court with the assistance of a court-appointed psychiatrist or psychologist. The patient has a right to be represented by an attorney and to demand a trial by jury. If he/she cannot afford an attorney, the public defender will represent him/her. The court hearing must take place within 4 working days after the petition is filed, or within ten days if a jury trial is requested. In order to certify the person, the jury verdict must be unanimous. If no decision is made within 30 days of the filing of the petition, the person must be released. (WIC Sections 5302, 5303, 5303.1).

CONSERVATORSHIP

An LPS conservatorship of the person is a legal relationship in which a person appointed by the court to serve as conservator acts in the interests of a "gravely disabled" individual to ensure that the basic needs for food, clothing and shelter are met, and if authorized, that the individual receive adequate medical and psychiatric care and treatment.

If the individual is "gravely disabled," he/she can be placed on a temporary conservatorship for 30 days, followed by a permanent conservatorship for renewable one-year periods. (WIC Section 5352.1).

LEGAL STANDARD:

- An adult may be referred for conservatorship if, due to a mental disorder or chronic alcoholism, he/she cannot provide for basic personal needs such as food, clothing or shelter. (WIC Section 5350).
- A minor may also be referred for conservatorship, if, as a result of a mental disorder, he/she is unable to use the elements of life that are essential to health, safety and development, including food, clothing and shelter, even though provided to him/her by others. (WIC Sections 5350, 5585.25)

A conservatorship of the estate (probate) may also be appointed by the court. Often it is the same person is appointed as conservator of the person and of the estate. The conservator of the estate is empowered by the court to handle the conservatee's property and income, pay bills, etc. If a conservator of the estate is not appointed, then the conservatee retains the full rights regarding property and income management.

TEMPORARY CONSERVATORSHIP

Temporary conservatorship may be initiated by petition to the court without a hearing. Neither the petitioner, the proposed conservatee nor his/her representative must appear in court prior to the establishment of a temporary conservatorship.

Each county has an officer providing conservatorship investigation or other county officer or employee designated by the county to act as the temporary conservator. If the officer providing conservatorship investigation or other county officer or employee petitions, the court may establish a temporary conservatorship for a period not to exceed 30 days based on the report filed by the county conservatorship investigator or an affidavit filed by the person's physician. If the court is satisfied that the necessity for a temporary conservatorship has been shown, the patient will be placed on temporary conservatorship.

No person who investigates or administers the conservatorship may have a financial interest in the facility where the conservatee is placed. The investigation

and administration must be completely independent of any person or agency who might provide mental health treatment for the conservatee. (WIC Section 5371).

DUTIES OF THE TEMPORARY CONSERVATOR

The temporary conservator is responsible for ensuring that arrangements are made to provide the conservatee with food, clothing and shelter during the period they are under temporary conservatorship. The conservator may require the conservatee be placed in a psychiatric hospital facility against his/her will. Should this occur, the conservatee has the right to request release by writ of habeas corpus.

In addition, the temporary conservator must take "all reasonable steps to preserve the status quo concerning the conservatee's previous place of residence." Thus, the temporary conservator cannot sell or dispose of the conservatee's property, either land or personal property, without specific court approval. (WIC Section 5353)

Temporary conservators may not consent for medications for the temporary conservatee without a specific determination by the court that the conservatee is incapable of making rational decisions about medical treatment related to his or her own grave disability, that is, lacks the mental capacity to rationally understand the nature of the medical problem, the proposed treatment, and the attendant risks. (K. G. v. Meredith, 204 Cal.App.4th 164).

EXPIRATION OF THE TEMPORARY CONSERVATORSHIP

By the 30th day of the temporary conservatorship, one of three things must happen:

- The conservatee may be released from the mental health system;
- The conservatee may volunteer for treatment; or
- The conservatee may be recommended for permanent conservatorship by the temporary conservator.

Note: If the temporary conservatee demands bench or jury trial to challenge the permanent conservatorship, the court may extend the temporary conservatorship until the date of the trial, but in no event longer than six months. (WIC Section 5352.1)

PERMANENT CONSERVATORSHIP

A permanent conservatorship lasts up to 12 months and is renewable every 12 months. In recommending permanent conservatorship, the conservatorship investigator must designate the person or agency determined to be the most suitable to act as the conservator. Consideration will be given to a friend, family member or public official.

RIGHT TO BE REPRESENTED BY AN ATTORNEY

If the person is unable or does not desire to retain an attorney, one will be appointed for him/her by the court to represent him/her at the hearing. The hearing must be held within 30 days of the date of the petition for conservatorship. (WIC Section 5365)

RIGHT TO JURY TRIAL

Before being placed on a conservatorship, an individual has the right to a judicial hearing to determine whether the individual is "gravely disabled." Grave disability must be proven beyond a reasonable doubt. The hearing must be conducted before a jury if the person so requests. In addition, the powers (scope of authority) of the conservator will also be determined at the hearing. (WIC Section 5350(d)).

REESTABLISHMENT AT 1 YEAR PERIODS

The "permanent" conservatorship terminates automatically at the end of one year. It may be reestablished or “renewed” for another year only upon filing of a new petition. The conservatee may challenge the reestablishment of the conservatorship and the conservatee has the same rights at the reestablishment that the/she had at the initial establishment of the conservatorship. The standard of proof required at the reestablishment hearing or trial is the same as at the initial establishment of conservatorship: the state must prove beyond a reasonable doubt that the person is gravely disabled and in need of appointment of an LPS conservator. The conservatee may also petition the court for a re-hearing on his/her status at any time and, thereafter, once every six months. The burden at a re-hearing is on the conservatee, however, to prove by a preponderance of the evidence that he/she is not gravely disabled. In addition, the conservatee may petition the court to challenge the rights denied the conservatee or the powers of the conservator. (WIC Sections 5358.3, 5364)

TERMINATION OF CONSERVATORSHIP

At any time after establishment of conservatorship, if it is determined through progress under the treatment plan that the conservatee is no longer gravely disabled, the court is to be notified and the conservatorship terminated. Conservatorship is automatically terminated after one year unless reestablishment through another petition for hearing prior to termination. (WIC Section 5352.6, 5361)

CONSERVATEE'S RIGHTS

Conservatees retain all the rights provided to mental patients under Cal. Welf & Inst. Code Section 5325. (WIC Section 5325(i)). They must also be notified of these rights at admission to a psychiatric facility and be given a copy of the "Patients' Rights Handbook". This notification must be documented in the patient's record. (WIC Sections 5325(i), 5357).

Patients' rights may not be waived or denied by the conservator. (WIC Section 5325(i)) A conservatee may lose certain basic rights only if the court so orders. Once a person is placed under conservatorship, the court will usually order that he/she loses the right to refuse or consent to treatment related specifically to his/her being gravely disabled. The court may also order that he/she lose some or all of the following rights and privileges, but must do so specifically:

- the right to refuse or consent to other routine medical treatment unrelated to remedying or preventing the recurrence of grave disability;
- the right to enter into contracts;
- the privilege of possessing a driver's license; and
- the right to vote.

The conservatee loses only those rights that a court specifically enumerates. Unless the court has specifically deprived the conservatee of a right, the conservatee is presumed to be legally competent to act for himself/herself in that area.

Finally, all conservatees have the right to an individualized treatment plan, discussed in 'Conservator's powers and duties' section below.

(WIC Sections 5325(i), 5357).

CONSERVATOR'S POWERS AND DUTIES

Conservators have only those powers granted to them by the court under the written conservatorship order. In addition, the law requires that, to the extent the conservator is authorized to place the conservatee, that placement must be the least restrictive alternative and that first priority be given to a facility as close as possible to the conservatee's home. Any change in placement of the conservatee to a more restrictive setting than the court determined placement must be reported to the court, the conservatee's attorney, the Patients' Rights Advocate and others designated by the court. (WIC Section 5358).

"[A]ny surrogate...ought to be guided in his or her decisions first by his or her knowledge of the patients' own desires and feelings, to the extent that they were expressed before the patient became incompetent. If it is not possible to ascertain the choice the patient would have made, the surrogate ought to be guided in his or her decision by the patient's best interests" Barber v. Superior Court, supra, 147 Cal. App. 3d 1006, 1021 (1983).

Under California law, the legal incompetence of a person identified as mentally disabled (e.g., a conservatee) does not result in the loss of this important decision-making right, but merely its transfer and vicarious exercise. See e.g., Conservatorship of Valerie N., 40 Cal. 3d 143 (1985); Foy v. Greenblott, 141 Cal. App. 3d 1(1983); In re Hop, 29 Cal. 3d 82 (1981).

For persons who have been adjudicated incompetent and are subject to LPS detentions in excess of 14 days, substituted judgment is required. Substituted judgment attempts to reflect, as closely as possible, the individual preferences or wishes of the patient. See generally J. Parry, A Unified Theory of Substituted Consent: Incompetent Patients' Right to Individualized Health Care Decision-making (1987) 11 Ment. & Phys. Disab. L. Rep. (MPDLR) 378, 381.

The conservator or other court-appointed surrogate decision-maker must be guided by the individual's wishes and desires regarding medication. In the absence of any clear evidence of the person's wishes regarding drug treatment, the decision whether or not to medicate should be based on the patient's best interest. "Best interest" is not a narrow examination of medical concerns, but encompasses a broad examination of moral, religious, cultural, medical, psychological and legal concerns expressed as much as possible from the patient's point of view. See Parry above.

A conservator does not have the authority to order medical treatment that the court did not approve at the time it established the conservatorship. If the

conservator feels the conservatee requires medical treatment that the court has not specifically approved, he/she must go back to court and obtain a court order. The only exception to this rule is an emergency in which loss of life or serious bodily injury would result. The conservatee, if he or she chooses to contest the request for a court order, may petition the court for hearing which shall be held prior to granting the order. (WIC Section 5358.2)

In making decisions concerning the finances of the conservatee, the conservator must exercise ordinary care and diligence determined by all the circumstances of the particular estate. (California Probate Code Section 2401)

Within ten days after the conservatorship of the person has been established there shall be an individualized treatment plan developed. The plan shall specify goals for the individual's treatment, criteria by which accomplishment of the goals can be judged, and a plan for review of the progress of treatment. The goals of the treatment plan shall be equivalent to reducing or eliminating the behavioral manifestations of grave disability. (WIC Section 5352.6)

A conservator shall find alternative placement for a conservatee after being notified by the person in charge of the facility that the conservatee no longer needs the care or treatment offered by that facility. (WIC Section 5359)

ASSISTED OUTPATIENT TREATMENT

In counties that have implemented Assisted Outpatient Treatment ("Laura's Law), individuals may be mandated by the court to participate in outpatient mental health treatment. Assisted Outpatient Treatment is limited to those individuals 18 years of age or older with a diagnosed with a "serious mental disorder" for whom the following is true:

- There has been a clinical determination that the person is unlikely to survive safely in the community without supervision; and
- The person has a history of lack of compliance with treatment for his or her mental illness, in that at least one of the following is true:
- The person's mental illness has, at least twice within the last 36 months, been a substantial factor in necessitating hospitalization, or receipt of services in a forensic or other mental health unit of a state correctional facility or local correctional facility, not including any period during which the person was hospitalized or incarcerated immediately preceding the filing of the petition; or

- The person's mental illness has resulted in one or more acts of serious and violent behavior toward himself or herself or another, or threats, or attempts to cause serious physical harm to himself or herself or another within the last 48 months, not including any period in which the person was hospitalized or incarcerated immediately preceding the filing of the petition. (WIC Section 5346(a))

PETITION AND AFFIDAVIT FOR AOT

The county mental health director, or his or her designee, can file an AOT petition, accompanied by an affidavit of a licensed mental health treatment provider, in the Superior Court in the county in which the person lives. The petition must include the criteria listed above, and among other things, verification of the following:

- The person has been offered an opportunity to participate in a treatment plan but person continues to fail to engage in treatment;
- The person's condition is substantially deteriorating;
- Participation in AOT would be the least restrictive placement necessary to ensure the person's recovery and stability;
- In view of the person's treatment history and current behavior, the person is in need of AOT in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to himself or herself, or to others.
- It is likely that the person will benefit from AOT;
- Facts that support the petitioner's belief that the person meets each criterion.

The accompanying affidavit must verify that mental health provider the has personally examined the person who is the subject of the petition no more than 10 days prior to the submission of the petition or, no more than 10 days prior to the filing of the petition, the provider attempted to examine the person but has not been successful in persuading that person to submit to an examination. (WIC Sections 5346(b)(4), 5346(b)(5)).

Upon receipt of an AOT petition, the court must set a date for a hearing at a within five judicial days from the date the petition.

RIGHTS OF PERSONS SUBJECT TO AOT PETITION

The person subject to the petition must be personally promptly served with a copy of the petition and written notice of the hearing date. The person has the following rights:

- To adequate notice of the hearings to the person who is the subject of the petition, as well as to parties designated by the person who is the subject of the petition;
- To receive a copy of the court-ordered evaluation;
- To counsel. If the person has not retained counsel, the court shall appoint a public defender;
- To be informed of his or her right to judicial review by habeas corpus;
- To be present at the hearing unless he or she waives the right to be present;
- To present evidence;
- To call witnesses on his or her behalf;
- To cross-examine witnesses; and
- To appeal decisions, and to be informed of his or her right to appeal.

(WIC Section 5346(d)(1)-(4)).

If after hearing all relevant evidence, the court finds by clear and convincing evidence that the person who is the subject of the petition meets the criteria for AOT, and there is no less restrictive alternative, the court may order the person to receive AOT for an initial period not to exceed six months.

REFUSAL TO PARTICIPATE IN AOT

If the person who is ordered into AOT refuses to participate in the AOT program, the court may order the person to meet with an AOT team. The treatment team must attempt to gain the person's cooperation with treatment ordered by the court.

If these attempts are unsuccessful, and in the clinical judgment of the mental health provider the person has failed or has refused to comply with the treatment ordered, and the person is need of involuntary admission to a hospital for evaluation, the mental health provider may request that the person be taken into custody and transported to a hospital, to be held up to 72 hours for examination

by a licensed mental health treatment provider to determine if the person is in need of treatment pursuant to Section 5150.

(WIC sec 5346 (d)(6), (f)).

REVIEW OF AOT ORDERS

The director of the outpatient treatment program where the individual receives services must file an affidavit with the court, at intervals of not less than 60 days that the person who is the subject of the order continues to meet the criteria for AOT.

- At these times, the person subject to the order has the right to a hearing on whether or not he/she still meets the criteria for AOT if he or she disagrees with the director's affidavit. The burden of proof shall be on the director.

During each 60-day period, if the person who is the subject of the order believes that he or she is being wrongfully retained in the AOT program against his or her wishes, he or she may file a petition for a writ of habeas corpus, thus requiring the director of the AOT program to prove that the person who is the subject of the order continues to meet the criteria for AOT.

Any person ordered to undergo AOT, who was not present at the hearing at which the order was issued, may immediately petition the court for a writ of habeas corpus. Treatment under the order for AOT may not commence until the resolution of the habeas petition.

Additionally, during each 60-day period, if the person believes that he or she is being wrongfully retained in the AOT program, he/she may file a petition for a writ of habeas corpus, thus requiring the director of the AOT program to prove the/she continues to meet the criteria for AOT.

(WIC Section 5346(h)-(j))

EXTENSION OF AOT

If the director of the AOT program determines that the condition of the patient requires further AOT, the director shall apply to the court, prior to the expiration of the period of the AOT order, for an order authorizing continued AOT for a period not to exceed 180 days from the date of the order. The procedures for obtaining extensions of AOT orders are the same as for obtaining original AOT orders.

(WIC Section 5346(g)).