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# LPS CASE SUMMARIES

## INTRODUCTION

The following is an updated version of a document last published by Barry Melton, Yolo County Public Defender (and originally published by Daniel Pone of Disability Rights California). The document consists of a short summary of cases relevant to LPS commitments and conservatorships. Feel free to share this handout with others who may be interested.

This version contains the following new cases:

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This version has removed the following cases (because they are no longer good law or otherwise inapplicable):

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# CASES

## I. CONSTITUTIONAL ISSUES

### A. 72-Hour Hold Provisions (CA W&I Code § 5150 et seq.)

1. **People v. Triplett (1983) 144 Cal.App.3d 283**
   The First District Court of Appeal defined probable cause for detention pursuant to CA W&I Code § 5150 as follows:

   > To constitute probable cause to detain a person pursuant to section 5150, a state of facts must be known to the peace officer (or other authorized person) 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 herself or is gravely disabled. In justifying the particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his or her belief or suspicion. (*Id*. at 287-288, citations omitted.)

2. **Smith v. County of Kern (1993) 20 Cal.App.4th 1826, review denied**
   The Fifth District held that the W&I Code section 5150 was designed to protect the committed individual and the public against injury resulting from the individual's mental condition, not to quarantine an individual for diagnosis of contagious disease. Therefore, a court cannot and should not invoke the W&I Code to protect the public from a contagious disease such as AIDS.

3. **Heater v. Southwood Psychiatric Center (1996) 42 Cal.App.4th 1068, rehearing denied, review denied**
   The Fourth District held that a nurse, who was authorized to admit persons under 72 hour detention, had probable cause to believe that individual detained was mentally disordered and posed danger to himself or others. Thus, detention did not constitute false imprisonment where nurse evaluated individual and determined that he was mentally disordered and danger based on individual's abuse of alcohol, statements that he planned to get even with persons who murdered his brother, and statements that he entertained suicidal thoughts. The nurse could not be held liable, pursuant to W&I section 5278 immunity for "treatment and evaluation." The court further held that section 5278 immunity is for

detention that is "in accordance with the law," and is not analogous to the absolute immunity provided under child abuse reporting statutes. *See also Gonzalez v. Paradise Valley Hospital* (2003) 111 Cal.App.4th 735 (statute immunizing individuals authorized to detain for 72-hour psychiatric treatment and evaluation is confined to the exercise of statutory authority to detain, evaluate, and treat and does not extend to manner in which such activities are carried out – e.g. negligence).

The Court ruled that to constitute probable cause to detain person for psychiatric evaluation, state of facts must be known to officer, or other authorized person, that would lead person of ordinary care and prudence to believe, or to entertain strong suspicion, that person detained is mentally disordered and is danger to himself or herself or is gravely disabled, and in justifying particular intrusion, officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant his or her belief or suspicion. Each case must be decided on facts and circumstances presented to detaining person at time of detention, and detaining person is justified in taking into account past conduct, character, and reputation of detainee.

**B. 14-Day Certification Provisions (CA W&I Code § 5250 et seq.)**

1. **Thorn v. Superior Court (1970) 1 Cal.3d 666**
The California Supreme Court upheld the constitutionality of 14-day detention provisions of LPS as they pertain to legal rights of detainees and their access to the courts. The Supreme Court affirmed a trial court's order which required a private designated facility to allow attorneys to visit all detainees in order to inform them of their legal rights to counsel and to seek release on habeas corpus.

2. **Doe v. Gallinot (1979) 486 F.Supp. 983, aff'd 657 F.2d 1017 (9th Cir. 1981)**
Former 5250 permitting certification for an additional 14 days of intensive treatment beyond a 72-hour emergency detention of a person alleged to be gravely disabled was unconstitutional since it allowed the state to deprive an individual of fundamental liberty against his will without an automatic review or hearing at which the state was required to show probable cause for the detention. The bare existence of optional habeas corpus review did not, of itself, alleviate due process concerns with respect to lack of mandatory probable cause hearing where private interests of individuals committed under statutory provisions was substantial because of massive

curtailment of liberty and adverse social consequences resulting from commitment.

## C. Post-certification Provisions for Imminently Dangerous Persons (CA W&I Code § 5300 et seq.)

### 1. People v. Superior Court (Dodson) (1983) 148 Cal.App.3d 990

The Second District Court of Appeal upheld constitutionality of CA W&I Code § 5300, as the statute makes clear that past conduct is relevant only as a prognosticator of probable future behavior. Relying on Suzuki v. Yuen (1980) 617 F.2d 173, 178, Dodson argued that the standard for confinement enunciated in 5300, "presents a demonstrated danger of substantial physical harm to others," was unconstitutional because it looked to the individual's past conduct, rather than to future behavior, and that due process prohibits involuntary confinement except upon showing of "imminent danger." The Dodson court noted that state courts are not required to follow the decisions of lower federal courts on constitutional issues, and turned to U.S. Supreme Court decisions for guidance. In upholding the statute, the Dodson court ruled, in pertinent part:

> Nowhere in its decisions does the Supreme Court define the danger which must be posed to justify involuntary commitment as "imminent," … By substituting the phrase "demonstrated danger" for "imminent danger" in section 5300, the Legislature shifted from a focus on the necessarily imprecise element of psychiatric prognostication to an emphasis on the evidentiary underpinnings of the diagnosis; from that which is least capable of proof, to that which is most capable of proof. In so doing, the statute did not sacrifice the element of immediacy in the danger perceived. The statute still requires that the individual be suffering from a current mental disorder which constitutes a present danger. (*Id.* at 998 999, emphasis added.)

### 2. Conservatorship of Bones (1987) 189 Cal.App.3d 1010

The First District Court of Appeal held that a person does not have a Fifth Amendment right to refuse to testify during a hearing on a petition for extension of post-certification treatment pursuant to CA W&I Code § 5304(b).

### 3. People v. Superior Court (Finch) (1988) 200 Cal.App.3d 1546

The First District Court of Appeal held that a petition for post-certification treatment pursuant to CA W&I Code § 5301 must be filed

with the proper court by the expiration of the 14 day certification period or the person must be released. The court noted that:

> "These time limits, designed to protect the committed person from unjustified restraint, would be meaningless if the committed person could be held for an additional period between expiration of the 14 day period and the filing of a petition and if the public officer were in sole control of when to file the petition." (*Id.* at 1550 1551.) However, the court also concluded that the time periods under LPS are to be computed under the method specified in Code of Civil Procedure section 12: In computing time, the first day is excluded and the last day is included." (*Id.* at 1551, citations omitted.) Under this method of computing time, fractions are not counted but deemed entire days. (Ibid.)

Thus, in computing the 14 day period, the first day is excluded and the last is included, rather than counting as full day each calendar day of custody regardless of what portion of it was spent in confinement.

[**Note:** the Finch court did not hold that the method for counting time under Code of Civil Procedure section 12 applies to the time during the initial 72 hour detention period. Consistent with CA W&I Code § 5151, the court noted: "Mr. Finch's 72 hour commitment began at some time on February 8. It therefore expired at the same time on February 11." (*Id.* at 1551, emphasis added.)]

### D. Temporary Conservatorship Provisions (CA W&I Code § 5270.15 et seq.)

1. **Edward W. v. Lamkins (2002) 99 Cal.App.4th 516**
   The First District held that all applications for temporary conservatorships (30-day) must provide five days notice to an individual institutionalized under CA W&I Code § 5150 or 5250. (*Id.* at 545.) This notice requirement may be departed from only upon a showing of good cause, that is, an individualized showing of exigent circumstances in a particular case. (*Id.*) A blanket statement of reasons offered as a matter of routine policy does not constitute good cause. (*Id.*) Citing due process, the Court stated:

   > What due process does require is notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections…

[**Note:** Contains detailed discussion of due process.]

[**Note:** 5-day notice required by CA Probated Code § 2250.]

### E. Conservatorship Provisions (CA W&I Code § 5350 et seq.)

#### 1. Establishment of Conservatorships

##### i. Constitutionality of Grave Disability Standard

**a. Conservatorship of Chambers (1977) 71 Cal.App.3d 277**
The First District Court of Appeal held that the definition of "gravely disabled" in the LPS Act is not unconstitutionally vague or overbroad. The court found that the term "gravely disabled" is sufficiently precise to exclude unusual or nonconformist lifestyles, that it connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter, and that it also provides fair notice of the proscribed conduct to the proposed conservatee who must be presumed to be a person of common intelligence for the purpose of determining the sufficiency of the statute.

**b. Doe v. Gallinot (C.D. Cal. 1979) 486 F.Supp. 983, (aff'd 1981) 657 F.2d 1017**
Held that the "[s]tandards for commitment to mental institutions are constitutional only if they require a finding of dangerousness to others or to self." (*Id.* at 991.) The Gallinot court upheld the constitutionality of California's present definition of grave disability since "[i]t implicitly requires a finding of harm to self: an inability to provide for one's basic physical needs." (*Id.*, emphasis added.)

##### ii. Procedural Rights

**a. Conservatorship of Roulet (1979) 23 Cal.3d 219**
The California Supreme Court held that the due process clause of the California Constitution requires finding proof beyond a reasonable doubt and a unanimous jury verdict in conservatorship proceedings under the LPS Act. The Court admonished that "[t]he law must still strive to make certain that only those truly unable to take care of themselves are being assigned conservators under the LPS Act and

committed to mental hospitals against their will." (*Id.* at 225.)

[**Note:** contains detailed discussion of the deprivation of liberty and stigma associated with mental commitments.]

b. **Conservatorship of Rodney M. (1996) 50 Cal.App.4th 1266**
The Fourth District Court of Appeal held that a unanimous jury verdict is not required for finding a conservatee is NOT gravely disabled. The court held that while Conservatorship of Roulet interpreted the LPS Act to require jury unanimity to support a finding that a person is gravely disabled, there is no similar requirement for a finding that a person is not gravely disabled. The court found that the Probate Code calls for a three fourths majority to support factual determinations, and "[p]ermitting a finding of no grave disability to be based on a three fourths majority coincides with Roulet's goal of minimizing the risk of unjustified and needless conservatorships." (*Id.* at 1270.)
Thus, the court found that a petition to reappoint conservatorship over the proposed conservatee was properly dismissed when the jury voted 11 to 1 in favor of finding that the proposed conservatee was not gravely disabled.

c. **Conservatorship of Kevin M. (1996) 49 Cal.App.4th 79**
The First District Court of Appeal held that a proposed conservatee's jury trial right must be exercised within the time period specified in CA W&I Code § 5350(d). The Kevin M. court ruled that an unwritten procedure of the Alameda County Superior Court, which allowed the conservatee to automatically reserve his right to a jury trial and exercise that right once at any time during the year long conservatorship, is fatally inconsistent with the LPS Act. In rejecting the county's procedure, the court noted:

> At the time a conservatee demands a jury trial under the Alameda County procedure, however, he or she has already been found gravely disabled, entered the system, lost his or her freedom, and incurred the stigma of involuntary commitment. He or she has thus already suffered the effects that the jury trial and its

attendant procedural safeguards is intended to protect against. (*Id.* at 90, 91.)

The court rejected policy arguments presented by both sides in support of the unwritten procedure, noting that these arguments should be addressed to the Legislature. (*Id.* at 91 fn 11.)

[**Note:** this decision would appear to invalidate similar procedures in other counties in which the conservatee "submits" to the conservatorship and "reserves" his or her right to jury trial at a later date.]

The court also held that while the statutory five day demand requirement of section 5350(d) is mandatory, it is not jurisdictional. (*Id.* at 87). The court noted that public policy favors the preservation of jury trial rights, and that the conservator (appellant) had waived her objections and was estopped from challenging the holding of a jury trial consistent with the terms of the unwritten procedure. (*Id.* at 92.)

d. **Conservatorship of Baber (1984) 153 Cal.App.3d 542**
The Fourth District Court of Appeal held that a proposed conservatee may not refuse to testify in his or her own conservatorship trial (i.e., Fifth Amendment privilege against self incrimination not applicable). The Baber court also held that the doctrine of double jeopardy is not applicable in conservatorship proceedings.

e. **Conservatorship of Mitchell (1981) 114 Cal.App.3d 606**
The Second District Court of Appeal held that proposed conservatees do not have a right to a warning of the privilege against self incrimination prior to psychiatric examinations.

f. **Conservatorship of Maldonado (1985) 173 Cal.App.3d 144, review denied Dec. 19, 1985**
In a conservatorship proceeding, the trial court found plaintiff to be gravely disabled after his counsel waived his right to a jury trial at the time the case was called for trial from the master calendar. The plaintiff appealed on the basis

that he was denied his right to a jury trial, arguing that he had a constitutional right to a jury trial and that criminal procedural law is applicable in conservatorship proceedings to determine the waiver of this right. The Sixth District Court of Appeal held that there is only a statutory right to a jury trial in conservatorship proceedings, and that civil procedural law determines whether an individual has waived the right to a jury trial in such proceedings (i.e., waiver may be made by oral consent, in open court, entered into the minutes or docket). [Cf. Conservatorship of Chambers (1977) 71 Cal.App.3d 277, 285 288 (discussion of conservatee's ability to waive right to jury trial).]

g. **Conservatorship of Mary K. (1991) 234 Cal.App.3d 265**
The Fifth District Court of Appeal held that counsel can waive statutory advisement of conservatee's rights, as required in Probate Code section 1828, by oral consent and in open court, without personal explicit waiver by conservatee or indication by counsel that he had discussed such a waiver with his client. [Cf. Conservatorship of Chambers (1977) 71 Cal.App.3d 277, 286 288 (the court reviewed Probate Code § 1754.1, the predecessor of 1828, and indicated in dicta that an on the record voir dire by the court of the proposed conservatee as to his rights was required).]

h. **Conservatorship of Symington (1989) 209 Cal.App.3d 1464**
The Fourth District Court of Appeal held that the appointment of an LPS conservator does not require a specific finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment for her mental illness. [But see CA W&I Code § 5250(c), 5252, 5276.] However, the court also found that "gravely disabled" and "unable to voluntarily accept treatment" are not interchangeable terms, and that "an individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Id.* at 1468.)

i. **Conservatorship of Warrack (1992) 11 Cal.App.4th 641**
The Fourth District Court of Appeal held that a proposed conservatee in a jury trial under LPS Act may not be

physically restrained unless the trial court follows procedures applicable to shackling of criminal defendants.

> We believe the risk to the integrity of the fact finding process caused by the use of physical restraints is just as great in LPS proceedings as it is in criminal perhaps more so. The proposed conservatee is on trial to determine whether the person is gravely disabled because of mental illness. The image of a person bound hands and feet with leather restraints and closely attended, as in this case, with two male nurses gives an image of a person out of control. That image presented to the lay jurors in the context of a claimed mental illness could well be potent, though unexamined, evidence of disability. Thus, we hold a proposed conservatee in a jury trial may not be physically restrained unless the trial court follows the procedures outlined in People v. Duran (1976)] 16 Cal.3d 282, 288 290. (*Id.* at 647.)

In Duran, the Supreme Court held that a defendant may not be shackled absent facts on the record which justify the trial court's decision to impose such extraordinary restraints (e.g., where the person at trial poses a risk of violence, disruption, or escape, and only as a last resort). Applying these principles, the Court of Appeal found that the trial court acted within its discretion in ordering Warrack shackled, based on testimony showing a pattern of escape, violence and disruptive behavior, and a deterioration in the conservatee's condition demonstrating he was unpredictable and dangerous. The Appeals Court also found that the trial court had a duty without request to give the jury a cautionary instruction, but held that the failure to do so in this case was harmless error.

**j. Conservatorship of Susan T. (1994) 8 Cal.4th 1005**

In Conservatorship of Tedesco (1993) 21 Cal.Rptr.2d 763, 772, (depublished) the First District Court of Appeal held that the exclusionary rule applied in conservatorship proceedings, and that evidence obtained from a social worker's warrantless search of the conservatee's apartment violated the Fourth Amendment and should have been

suppressed. The Court of Appeal affirmed the trial court ruling that the evidence obtained from the warrantless search violated the Fourth Amendment but upheld the trial court's order establishing the conservatorship in light of the wealth of other properly obtained evidence. (*Id.* at 773.) In Susan T., the California Supreme Court affirmed the Court of Appeal's decision but held that the exclusionary rule does not apply in conservatorship proceedings. (*Id.* at 1008-1020.)

**2. Appeals**

**i. Waltz v. Zumwalt (1985) 167 Cal.App.3d 835**
The Fourth District Court of Appeal held that indigent persons appealing grave disability proceedings must be provided with a complete transcript of the proceedings free of charge.

**ii. Conservatorship of Margaret L. (2001) 89 Cal.App.4th 675**
The Fourth District Court of Appeal held that when appointed counsel in a conservatorship appeal fails to discover an arguable issue, the Court of Appeal must independently review the record upon request. Civil commitment to a mental hospital threatens a person's dignity and liberty on as massive a scale as that traditionally associated with criminal prosecutions and hence it is not too burdensome for the appellate court to review the record for arguable issues. The court stated, "We did not find it too burdensome under these circumstances to expend two or three hours to review this sparse record for arguable issues. Such cases, after all, terrorize us with the prospect of extra work about as often as newly discovered asteroids threaten to collide with Earth." (*Id.* at 682).

**iii. Conservatorship of Ben C. (2004) 119 Cal.App.4th 710**
The Fourth District Court of Appeal disagreed with the Margaret L. decision and held that the procedural safeguards set forth in Anders (386 U.S. 738) and Wende (25 Cal.3d 436) for independent appellate review are not applicable in an LPS case.
The court stated there is a "delicate balance between the medical objectives of treating sick people without legal delays and the equally valid legal aim of insuring that persons are not deprived of their liberties without due process of the law." (*Id.* at 635). The court went on to say that "our independent review of the appellate record is not a procedural safeguard required to maintain this

delicate balance, because there are safeguards afforded to the conservatee throughout the duration of the conservatorship process." (*Id.*) The court reasoned that LPS conservatorships are inherently different from criminal convictions in that they last for one year during which the conservatee can petition for an early release or review, and conservatees who show significant improvement may petition for day passes to leave the facility. [**Note:** rules for conservatorship appeals are set out in Rule 39.4, Calif. Rules of Court.]

3. **Reestablishment of Conservatorships**

   i. **Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030**
   The Third District Court of Appeal held that in a proceeding to reappoint a conservator, the failure to send written notice of the right to a jury trial as required by CA W&I Code § 5362 was reversible error, where there was no indication in the record that he was orally advised of this right by the trial court. The fact that the conservatee was represented by counsel did not dispense with the necessity of such notice. (*Id.* at 1036 1039.)

   ii. **Conservatorship of Delay (1988) 199 Cal.App.3d 1031**
   Conservatee challenged the constitutionality of LPS provisions governing the reestablishment of conservatorships (CA W&I Code § 5361 et seq.). The conservatee's primary claim was that 5361 violates due process of law by allowing the petition to reappoint the conservator to be based on the opinion of two physicians, with no requirement that the physicians be mental health experts and no requirement that either of them have personally examined the conservatee before expressing their opinion. In rejecting this challenge, the Fourth District Court of Appeal held, in pertinent part:

   > We hold the statute on its face does not violate a conservatee's due process rights. All section 5361 does is establish the threshold requirements for presenting to the court the petition to reappoint the conservator. A hearing (and/or court or jury trial upon request) must be held on all petitions, where the conservatee may challenge the validity of the physicians' opinions by calling them as witnesses … We emphasize that satisfaction of the requirements for presenting the petition does not satisfy the requirements for

establishing the reappointment if it is challenged by the conservatee. At the reestablishment trial, the County must prove continued grave disability beyond a reasonable doubt … Issues as to the qualifications of the physicians and whether they personally examined the conservatee are matters to be considered by the trier of fact when evaluating whether the requisite showing has been made. (*Id.* at 1036 1037, emphasis added, citation and footnote omitted.)

**iii. Conservatorship of Walker (1989) 206 Cal.App.3d 1572**
The Fifth District Court of Appeal affirmed the trial court reappointment of the conservatorship but remanded the matter for further proceedings concerning special disabilities. The appellate court held that "the fact that appellant continued to be gravely disabled did not by itself satisfy the evidentiary requirements for the imposition of special disabilities under section 5357. A conservatee does not forfeit any legal right nor suffer legal disability by reason of the LPS commitment alone." (*Id.* at 1578.) The court also ruled that the petitioner in a conservatorship reestablishment proceeding has the burden of producing evidence to support the special disabilities which he sought. (*Id.*) And, the court held that nothing in W&I Code § 5358.3 prevents a conservatee from seeking appellate review (i.e., a conservatee need not exhaust remedies by filing a petition challenging powers of conservator or disabilities imposed on conservatee pursuant to 5358.3 before seeking appellate review on issue). (*Id.* at 1578 1579.)

**iv. Conservatorship of Pollock (1989) 208 Cal.App.3d 1406**
The Fourth District Court of Appeal held that the trial court was not required to hold a hearing in connection with a reestablishment of conservatorship where a petition filed by the conservatee's attorney indicated that the conservatee had no objection to reestablishment and that neither the conservatee nor her counsel would be present at such hearing. The court held that the petition filed by the conservatee, which also asked the court to find that all required procedural requirements had been met and that credible evidence supported finding beyond a reasonable doubt to prove continued grave disability, was properly treated as a stipulation that conservatorship could be continued.

v. **Conservatorship of Scharles (1990) 220 Cal.App.3d 247, review denied July 18, 1990**
In a reestablishment proceeding, the trial court denied the conservatee's motion to dismiss the petition on the basis that the waiver requirements of W&I code section 5365.1 and a local court rule had not been met. The conservatee contended that since she did not make an express waiver of the presence of either her treating doctor or the doctors recommending reestablishment, their in-court testimony was required. After a jury trial, the court reestablished the conservatorship. On appeal, the Fourth District held that the basic purpose of section 5365.1 is to provide a procedure allowing admission of written records and recommendations without formal foundation being laid in court. No parties sought to introduce such records into evidence. The court held that neither section 5365.1 nor the local rule created mandatory requirements dictating the manner in which the conservator must carry the burden of proof; the failure to utilize the waiver procedure to facilitate admission of evidence did not create affirmative right to presence at trial of the doctors.

vi. **Conservatorship of Martha P. (2004) 117 Cal.App.4th 857**
The Fourth District Court of Appeals held that a public conservator has the right under CCP section 581(b)(1) to request a voluntary dismissal of a petition to reestablish a conservatorship where the conservator wished to terminate a conservatorship based on grounds that the conservatee was no longer gravely disabled. In a case such as this, the conservator is akin to the plaintiff because he or she is the only person in position to seek reestablishment of the conservatorship. The court noted that "In light of the protections in the LPS Act to ensure the earliest termination of an involuntary commitment and the 'social stigma attaching to one found 'gravely disabled' as a result of a mental disorder' it is only appropriate that the conservator in reestablishment proceeding have the discretion to dismiss or withdraw a petition when the investigation shows the conservatee is no longer gravely disabled." (citing Kaplan v. Superior Court, 216 Cal.App.3d at 1360) *Id.* at 868.

vii. **Conservatorship of Linda D., 2004 WL 68013**
**(NOT CURRENTLY PUBLISHED, NOT CITABLE)**
In hearing to reappoint conservator, Linda D. was found gravely disabled under LPS and the court imposed special disabilities. The

Fifth Distinct Court of Appeal found substantial evidence supported the finding of grave disability. The court reasoned, "the evidence shows that appellant lacks insight into her mental illness, does not think she needs medication and will not take it without the supervision of a conservator, but cannot provide for her basic needs without it. Thus, appellant's anticipated refusal of medication serves as an ample basis for the finding that she is gravely disabled." (*Id.* at 5).

**F. Habeas Corpus (CA W&I Code § 5275 et seq.)**

1. **In re Azzarella (1989) 207 Cal.App.3d 1240**
   The Fourth District Court of Appeal held that the County or government must bear the burden of proof in a habeas corpus proceeding challenging the legality of a 14 day certification, but that the applicable standard of proof in such writ proceedings is only preponderance of the evidence. (See also In re Lois M., below, 214 Cal.App.3d 1036.)

   [**Note:** In denying the petition for review, the California Supreme Court also ordered the de-publication of In re Grant (1988) 198 Cal.App.3d 1458, which was listed under this section in prior versions of this handout.]

2. **Conservatorship of Munson (1978) 87 Cal.App.3d 515**
   The Fourth District Court of Appeal confirmed the right of LPS conservatees to petition the court for a writ of habeas corpus (pursuant to Penal Code 1473) "if he feels he is improperly or illegally hospitalized by his conservator." (*Id.* at 520.)

3. **In re Lois M. (1989) 214 Cal.App.3d 1036, review denied January 4, 1990**
   The First District Court of Appeal held that in a habeas corpus proceeding brought by a person challenging the legality of a temporary conservatorship, the County or government agency has the burden of proving the legality of the detention without the benefit of any presumption of regularity, but that the applicable standard of proof is only a preponderance of the evidence. In reaching its decision, the court relied almost exclusively on Azzarella, supra, 207 Cal.App.3d 1240.

## G. Minors

1. **In re Roger S. (1977) 19 Cal.3d 921**
   The California Supreme Court held that minors 14 years and older, who object to involuntary detention in a state mental hospital, are entitled to a pre commitment hearing before a neutral decision maker. (*Id.* at 937.) The minor is also entitled to: adequate written notice stating the basis for the detention prior to the hearing; representation by counsel; the opportunity to personally appear and present evidence on his behalf; the right and opportunity to confront and cross examine witnesses; and, a record of the proceedings adequate to permit meaningful judicial or appellate review. (*Id.* at 937 939.) At the hearing, it must be established, by a preponderance of the evidence, that the minor is mentally disordered and likely to benefit from the treatment or he must be released (unless he meets the LPS criteria for involuntary detention, evaluation or conservatorship). (*Id.* at 940.)

2. **In re Antoine C. (1986) 186 Cal.App.3d 424**
   The Fourth District Court of Appeal held that the right to "counsel" guaranteed to minors pursuant to Roger S., supra, means an attorney (rejects the use of lay advocates in such pre commitment hearings).

3. **In re Michael E. (1975) 15 Cal.3d 183**
   The California Supreme Court held that "the actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished only in accordance with the LPS Act." (*Id.* at 189.) The ruling also applies to dependent children of the court. (*Id.* at 193, fn. 13.)

   [**Note:** This decision was later extended, by subsequent legislation, to include all mental health facilities, inpatient and outpatient (see CA W&I Code § 6552).]

4. **In re Michael D. (1977) 70 Cal.App.3d 522**
   The First District Court of Appeal confirmed that the involuntary commitment of dependent minors and wards of the court can only be effectuated through the LPS Act. The court held that the juvenile court lacks direct authority to commit one of its wards to a mental institution, and it cannot evade the application of Michael E., supra, by appointing one of its own officials as guardian of the minor for purposes of making application for "voluntary" admission of the minor pursuant to CA W&I Code § 6000(b). (*Id.* at 528 530.)

[**Note:** SB 595 (Stats. 1989, Chapter 1375), which went into effect January 1, 1990, provides an "Independent Clinical Review" to certain minors 14 years of age and older, who have been admitted to private psychiatric facilities as voluntary patients by their parents or guardians. Emancipated minors, minors committed under CA W&I Code § 5585.50 and 5585.53, and minors under the jurisdiction of the juvenile court are specifically excluded from SB 595. (See CA W&I Code § 6002.10 et seq.)]

5. **In re Patrick H. (1997) 54 Cal.App.4th 1346**
   In juvenile court proceedings against a minor charged with conduct that would be criminal if he were an adult, in which the juvenile court finds that the minor is incompetent to stand trial, the court may not treat the minor as an adult and commit the minor to a 90-day evaluation under CA Penal Code § 1370. Instead, the court should proceed under CA W&I Code § 6550 or Penal Code § 4011.6, whichever is appropriate, and then refer the minor to a facility for 72-hour treatment and evaluation. In dealing with conflicts between the two sections, the court has concluded that 6551 and 4011.6:

   > Should be considered complementary, rather than as providing alternative procedures. Together, the sections authorize the juvenile court to refer persons within its jurisdiction for 72-hour evaluation or treatment after which, in appropriate cases, the provisions of the LPS Act may be invoked, pursuant to which the minor may be detained in a mental health facility for a longer period of time. (*Id.* at 1358.)

   Regarding jurisdiction, the court also stated:

   > The juenile court retains concurrent jurisdiction over the minor during the LPS proceedings, unless the person in charge of the facility determines that arraignment or trial would be detrimental to the well-being of the minor. In such a case the juvenile court=s jurisdiction is suspended during such time as the minor is subject to the jurisdiction of the court overseeing the LPS proceedings. (*Id.*)

6. **In re Vicki H. (1979) 99 Cal. App. 3d 484**
   The Fifth District ruled that courts cannot extend their jurisdiction to cover matters of social importance, and therefore a juvenile court could not legally initiate conservatorship proceedings in accordance with LPS on behalf of minor who was charged with assault and battery and found

legally insane, but did not impose a threat to others and was not ruled gravely disabled.

7. **Breed v. Superior Court (1976) 63 Cal. App. 3d 773**
The First District found that a ward, who was returned to juvenile court by the youth authority so that he could be evaluated for a possible conservatorship and be committed to facilities of state department of mental hygiene, was properly ordered returned to youth authority under existing commitment when it was determined that he was not a fit subject for a conservatorship and commitment.

8. **In re L. L. (1974) 39 Cal. App. 3d 205**
The Court of Appeal granted the minor's petition for writ of habeas corpus and vacated juvenile court orders placing him in a state mental institution. Commitment by the juvenile court was in excess of its powers in that it did not follow Welf. & Inst. Code sections 6550, 6551 and related LPS provisions. The court held that the Juvenile Court must adhere to the LPS requirements when committing a ward of the court, and voluntary detention or commitment under LPS may be ordered only where person, as result of mental disorder, is danger to others, or to himself, or gravely disabled.

## II. INTERPRETATIONS OF GRAVE DISABILITY STANDARD

### A. Present finding of Grave Disability Required

1. **Conservatorship of Murphy (1982) 134 Cal.App.3d 15**
The Third District Court of Appeal reversed trial court's reestablishment of LPS conservatorship on basis that no evidence had been introduced as to whether Murphy was "presently" gravely disabled. Experts testified that Murphy was presently capable of managing his own affairs, i.e., providing for his own food, clothing and shelter needs. Rather, their determination that he was still gravely disabled was based on a "likelihood" that if he were released he would at some future time return to the use of alcohol. "The pivotal issue is whether Murphy was 'presently' gravely disabled, and the evidence demonstrated he was not." (*Id.* at 19.)

**Note:** the court also indicated that the proper standard of appellate review in such proceedings is the substantial evidence rule].

2. **Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030**
   The Third District Court of Appeal, applying Murphy, supra, held that it was error to find the conservatee still gravely disabled on the basis of the possibility that if the conservatorship were discontinued, Benvenuto might cease taking his medication and quickly become gravely disabled. The court noted that "[i]f LPS conservatorship may be reestablished because of a perceived likelihood of future relapse, many conservatees who would not relapse will be deprived of liberty based on probabilistic pessimism. This cost is unwarranted in view of the statutory procedures available to rapidly invoke LPS conservatorship if required." (*Id.* at 1034, fn., 2, citation omitted.)

   [**Note:** In Conservatorship of Walker, infra, the court emphasized that the LPS Act conspicuously does not state that persons are gravely disabled solely because they refuse treatment for a mental illness.]

3. **Conservatorship of Guerrero (1999) 69 Cal.App.4th 442**
   The Fourth District held that it was not error for a jury to reestablish a conservatorship when the jury was instructed to consider whether the proposed conservatee:

   **(1)** Lacks of insight into his or her mental illness;
   **(2)** Thinks that he or she does not need medication;
   **(3)** Cannot provide for his or her basic needs without medication; and,
   **(4)** Will not take medication without supervision of a conservator, by evidence from past history and circumstantial evidence.

   The court held that proving the above, beyond a reasonable doubt, supported a finding that the defendant was presently gravely disabled. (*Id.* at 446.) The court also explained that a conservator must show the conservatee is presently gravely disabled and not that he may relapse and become gravely disabled in the future. (*Id.*) In contrast, Benvenuto, supra, held that an LPS conservatorship cannot be established where a person is not presently gravely disabled but may become so because of a future failure to take medication. (*Id.*) A key to distinguishing Guerrero from Benvenuto involves understanding that a conservator may only introduce evidence regarding the conservatee=s present insight into their mental health and the need to take medication in the future. Introduction of evidence regarding the conservatee=s continued use of medication in the

future outside the narrow scope of Guerrero is most likely still inadmissible under Benvenuto.

## B. Evidence of Third Party Assistance Must Be Considered

1. **Conservatorship of Davis (1981) 124 Cal.App.3d 313**
The Second District Court of Appeal held that a person is not gravely disabled within the meaning of the LPS Act "if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties." (*Id.* at 321.) The court based its conclusion on a review of the statutory scheme, rules of statutory construction, and the due process clauses of the federal and California constitutions.

   [**Note:** See also Conservatorship of Neal (1987) 190 Cal.App.3d 685, 689; a person is not gravely disabled if they can provide for their basic needs with the willing help of a common law spouse.]

2. **Conservatorship of Wilson (1982) 137 Cal.App.3d 132**
Trial court had instructed the jury that gravely disabled means that the person is unable, unassisted, to provide for basic food, clothing and shelter needs on the basis of mental disorder or chronic alcoholism. The Fourth District Court of Appeal reversed because the trial court had applied too narrow a definition. Citing Conservatorship of Davis, supra, the court went on to note that in modern society no one lives completely independently of everyone and everything, and that it was too much to ask proposed conservatee to do so.

3. **Conservatorship of Early (1983) 35 Cal.3d 244**
The California Supreme Court held that the definition of grave disability was intended to encompass a consideration of whether the person could provide for his needs with or without the assistance of willing and responsible family members, friends or other third parties. Therefore, the trier of fact on the issue of grave disability must consider the availability of third party assistance in making its determination, but only if credible evidence of such assistance is adduced from any source at the trial of the issue. If the trier of fact is the jury, it must be so instructed if requested by the proposed conservatee. Approves Davis and Wilson, supra, and disapproves Conservatorship of Buchanan (1978) 78 Cal.App.3d 281 [Fourth District Court of Appeal had held that third party assistance cannot be considered by the trier of fact.].

4. **Conservatorship of Neal (1987) 190 Cal.App.3d 685**
   The Fourth District Court of Appeal reaffirmed the proposition that evidence of third party assistance must be considered by the trier of fact in determining grave disability.

   [**Note:** strong dissenting opinion which reviews Davis, Early, & Wilson, supra, and concludes that these cases do not exclude an LPS conservatorship of a person adjudicated as gravely disabled where family or friends are willing and able to assist. Rather, the dissent's view is that these cases only require the trier of fact to consider evidence of third party assistance, and that in this case, the evidence of proffered assistance was outweighed by the evidence of the person's grave disability.]

5. **Conservatorship of Law (1988) 202 Cal.App.3d 1336**
   The conservatee argued that because she had been placed in a board and care facility by her conservator, and since her mother was the payee for her public support check, she was utilizing the assistance of family members, friends, or third parties within the meaning of Davis and related cases, and thus she was not gravely disabled. After noting that the evidence was uncontradicted that the conservatee did not believe she had a mental disability, her family would not take her in, and she had recently refused treatment, the court held as follows:

   > Following Law's logic, a proposed conservatee could never be found gravely disabled in a reestablishment situation because the conservator is a willing and responsible other third party assisting the conservatee and providing for his or her needs. This could not have been the legislative intent for it would nullify CA W&I Code § 5361 permitting reestablishment of the conservatorship. (*Id.* at 1341.)

6. **Conservatorship of Jones (1989) 208 Cal.App.3d 292, review denied May 17, 1989**
   The Fourth District Court of Appeal held that California Department of Corrections (CDC) custody does not qualify as third party assistance within the meaning of the LPS Act. The court found that CDC cannot reasonably be found to provide the same type of volitional, altruistic care which family or friends can supply. The court also concluded that there was no rationale in the LPS Act or case authority to justify casting CDC in the third party assistance role.

**Note:** SB 1491 (Stats. 1989, Chapter 999), which went into effect January 1, 1990, amends sections 5250 and 5350 of the Welfare and Institutions Code as follows:

> Notwithstanding paragraph (1) of subdivision (h) of Section 5008, a person is not "gravely disabled" 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. CA W&I Code § 5250(d)(1), 5350(e)(1).
>
> However, SB 1491 also provides that "unless they specifically indicate in writing their willingness and ability to help, family, friends or others shall not be considered willing or able to provide this help." (CA W&I Code § 5250(d)(2), 5350(e)(2).)

In interpreting this "in writing" requirement, the State Department of Mental Health stated as follows:

> "Writing" means any one or combination of the following: handwriting; typewriting; printing; Photostatting; photographing; and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. (See Section 250 of the Evidence Code)

DMH Information Notice No. 90 04 at p.2 (January 31, 1990).

7. **Conservatorship of Johnson (1991) 235 Cal.App.3d 693**
The Third District Court of Appeal upheld a finding of grave disability despite the fact that the conservatee's mother was willing to help care for her. This is the first reported decision to interpret the statutory provisions codifying the third party assistance rule as noted above. Among the evidence considered by the court was an apparent admission by the conservatee's mother prior to trial that she was not capable of taking care of the conservatee or of meeting her needs, and the fact that the conservatee had a near fatal suicide attempt a year prior while living with her mother. After reviewing the evidence, the Court concluded that the assistance offered by the conservatee's mother was insufficient to provide the type of structured environment that she needed:

> Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can survive safely with the assistance of a

third party. There is substantial evidence that the assistance offered by Cornelius [the conservatee's mother], while well intentioned, and would not meet this requirement. (*Id.* at 699.)

8. **Conservatorship of Tedesco (1993) 21 Cal.Rptr.2d 763 (WARNING - DEPUBLISHED AND NOT CITABLE)**
   The First District Court of Appeal upheld the constitutionality of the recent amendment to the LPS Act (see Note following Jones, supra) which requires that evidence of third party assistance be submitted "in writing." The court noted that "[t]he restriction is not on the scope of the inquiry the jury may undertake, but on the kind of evidence upon which it may rely. In effect, the conservatee may only present direct evidence of the existence of willing and able third party assistance; circumstantial evidence shall not be considered." (*Id.* at 774.) The Tedesco court also held that "the purpose of the statute is not served by rigid application; thus, where a third party directly testifies to his or her willingness to assist the proposed conservatee, it would be absurd to require the testimony to be reduced to writing before the trier of fact could consider it." (*Id.*)

   [**Note:** This case has been depublished and is not citable. However, the Court=s focus concerned the application of the exclusionary rule in conservatorship proceedings (see Susan T., supra). The court=s logic in Tedesco regarding third party testimony may still be useful in interpreting LPS law.]

## C. Grave Disability Defined Narrowly

1. **Conservatorship of Smith (1986) 187 Cal.App.3d 903**
   The First District Court of Appeal stressed that a finding of grave disability must be supported by an "objective finding that the person, due to mental disorder, is incapacitated or rendered unable to carry out the transactions necessary for survival or otherwise provide for her basic needs of food, clothing, or shelter." (*Id.* at 909.) The court went on to state that "bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting a conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival. Only then does the interest of the state override her individual liberty interests." (*Id.*)

## III. JURISDICTION AND OTHER EVIDENTIARY/PROCEDURAL ISSUES

### A. Jurisdiction Over Conservatees

1. **In re Gandolfo (1984) 36 Cal.3d 889**
   The California Supreme Court held that the determination of a proper placement of conservatee is exclusively within the continuing jurisdiction of the superior court which appointed the conservator and authorized the conservatee's placement. However, the court also held that an unreasonable denial of such freedom as is essential to a conservatee's welfare might be a proper subject of inquiry on habeas corpus, and that a petition for habeas corpus, filed in the county of confinement, would be an appropriate vehicle to inquire into the conditions of an institution which would endanger the health and safety of a conservatee or which deprive a conservatee of fundamental rights.

   [But see CA W&I Code § 5358.7 (Added by Stats. 1986, ch. 226, 1) which provides that when a conservatee challenges his or her placement or conditions of confinement by a writ of habeas corpus, judicial review shall be in either the county where the conservatorship was established or in the county in which the conservatee is placed or confined].

   The Supreme Court also held that the LPS statutes governing automatic termination and reestablishment of conservatorships "do not contemplate the extinguishment of the appointing court's continuing jurisdiction merely by a temporary interruption in the chain of conservatorship." (*Id.* at 896, fn., 2.)

2. **Conservatorship of Ivey (1986) 186 Cal.App.3d 1559, review denied Jan. 29, 1987**
   A consolidated appeal brought by a number of conservatees who jointly raised the issue of whether transmittal of the conservatorship investigation report to the proposed conservatee, as required by CA W&I Code § 5354, is satisfied by service of the report on the proposed conservatee's court appointed attorney. The Fourth District Court of Appeal held that "the plain meaning of the statute requires at minimum the mailing of the report to the proposed conservatee." (*Id.* at 1564.) However, the court went on to find that the failure to transmit a copy of the conservatorship investigation report to the conservatee does not, in and of itself, deprive the court of its jurisdiction. In Ivey, counsel had stipulated that the petition to establish a temporary conservatorship and conservatorship had been personally served on the conservatee. In affirming each of the conservatorships, the

court assumed the trial counsels were competent and adequately communicated with the proposed conservatees about the entire proceedings, including the contents of the investigations reports. (See also Conservatorship of Forsythe (1987) 192 Cal.App.3d 1406, review denied Aug. 26, 1987; Conservatorship of Isaac O. (1987) 190 Cal.App.3d 50; Conservatorship of Jones (1986) 188 Cal.App.3d 306, review denied Feb. 25, 1987.)

3. **Conservatorship of Wyatt (1987) 195 Cal.App.3d 391**
   The Fourth District Court of Appeal held that personal service of reestablishment documents is neither statutorily nor constitutionally required. The court found that a superior court rule permitting service of reestablishment petition on proposed conservatee by first class mail was valid.

4. **Conservatorship of McKeown (1994) 25 Cal.App.4th 502**
   The Fourth District Court of Appeal held in a reestablishment case that although the jury trial commenced four days after the original one year conservatorship period, the initial hearing to reestablish the conservatorship was noticed before the end of the one year period and thus, the trial court retained jurisdiction over the conservatee. (*Id.* at 505.) The court noted that "[e]ven a temporary interruption in the chain of conservatorship does not extinguish the court's continuing jurisdiction." (*Id.*, citing In re Gandolfo, supra, 36 Cal.3d at 896, fn. 2; Conservatorship of Wyatt, supra, 195 Cal.App.3d at 397.)

5. **Conservatorship of James M. (1994) 30 Cal.App.4th 293**
   The Third District Court of Appeal held that the statute which provides that a jury trial commence within 10 days of the date of the demand by the person for whom conservatorship was being sought was directory, rather than mandatory. Therefore, the trial court was not deprived of jurisdiction to conduct the hearing for reappointment of the conservator where the trial was held 34 days after the demand due to an agreement by the conservatee to set the trial 30 days later and a four day delay due to a snowstorm. In reaching its decision, the court relied in part on In re Gandolfo, supra.

## B. Evidentiary Questions

1. **Conservatorship of Manton (1985) 39 Cal.3d 645**
   The California Supreme Court unanimously held that an LPS conservatorship investigation report containing hearsay statements from

doctors, relatives, and other third parties could not be admitted into evidence in a contested court or jury trial on the issue of grave disability to the extent the report contained inadmissible hearsay.

2. **Conservatorship of Torres (1986) 180 Cal.App.3d 1159, review denied July 9, 1986**
   The Fourth District Court of Appeal held that in LPS conservatorship proceedings, a psychiatrist is permitted to testify as an expert on the person's mental capacities and to rely on hearsay, including statements made by the patient or by third persons. The court also held that expert psychiatric testimony was appropriate as the jurors might not know from common experience whether a proposed conservatee's inability to care for himself resulted from a mental disorder or from some other reason.

3. **Conservatorship of Peter C. 2004 WL 729162 (Cal. App. 4 Dist.) (NOT CURRENTLY PUBLISHED, NOT CITABLE)**
   The Fourth District Court of Appeals upheld the standard for sufficient evidence in an LPS proceeding set forth in Conservatorship of Walker and People v. Johnson. In order to review the evidence, the court must "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the [respondent is gravely disabled] beyond a reasonable doubt." *Id.* at 2. Therefore, evidence that the claimant was often starved, homeless, and ill after being re-released from a hospital and often had to be readmitted, was sufficient to find grave disability, despite that the claimant does not pose a violent threat to himself or others.

4. **People v. One Ruger .22 Caliber Pistol (2000) 84 Cal.App.4th 310**
   The testimony of a psychiatrist who examined a person detained pursuant to 5150 is admissible at his hearing because the public policy favoring doctor/patient privilege is outweighed by the need to protect the public from a potentially violent individual.

5. **Conservatorship of Edward G. (2004) 2004 WL 1054241 (NOT CURRENTLY PUBLISHED, NOT CITABLE)**
   The Court determined that where an expert testified that a person's disability was the causal connection to that person's inability to provide food, clothes or shelter for himself, such testimony did not substitute for the trier of fact's determination of grave disability. "Expert opinion is allowed on a conservatee's inability to take care of his or her basic needs

because a juror cannot determine from common experience whether the conservatee's inability … results from a mental disorder or from some other reason." (*Id.* at 2). The expert opinion was not an attempt to usurp the trier of fact. The Court recognized the importance of experts in presenting whether there was a link between the claimant's disability and an inability to care for himself, and allowed such testimony.

## C. Initiation of Conservatorship Proceedings

### 1. Kaplan v. Superior Court (Adler) (1989) 216 Cal.App.3d 1354

The Third District Court of Appeal held that a private citizen cannot institute conservatorship proceedings under the LPS Act. The court held that only the county's designated conservatorship investigation officer may file and prosecute a petition to establish an LPS conservatorship:

> In order to protect the liberty and dignity of persons threatened with confinement in a mental health facility, the Legislature has determined that the safeguards attending Probate Code conservatorships are insufficient, and has required that such restraints may be imposed only after complying with LPS. A vital element of this protective framework is the vesting in a public official the duty to investigate the need for a conservatorship which may lead to commitment, and the discretion to file a petition in light of that investigation.
>
> To allow anyone who may initiate a Probate Code conservatorship to assume the role of "prosecutor" in an LPS proceeding would run counter to these protections. The effect would be to eliminate a key element of a statutory structure designed to assure that abuses of the mental health system in the form of unwarranted commitments are avoided. Here, as in the case of a criminal defendant, it is appropriate that when the power of the state is invoked to deprive an individual of her freedom, the decision to commence judicial proceedings should be left to a public officer. (*Id.* at 1360.)

## D. Appointment of Conservators

### 1. Conservatorship of Walker (1987) 196 Cal.App.3d 1082

The Fourth District Court of Appeal held that a conservatee is entitled to a hearing on the issue of who is to be his or her conservator. Under Probate Code section 1812, a preference list of family members must be considered before a neutral and public conservator is appointed. In

Walker, the court relied in part on recent amendments to the LPS Act which require that the public guardian serve as the conservator only after the court has made specific finding that no other person or entity is willing and able to serve as conservator. (*Id.* at 1101, citing CA W&I Code § 5354.5.)

## E. Mootness

**Note:** Numerous appellate courts dealing with conservatorship and other LPS matters have exercised inherent discretion to consider appeals to avoid dismissals on technical grounds or for mootness, since a stricter policy might tend to allow issues of important public interest to evade review. See, e.g.:

Conservatorship of Wilson (1982) 137 Cal.App.3d 132, 136;
Conservatorship of Baber (1984) 153 Cal.App.3d 542, 546;
Conservatorship of Moore (1986) 185 Cal.App.3d 718, 725;
Conservatorship of Bones (1987) 189 Cal.App.3d 1010, 1014 1015;
Conservatorship of Forsythe (1987) 192 Cal.App.3d 1406, 1409;
Conservatorship of Jones (1989) 208 Cal.App.3d 292.

## F. Jury Instructions Miscellaneous

1. **Conservatorship of Davis (1981) 124 Cal.App.3d 313**
   The term "willing and able" to accept treatment on a voluntary basis is not defined in LPS. In Davis, the Second District Court of Appeal approved a trial court jury instruction defining the "willing and able" term as follows:

   > "If you find that [the person] is capable of understanding her need for treatment for any mental disorder she may have and capable of making meaningful commitment to a plan of treatment of that disorder, she is entitled to a verdict of 'not gravely disabled.'" (*Id.* at 319.)

2. **Conservatorship of Walker (1987) 196 Cal.App.3d 1082**
   The Fourth District Court of Appeal held that it was error to instruct the jury that they must make a finding of grave disability unless the proposed conservatee was both able to survive safely on his own or with help and willing to voluntarily accept treatment. As the court noted:

   > Under this instruction a conservatorship may be established merely because one refuses treatment even if that person otherwise can meet his or her basic needs. Such a result is contrary to the LPS

> Act's mandate that a person is gravely disabled, so as to justify the serious deprivation of their liberty rights arising from a conservatorship, only if they cannot provide for their basic personal needs for food, clothing, or shelter. The LPS Act conspicuously does not state that persons are gravely disabled solely because they refuse treatment for a mental illness. In short, the structure of the LPS Act preserves the right of non-dangerous persons to refuse treatment as long as they can provide for their basic needs, even if they have been diagnosed as mentally ill. The instruction given here improperly requires that a person accept treatment in order to avoid a conservatorship. (*Id.* at 1093 1094, citations and footnote omitted.)

The court also held that, "on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Id.* at 1099; Accord, Conservatorship of Law (1988) 202 Cal.App.3d 1336, 1340.)

3. **Conservatorship of McKeown (1994) 25 Cal.App.4th 502**
   In a reestablishment case, the conservatee argued that the trial court should have given CALJIC No. 2.80, a jury instruction regarding expert testimony in criminal cases, as opposed to BAJI No. 2.40 (civil). The Fourth District Court of Appeal rejected this argument, holding that there is no duty to give the criminal instruction on expert testimony in civil trials, and that conservatorship proceedings are civil, not criminal. (*Id.* at 545.) The court also held that even if it were error to refuse to give the requested instruction, it was harmless beyond a reasonable doubt given strong evidence of McKeown's mental disorder and his inability to meet his basic needs for food, clothing, or shelter. In dicta, the court observed that the last sentence in BAJI 2.40 that uncontradicted expert testimony is "conclusive and binding" on the jury does not withstand analysis:

> In sum, the better statement of the point in question is the near truism that the jury should not arbitrarily reject testimony from the witnesses. There is no need to further assert some testimony is "conclusive," and in the context of proceedings such as the present one, involving a high standard of proof, continued use of the "conclusive" language seems likely to lead only to repetition of challenges such as the present one, both in the trial courts and on appeal. [par.] We therefore suggest that the last sentence of the fourth paragraph of BAJI No. 2.40 (in brackets) not be given, at

> least in future conservatorship cases, although we reject the assertion of prejudicial error in this matter. (*Id.* at 547.)

4. **Conservatorship of Linda D., 2004 WL 68013 (NOT CURRENTLY PUBLISHED, NOT CITABLE)**
   The court further found the following: that the jury instructions given at trial "provided an appropriate framework for the jury to consider in determining whether appellant's grave disability was present at the time of trial" (*Id.* at 7); that the jury instructions did not encourage the jury to make its decision based on fear (of releasing appellant into society); and that a jury instruction concerning the "benevolent" purpose of LPS should not have been given but was not prejudicial.

### G. Peremptory Challenges

1. **Conservatorship of Gordon (1989) 209 Cal.App.3d 364, review denied June 7, 1989**
   The Fourth District Court of Appeal held that in conservatorship jury trial the proposed conservatee is limited to six peremptory challenges as provided by the law governing civil actions (i.e., not entitled to the number of peremptory challenges provided to criminal defendants).

### H. Miscellaneous

1. **Conservatorship of Berry (1989) 210 Cal.App.3d 706**
   The Fourth District Court of Appeal held that a probate court could order a public conservator to use the conservatee's estate to pay the costs of a public defender's legal services, provided the costs awarded took into account the conservatee's ability to pay.

2. **Conservatorship of Rand (Singer) (1996) 49 Cal.App.4th 835**
   The Fourth District Court of Appeal upheld a trial court's order awarding attorney's fees and costs to the conservatee's court appointed private counsel.

   The conservatee had appealed from the order asserting that the trial court erred in:

**(1)** improperly conducting the hearing to determine his present ability to pay attorney fees;
**(2)** failing to give him proper notice of this hearing;
**(3)** reaching a determination not supported by substantial evidence; and,
**(4)** using an improper legal standard to calculate the amount of fees owed.

On the issue of notice, the court agreed that the notice which was given to the conservatee pursuant to local court rules was defective:

> Rule 2.4.18 fails to comply with [Penal Code] section 987.8, subdivision (f), because the rule:
>
> **(1)** does not inform the person receiving it of the entitlement to a hearing to determine the present ability to pay attorney fees; and,
>
> **(2)** does not state that the potential resulting court order will have the force and effect of a civil judgment.
>
> **(3)** The San Diego County Superior Court must amend rule 2.4.18 and the Citation for Conservatorship form to comply with the requirements of section 987.8, subdivision (f). (*Id.* at 840.)

However, the court found that the conservatee was not prejudiced by the inadequate notice since he was given a separate hearing to determine his ability to pay attorney fees and he was represented by counsel at this hearing. (*Id.*) The court also found that the conservatee's present ability to pay his appointed attorney fees was supported by substantial evidence. Finally, the court rejected the conservatee's argument that the trial court used an improper legal standard to calculate the amount owed in attorney fees. The court noted that Conservatorship of Berry, supra, addressed the issue of what constitutes proper award of attorney fees to a public defender, where a contractual relationship exists between the attorney and the county. In this case, no such relationship existed and the court determined that the private appointed counsel had made an adequate showing of the actual cost of the legal services he provided.

3. **Conservatorship of Sides (1989) 211 Cal.App.3d 1086**
   The Third District Court of Appeal held that an indigent parent of a proposed conservatee has no statutory or constitutional right to court appointed counsel in conservatorship proceedings involving her son.

4. **Ford v. Norton, (2001) 89 Cal. App. 4th 974, review denied**
   The Fifth District Court of Appeal held that defendant psychologist and psychiatrist were not entitled to immunity under W&I section 5154 where the psychologist (after consulting with the psychiatrist) authorized an early release of a patient under a 5150 hold, contrary to the unambiguous language of section 5152 (that only a psychiatrist can authorize an early release). Although the early release was inappropriate in this case, the court noted that in accordance with the legislative purpose of preventing inappropriate, indefinite commitments of mentally disordered persons, such detentions are implemented incrementally and can be terminated before the expiration of the commitment period. LPS is intended to provide prompt, short-term, community-based intensive treatment, without stigma or loss of liberty, to individuals with mental disorders who are either dangerous or gravely disabled. See also Bragg v. Valdez, M.D. (2003) 111 Cal.App.4th 421 (because legislative purpose of LPS is to prevent inappropriate, indefinite commitments, such detentions are implemented incrementally and can be terminated before end of commitment period).

## IV. POST ESTABLISHMENT CHALLENGES TO CONSERVATORSHIP

### A. Rehearing of Conservatorship Status (CA W&I Code § 5364)

1. **Henreid v. Superior Court (1976) 59 Cal.App.3d 552**
   The First District Court of Appeal interpreted the language in CA W&I Code § 5364 to mean that the six month limitation on petitions for rehearing was applicable to a conservatee's initial petition for rehearing as well as to successive petitions for rehearing. However, the court also indicated that "[i]f unreasonable consequences should ensue from it, [the conservatee] is entitled to seek habeas corpus relief at any time." (*Id.* at 558, citations omitted.)

   [**Note:** The Henreid decision was overturned by the Legislature in 1976 when 5364 was amended into its present form. (Stats. 1976, ch. 905, 5.) See also In re Gandolfo, supra, 36 Cal.3d at 897 898, fn.6]

2. **Baber v. Superior Court (1980) 113 Cal.App.3d 955**
   The Fourth District Court of Appeal held that in rehearings pursuant to CA W&I Code § 5364, conservatees are not entitled to a jury trial. The court also held that the conservatee has the burden of proving by a "preponderance of the evidence" that circumstances had changed since the inception of the conservatorship such that he was no longer gravely disabled. (*Id.* at 965 966.)

3. **Conservatorship of Jones (1989) 208 Cal.App.3d 292, review denied May 17, 1989**
   The Fourth District Court of Appeal held that denial of petition for rehearing of conservatorship status pursuant to CA W&I Code § 5364 is an appealable order. (*Id.* at 298.)

4. **Conservatorship of Everette M. (1990) 219 Cal.App.3d 1567**
   In a case of first impression, the Fifth District Court of Appeal set out the standard for deciding a non-suit motion in conservatorship rehearing proceedings. The court noted that in a rehearing pursuant to CA W&I Code § 5364, all the conservatee had to do to overcome a non-suit motion is to make out a prima facie case that since the establishment of the conservatorship, his situation had changed to the point that he is no longer gravely disabled. In determining whether a prima facie case has been proved, the trial court must consider evidence of the conservatee's ability to rely on the help of third persons.

5. **Conservatorship of Scharles (1991) 233 Cal.App.3d 1334**
   In a case of first impression, the Fourth District Court of Appeal held that the trial court abused its discretion in denying an indigent conservatee's request for a county paid independent psychiatric examination in a rehearing proceeding under CA W&I Code § 5364 because of her representation by private pro bono counsel. In reaching its decision, the Court noted that there was no judicial inquiry to determine whether Scharles was in fact indigent and unable to pay attorney's fees or to hire an independent expert. And, there was no judicial inquiry into whether an independent psychiatric examination was warranted:

   > Absent a critical inquiry into the financial and evidentiary need for an independent forensic psychiatric examination, the trial court not only failed to exercise its discretion, but also denied the conservatee her statutory right to meaningful rehearing under section 5364. (*Id.* at 1442, 1443.)

The Scharles court commented on the conservatee's need for expert testimony as follows:

> The County questions Scharles's perceived need for expert testimony at the rehearing; however, we find the County's inquiry to be patently shallow given the revealing consideration the conservator found it necessary to have available expert testimony of a forensic psychiatrist at the hearing. Moreover, although a fact finder can cast aside expert testimony, the burden placed upon the conservatee at the rehearing would be significantly increased when confronted by the expert testimony of a forensic psychiatrist for the conservator, unable to proffer any conflicting medical opinion and required to rely on the kind of evidence effectively presented in Conservatorship of Everette M. (1990) 219 Cal.App.3d 1567." (*Id.* at 1143, fn 6.)

[**Note:** although this case involved a rehearing proceeding, the court's holding would apply equally at establishment and yearly reestablishment hearings.]

[**Note:** The People v. Hardacre court, (2001) 90 Cal.App.4th 1392, 1401, declined to extend the Scharles holding because:

> On appeal, this ruling was deemed an abuse of discretion because the funds would have been available if the conservatee had been represented by a public agency; in essence, she was being penalized for locating a private attorney who would handle her case pro bono. (*Id.* at pp. 1340-1343, 285 Cal. Rptr. 325) The case does not stand for the broad proposition that due process requires the appointment of an expert whenever a person seeks to challenge an involuntary civil commitment."

## V. EFFECT OF LPS CONSERVATORSHIP ON LEGAL CAPACITY

### A. Capacity – In General

#### 1. Conservatorship of Moore (1986) 185 Cal.App.3d 718, review denied Dec. 30, 1986

The Fourth District Court of Appeal held that "conservatees are not, by reason of their conservatorship, automatically considered incompetent …" (*Id.* at 732.)

2. **Conservatorship of Linda D., 2004 WL 68013 (NOT CURRENTLY PUBLISHED, NOT CITABLE)**
   The Court of Appeal found that the trial court's imposition of various special disabilities (regarding owning a firearm, operating a motor vehicle, entering into contract, refusing/consenting to mental health and/or medical treatment) was supported by substantial evidence.

3. **Conservatorship of Joan B., 2004 WL 772595 (NOT CURRENTLY PUBLISHED, NOT CITABLE)**
   The First District Court of Appeal found that the trial court's imposition of various special disabilities (regarding owning a firearm, operating a motor vehicle, entering into contract, refusing/consenting to mental health and/or medical treatment) was not supported by substantial evidence because no specific evidence was introduced relating to them. On this issue, the Court vacated the special disability findings and remanded for further proceedings.

### B. Capacity to Contract

1. **Board of Regents v. Davis (1975) 14 Cal.3d 33, on remand (1977) 74 Cal.App.3d 862**
   The California Supreme Court held that an LPS conservatee has the capacity to contract which may only be limited by explicit judicial declaration.

### C. Capacity to Consent to or Refuse Treatment

1. **Psychotropic Drugs**

   i. ***Keyhea v. Rushen* (1986) 178 Cal.App. 3d 526, review denied July 10, 1986**
   The First District Court of Appeal unanimously determined that LPS conservatees have a statutory right to refuse Psychotropic drugs absent judicial determination of incompetence, which right extended through Penal Code section 2600 to prisoners.

   **Note:** a recent amendment to Penal Code section 2600 (Stats. 1994, ch. 555, 1) added the following language regarding the administration of Psychotropic medications to prisoners:

   > Nothing in this section shall be construed to permit the involuntary administration of psychotropic medication unless the process specified in the permanent injunction, dated

October 31, 1986, in the matter of *Keyhea v. Rushen*, 178 Cal.App.3d 526, has been followed. The judicial hearing for the authorization for the involuntary administration of psychotropic medication provided for in Part III of the injunction shall be conducted by an administrative law judge. The hearing may, at the direction of the director, be conducted at the facility where the inmate is located. Nothing in this section shall be construed to overturn the decision in *Thor v. Superior Court*, 5 Cal.4th 725.

**ii. *Riese v. St. Mary's Hospital and Medical Center* (1987) 209 Cal.App.3d 1303**

The First District Court of Appeal unanimously held that persons under 72 hour holds (CA W&I Code § 5150) and 14 day certifications (CA W&I Code § 5250) have statutory rights under LPS to exercise informed consent to the use of antipsychotic drugs in non emergency situations absent a judicial determination of their incapacity to make treatment decisions. The Court expressly did not reach the constitutional or common law issues.

[**Note:** On June 22, 1989, the California Supreme Court unanimously reinstated the Court of Appeal's decision and ordered it to be published in the Official Appellate Reports. The decision became final on June 29, 1989.]

[**Note:** SB 665 (Statutes of 1991, Chapter 681, effective Jan. 1, 1992), implements, with some modifications, the *Riese* decision. SB 665 is codified at CA W&I Code § 5325.2, 5332 5337.]

**iii. *In re Qawi* (2004) 32 Cal.4th 1**

The Supreme Court held that, in non-emergency situations, an MDO could be compelled to be treated with antipsychotic medication only if:

**(1)** The patient has been determined by a court to be incompetent to refuse medical treatment, or

**(2)** Where the patient has been determined by a court to be a danger to others pursuant to CA W&I Code §5300.

Additionally, the MDO's ability to refuse antipsychotic medication "may also be limited pursuant to State Department of Mental Health regulations modifying the MDO's rights as is necessary in

order to provide for the reasonable security of the inpatient facility in which the patient is being held." *Id.* at 27.

"A determination that a patient is incompetent to refuse medical treatment, or is dangerous within the meaning of section 5300, may be adjudicated at the time at which he or she is committed or recommitted as an MDO, or within the commitment period." (*Id.* at 28.)

The Court reasoned that the purpose of the MDO Act is not punitive or penal but to provide treatment as well as protection for the general public. Therefore, MDO patients are granted the same rights that are afforded involuntary patients under the LPS Act.

[Case includes discussion of case, statutory, and constitutional law regarding right to refuse antipsychotic medication.]

**iv. *Heater v. Southwood Psychiatric Center* (1996) 42 Cal. App. 4th 1068, rehearing denied, review denied**

The Fourth District observed that "the legislative direction for consent and hearings on capacity with respect to administrations of 'antipsychotic medication' to involuntary detainees necessarily implies no such procedures are required for other medications." In this case, the court found there was no evidence that Ativan falls within the class of "powerful mind-altering drugs." (*Id.* at 1083, citing *Riese*).

**2. Electroconvulsive Therapy (ECT)**

**i. *Aden v. Younger* (1976) 57 Cal.App.3d 662**

The Fourth District Court of Appeal struck down as unconstitutional most of the prior provisions of LPS Act governing psychosurgery and ECT. The court recognized that "[m]ental patients' incompetence may not be presumed solely by their hospitalization." (*Id.* at 674, citing CA W&I Code § 5331.) The court then indicated that, "their competence to accede to treatment is more questionable than that of other patients," and that "their ability to voluntarily accept treatment is questionable." (*Id.*) The court also stated that "it is common knowledge mentally ill persons are more likely to lack the ability to understand the nature of a medical procedure and appreciate its risks." (*Id.*)

**ii.** ***Conservatorship of Fadley* (1984) 159 Cal.App.3d 440**

The question posed in this appeal was whether a trial court may review conservatee's treating physician's decision that ECT was warranted in the course of determining the conservatee's capacity to give informed consent. The Fourth District Court of Appeal held that the trial court's sole duty was to determine the patient's capacity to give written informed consent to the therapy:

A reading of section 5326.7 suggests the issue before the court at subdivision (f) evidentiary hearing, however, is a narrow one: Does the patient have the ability to give written consent to the proposed therapy. Not at issue in the hearing is whether ECT is definitely indicated and the least drastic alternative available to the patient. (*Id.* at 446.)

**iii.** ***Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314**

The First District Court of Appeal held that clear and convincing evidence must be presented to support an order that a person lacks the capacity to consent to or refuse ECT. (*Id.* at 324.)

**iv.** ***Conservatorship of Waltz* (1986) 180 Cal.App.3d 722**

The Fourth District Court of Appeal reversed trial court's order allowing the conservator the power to consent to ECT under the present statutory scheme. In deciding the capacity question, the court indicated that the, "mere fact Waltz has been diagnosed as having a mental illness is not enough to deem him incapable of consent." (*Id.* at 732.) The court indicated that Waltz had both a psychotic and rational fear of ECT, and that "even though he has a mental illness which causes him to be paranoid about ECT and many other things, this fact alone cannot be used to negate the presence of a rational fear of ECT which causes him to refuse the treatment even during his non-psychotic moments." (*Id.*) The court concluded that the evidence indicated a disagreement between Waltz, who believed his medications would make him better, and his physician, who believed the drugs had not been effective, and that this disagreement did not show Waltz' inability to give informed consent.

If you have any questions, contact your county Patients' Rights Advocate, or call:

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