

**Mental Health at a Glance:  
LPS Conservatorship<sup>1</sup>**  
(last revised 8/21/2016)

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<sup>1</sup> This article was drafted by CCAP staff and panel attorney Conness Thompson. CCAP wishes to thank Ms. Thompson for her extensive research on this foundation overview article. As always, counsel is encouraged to conduct their own independent research for current and applicable cases and/or statutory updates in an ever-changing body of law.

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## Overview

There are two types of conservatorships: (1) that provided for by the Probate Code for a person who cannot “provide properly for his or her personal needs for physical health, food, clothing, or shelter” (Probate Code, § 1801, subd. (a)), and (2) that provided for by the Welfare and Institutions Code for “a person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism” (Welf. & Inst. Code, §5350). This latter conservatorship, also known as a Lanterman-Petris-Short (LPS) conservatorship, is the focus of this article.

The LPS Act was originally enacted in 1967 (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008) and became operative on July 1, 1969 (*Thorn v. Superior Court* (1970) 1 Cal.3d 666, 668). One of the goals driving the original enactment was “ending the inappropriate and indefinite commitment of the mentally ill . . .” (*Conservatorship of Susan T.*, *supra*, 8 Cal.4th 1005, 1009; see Welf. & Inst. Code, § 5001, subd. (a).) Since its original enactment, the LPS Act has been reenacted and amended a number of times. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 953.) The chapters presently in effect are:

- Chapter 1 - General Provisions
- Chapter 2 - Involuntary Treatment
- Chapter 3 - Conservatorship of Gravely Disabled Persons
- Chapter 4 - Administration
- Chapter 6.2 - Mental Health Advocacy

## Statutes

This article focuses on selected statutes from Chapter 3 - Conservatorship of Gravely Disabled Persons. The statutes covering LPS conservatorship begin at Welfare and Institutions Code section 5350. Not all code section addressing conservatorship are covered in this article. The code sections discussed cover the procedure for appointing a conservator (§ 5350); notifying family members (§ 5350.2); recommending conservatorship (§ 5352); temporary conservatorships (§ 5352.1); additional detention pending the filing of a petition (§ 5352.3); conservatorship during the appeal of the judgment establishing the conservatorship (§ 5352.4); initiating conservatorship proceedings (§ 5352.5); treatment plan following conservatorship (§ 5352.6); temporary conservator (§ 5353); alternatives to conservatorship (§ 5354); designating a conservator (§ 5355); conservator powers and conservatee disabilities (§ 5357); placement of conservatee (§ 5358); contesting rights denied a conservatee (§ 5358.3); conservatee challenge to placement or confinement (§ 5358.7); alternative placement (§ 5359); terminating conservatorship (§ 5361); notice of impending termination (§ 5362); rehearing on status as conservatee (§ 5364); return of competency with criminal charges pending (§ 5369); initiating conservatorship when charged with offense (§ 5370); and ex parte communications (§ 5372).

### **Welf. & Inst. Code, § 5350 - Procedure for Appointing a Conservator**

Before a conservator may be appointed, a proposed conservatee must be found to be gravely disabled. There are two definitions of gravely disabled: (1) where a person suffering from a mental health disorder is unable to provide for his or her needs for food, clothing, or shelter

(Welf. & Inst. Code, § 5008, subd. (h)(1)(A)); and (2) where a mentally incompetent person charged with committing a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person is unable to understand the proceedings against him or her and assist in his or her defense (Welf. & Inst. Code, § 5008, subd. (h)(1)(B)). A proposed conservatee has the right to a court or jury trial on the question of whether he or she is gravely disabled. If a proposed conservatee can survive without involuntary detention with the help of others, that person is not gravely disabled.

“The party seeking imposition of the conservatorship must prove the proposed conservatee’s grave disability beyond a reasonable doubt and[, where heard by a jury,] the verdict must be issued by a unanimous jury.” (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541.)

“[T]he *Anders/Wende* procedures are not required in appeals from LPS conservatorship proceedings. The conservatee is not a criminal defendant and the proceedings are civil in nature.” (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 537.)

### **Welf. & Inst. Code, § 5350.2 - Notification of Family Members or Other Designees**

The person for whom a conservatorship is sought has the right both to have family members or other designated persons notified of the time and place for the conservatorship hearing and, conversely, the right to have that information withheld. If the person for whom the conservatorship is sought chooses the former, then the county mental health program must make reasonable attempts to notify the family members or other designated persons.

### **Welf. & Inst. Code, § 5352 - Recommending Conservatorship**

An LPS conservatorship may be recommended by the professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment based on his or her determination of grave disability. Then, if the conservatorship investigation officer agrees with that recommendation, he or she petitions the superior court to establish a conservatorship.

### **Welf. & Inst. Code, § 5352.1 - Temporary Conservatorship**

A temporary conservatorship lasting up to 30 days may be established if the trial court is satisfied that it is necessary to do so. A temporary conservatorship automatically expires at the end of the 30 days. Although the conservatorship is temporary, the proposed conservatee has the right to a court or jury trial as to whether he or she is gravely disabled. Under these circumstances, the court may extend the temporary conservatorship to a maximum of six months to accommodate the resolution of the matter.

### **Welf. & Inst. Code, § 5352.3 - Additional Detention Pending Filing of Petition**

If an LPS conservatorship is recommended while a person is undergoing intensive treatment, and additional time is needed both to file a petition for temporary conservatorship and for the court to establish a temporary conservatorship, that person may be held at the treatment facility up to three days beyond date upon which the intensive treatment was to end.

### **Welf. & Inst. Code, § 5352.4 - Conservatorship During Appeal of Judgment**

An appeal of an order establishing a conservatorship does not stay the conservatorship. This happens only if the appellate court stays the execution of judgment.

### **Welf. & Inst. Code, § 5352.5 - Initiating Conservatorship Proceedings**

“[O]nly the county’s designated conservatorship investigation officer may file and prosecute a petition to establish an LPS conservatorship.” (*Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, 1360–1361; see Welf. & Inst. Code, § 5352.5.)

### **Welf. & Inst. Code, § 5352.6 - Treatment Plan Following Conservatorship**

An individualized treatment plan must be completed within ten days after the conservatorship is established, unless treatment is found not to be appropriate. The treatment plan must include the goals for the treatment, criteria by which to judge the progress toward those goals, and a review plan.

### **Welf. & Inst. Code, § 5353 - Temporary Conservator**

A temporary conservator is responsible for making the arrangements to provide a proposed conservatee with food, shelter, and care pending the outcome of the conservatorship proceedings. The preference is for arrangements that allow the proposed conservatee to return to his or her home, family, or friends. However, a temporary conservator may also require a proposed conservatee to be detained in a facility where he or she can receive intensive treatment. Should that occur, the proposed conservatee has the right to judicial review.

### **Welf. & Inst. Code, § 5354 - Alternatives to Conservatorship**

The conservatorship investigation officer must investigate all available alternatives to conservatorship, and must only recommend a conservatorship if no suitable alternatives are available. The officer must prepare a report for the court containing his or her recommendations prior to the conservatorship hearing. The trial court is not required to follow those recommendations. (See *County of Los Angeles v. Superior Court* (2013) 222 Cal.App.4th 434, 454.)

### **Welf. & Inst. Code, § 5355 - Designating a Conservator**

If the recommendation of the conservatorship investigation officer is conservatorship, the officer’s report must designate the most suitable person or entity to serve as conservator.

### **Welf. & Inst. Code, § 5357 - Conservator Powers and Conservatee Disabilities**

The conservatorship investigation officer’s report must lay out the powers of the conservator, as well as make recommendations for or against the imposition of certain enumerated disabilities on

the proposed conservatee. Those disabilities include possessing a license to operate a motor vehicle, entering into contracts, refusing or consenting to treatment related to the grave disability, refusing or consenting to general medical treatment, possessing a firearm, and the right to vote.

That a person has been found gravely disabled or a conservatorship imposed does not in-and-of-itself support the imposition of disabilities. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1578.) “The party seeking conservatorship has the burden of producing evidence to support the disabilities sought . . .” (*In re Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 612.)

### **Welf. & Inst. Code, § 5358 - Placement of Conservatee**

This code section provides the framework for determining the placement of a conservatee based on which of the two definitional categories of “gravely disabled” (see Welf. & Inst. Code, § 5008, subd. (h)(1)) the conservatee falls into.

### **Welf. & Inst. Code, § 5358.3 - Contesting Rights Denied Conservatee**

A conservatee may petition the court for a hearing to contest the rights he or she was denied. Such a hearing does not include a trial by jury.

### **Welf. & Inst. Code, § 5358.7 - Conservatee Challenge to Placement or Confinement**

A conservatee’s challenge to his or her placement or confinement shall be heard either in the county where the conservatorship was established or where the conservatee is placed or confined.

### **Welf. & Inst. Code, § 5359 - Alternative Placement**

If it is determined that the conservatee no longer needs the level of care or treatment provided by the facility at which he or she was placed, the conservator has seven days to find an alternative placement. If, due to unusual circumstances, an alternative placement cannot be found in seven days, the conservator has thirty days in which to find an alternative placement. Failing that, the conservator must work with the person in charge of the facility to determine the earliest date by when an alternative placement will be found.

### **Welf. & Inst. Code, § 5361 - Terminating Conservatorship**

A conservatorship automatically expires one year after the conservator is appointed. At that time, if the conservator determines that conservatorship is still required, he or she may petition the court for reappointment for another year.

### **Welf. & Inst. Code, § 5362 - Notice of Impending Termination**

Sixty days prior to the automatic expiration of a conservatorship, the superior court clerk must give notice to the conservator, the conservatee, the conservatee’s attorney, and the professional

person in charge of the facility where the conservatee resides. If the conservator does not petition to reestablish the conservatorship, the conservatorship is terminated.

### **Welf. & Inst. Code, § 5364 - Rehearing on Status as Conservatee**

A conservatee may petition for a rehearing as to his or her status as a conservatee. If that petition is denied, the conservatee must wait six months before filing another petition. The reason for the six-month limitation is that without the limitation, the purpose of an LPS conservatorship would be frustrated due to insufficient finality to allow the treatment to begin. (See *Henreid v. Superior Court* (1976) 59 Cal.App.3d 552, 555.)

### **Welf. & Inst. Code, § 5369 - Return of Competency when Criminal Charges Pending**

When a conservatee with criminal charges pending recovers his or her competence, he or she shall be immediately returned to the court where those charges are pending. Within two court days, the court shall hold a hearing to determine whether the defendant is to be admitted to bail or released on his or her own recognizance pending the conclusion of the criminal proceedings.

### **Welf. & Inst. Code, § 5370 - Initiating Conservatorship when Charged with Offense**

A conservatorship proceeding may be initiated for any person charged with an offence.

### **Welf. & Inst. Code, § 5372 - Ex Parte Communications**

Other than some enumerated exceptions, unless otherwise stipulated to, there shall be no ex parte communications between any party (or attorney for the party) and the court during a conservatorship proceeding.

## **Jury Instructions**

Jury instructions for matters related to the LPS Act are found within the Judicial Council of California Civil Jury Instructions (CACI), located on either Westlaw or Lexis Nexis, or on the court's website at <http://www.courts.ca.gov/partners/317.htm/>.

### **CACI 4000**

#### *Conservatorship—Essential Factual Elements*

[Name of petitioner] claims that [name of respondent] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [name of petitioner] must prove beyond a reasonable doubt all of the following:

1. That [name of respondent] [has a mental disorder/is impaired by chronic alcoholism];

2. That [name of respondent] is gravely disabled as a result of the [mental disorder/chronic alcoholism]; and

3. That [name of respondent] is unwilling or unable voluntarily to accept meaningful treatment.

Note: Element 3 may not be necessary in every case (see *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [“[M]any gravely disabled individuals are simply beyond treatment.”]).

### **CACI 4001**

#### *“Mental Disorder” Explained*

The term “mental disorder” is limited to those disorders described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. This book is sometimes referred to as “the DSM [current edition, e.g., “IV”].”

### **CACI 4002**

#### *“Gravely Disabled” Explained*

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

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

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

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

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

## **CACI 4004**

### *Issues Not to Be Considered*

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

## **CACI 4005**

### *Obligation to Prove - Reasonable Doubt*

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

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

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

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

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

(Note: But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409: “[W]e cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction.”)

## **CACI 4006**

### *Sufficiency of Indirect Circumstantial Evidence*

You may not decide that [name of respondent] is gravely disabled based substantially on indirect evidence unless this evidence:

1. Is consistent with the conclusion that [name of respondent] is gravely disabled due to [a

mental disorder/impairment by chronic alcoholism]; and

2. Cannot be explained by any other reasonable conclusion.

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [name of respondent] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [name of petitioner] must prove beyond a reasonable doubt each fact essential to your conclusion that [name of respondent] is gravely disabled.

Note: This instruction is to be read immediately after CACI No. 202, Direct and Indirect Evidence.

#### **CACI 4007**

##### *Third Party Assistance*

A person is not “gravely disabled” if [he/she] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs for food, clothing, or shelter.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [name of respondent] with food, clothing, or shelter. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

#### **CACI 4009**

##### *Physical Restraint*

The fact that respondent has been brought before the court in physical restraints is not evidence of grave disability. You must not speculate on the reasons for such restraints.

#### **CACI 4010**

##### *Limiting Instruction - Expert Testimony*

You have heard testimony by an expert witness regarding reports and statements from hospital

staff and other persons who have come into contact with [name of respondent]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.

### **CACI 4011**

#### *History of Disorder Relevant to the Determination of Grave Disability*

You must consider information about the history of [name of respondent]'s alleged mental disorder if you believe this information has a direct bearing on whether [he/she] is presently gravely disabled as a result of a mental disorder. Such information may include testimony from persons who have provided, or are providing, mental health or related support services to [name of respondent], [his/her] medical records, including psychiatric records, or testimony from family members, [name of respondent], or any other person designated by [name of respondent].

You must not consider any evidence that you believe is irrelevant because it occurred either too long ago or under circumstances that are not similar to those involved in this case.

### **CACI 4012**

#### *Concluding Instruction*

To find that [name of respondent] is gravely disabled, all twelve jurors must agree on the verdict. To find that [name of respondent] is not gravely disabled, only nine jurors must agree on the verdict. As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].

Note: This instruction is to be read immediately after CACI No. 5009, Predeliberation Instructions.

### **CACI 4013**

#### *Affidavit of Voter Registration*

If you find that [name of respondent], as a result of [a mental disorder/impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she] is capable of completing an affidavit of voter registration. To reach a verdict that [name of respondent] is not capable of completing an affidavit of voter registration, all 12 jurors must agree to that decision.

To complete an affidavit of voter registration, [name of respondent] must be able to state: the facts necessary to establish the [name of respondent] as a voter; [his/her] full name, residential address, and telephone number; [his/her] mailing address, if different from the residential address; [his/her] date of birth; the state or county of birth; [his/her] occupation; [his/her] political party affiliation; that [he/she] is not currently imprisoned or on parole for the conviction

of a felony; and whether [he/she] has been registered at another address, under another name, or is intending to affiliate with another party, and if so the prior address, name, or party.

Note: This instruction should be given if the petition prays for this relief.

## **Issue Spotting on Appeal<sup>2</sup>**

### **Procedural**

#### **1. No Issue Briefs (no *Wende/Anders* Review)**

In *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, the California Supreme Court held that on appeal from an LPS conservatorship finding, independent *Wende/Anders* court review was not required. (*Id.* at p. 537, 539.) However, the court did not hold that such independent court review was prohibited. (*Ibid.*) The court instructed that if appointed counsel in a conservatorship proceeding has found no arguable issues, counsel should file a brief informing the court he or she found no arguable issues to raise on appeal, and setting forth the applicable facts and law. (*Id.* at p. 544.) For further explanation and a sample brief, see “Procedures and Expectations for a *Ben. C.* Brief” on CCAP’s website at: [http://capcentral.org/civil/mental\\_health/index.asp](http://capcentral.org/civil/mental_health/index.asp)

#### **2. Convening a Competency Hearing**

Issue: Whether a trial court exceeds its jurisdiction by convening a competency hearing despite the state hospital deeming the patient unlikely to regain competency.

Holding: Yes - The trial court exceeds its jurisdiction because it does not have the authority to convene a competency hearing after the state hospital has found there is no substantial likelihood of restoration of competency.

*People v. Quiroz* (2016) 244 Cal.App.4th 1371: After finding the defendant incompetent to stand trial for assault with a deadly weapon, the trial court committed him to the state hospital for treatment. Later, the state hospital submitted its report certifying that the defendant remained incompetent, and was not likely to regain competency in the foreseeable future. Based on this, it recommended that LPS conservatorship proceedings be initiated. The public guardian declined to file a conservatorship petition. The trial court then ordered a competency hearing, concluded the defendant was restored to competency, reinstated criminal proceedings, and sentenced the defendant to a stipulated 10-year prison term pursuant to his no contest plea to battery with serious bodily injury. On appeal, the reviewing court held that the trial court could not convene a hearing on competency to stand trial after the state hospital certified that the defendant was not likely to regain competency. The only options available to the trial court at that point were to “initiate Murphy conservatorship proceedings, dismiss the charges against the defendant and

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<sup>2</sup> Note on Mootness: There is a high chance of issues becoming moot in LPS cases while awaiting disposition during the lengthy appellate process. Thus, in certain cases (e.g., an appeal from an extension of commitment), counsel should consider filing a motion for calendar preference to expedite the appeal. A sample motion can be found on CCAP’s website in the motion samples book at <http://www.capcentral.org/resources/motion.asp>.

order him released from confinement, or dismiss the charges and initiate other appropriate commitment proceedings under the LPS Act. [Citations.] The court [did] not have authority to convene a competency hearing at that point.” (*People v. Quiroz* (2016) 244 Cal.App.4th 1371, 1377.)

### **Standard of Review**

Questions involving jurisdiction—either actions absent jurisdiction or in excess of jurisdiction—present questions of law and thus are reviewed de novo. (*Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 485.)

### **Standard of Prejudice**

An assertion that the trial court acted in excess of its jurisdiction is reviewed for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Williams* (2006) 40 Cal.4th 287, 301.)

### **3. Establishing Grave Disability**

Issue: Whether a conservatorship can be established based on a perceived likelihood of future grave disability.

Holding: No - The person must be presently gravely disabled to establish a conservatorship.

*Conservatorship of Murphy* (1982) 134 Cal.App.3d 15: Murphy was under a conservatorship for alcoholism, which had rendered him gravely disabled. Upon the expiration of that conservatorship, the public guardian petitioned for reappointment as conservator. At the hearing, two expert witnesses testified. The first could not say unequivocally that Murphy still needed a conservator. This expert found that at the time of the hearing, Murphy was competent to manage his affairs. The concern was that if Murphy were released from conservatorship he would again indulge in alcohol and thus become, again, gravely disabled. The second expert also opined that at the present time Murphy was able to manage his own affairs—provide for food, clothing, and shelter—but that if Murphy were to return to consuming alcohol it was likely that he again would become greatly disabled. The trial court kept the conservatorship in place. The appellate court reversed, holding it was error for the trial court to find that Murphy was gravely disabled based on a likelihood that if he were released he would at some future time return to the use of alcohol.

### **Standard of Review**

“In conservatorship proceedings held pursuant to Welfare and Institutions Code section 5361, the standard to be applied is proof beyond a reasonable doubt . . . [thus] the appropriate standard [of review] is that applied in other proceedings where proof beyond a reasonable doubt is the standard in the trial court, namely the substantial evidence rule.” (*Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18.)

## Standard of Prejudice

Not applicable if there is insufficient evidence to support an order.

### 4. Recommending a Conservator

Issue: Whether the trial court abused its discretion in denying the conservatee's requested hearing on who should serve as conservator and instead peremptorily appointing the public conservator based on the investigator's recommendation.

Holding: Yes - The trial court abused its discretion because although the investigator's recommendation takes priority, the trial court should nonetheless evaluate the basis for that recommendation before making findings and orders.

*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082: 22-year-old Walker was diagnosed with chronic paranoid schizophrenia. When he did not take his medication, he suffered from bizarre and threatening behavior. Over a two-year period he lived first with his sister and brother-in-law, then his mother, and finally his father. During this period he did not take his medication. Following an LPS conservatorship hearing, a jury found the Walker gravely disabled. Over Walker's objection, the trial court appointed a public conservator without holding a hearing on whether a family member or friend should be preferred as a conservator. The conservatorship investigation report indicated that Walker's mother requested a neutral party as conservator and the investigator concurred. However, the report did not indicate that the investigator discussed the issue with Walker's father, sister, or brother-in-law, any of whom may have been willing and able to serve as the conservator. Accordingly, it was an abuse of discretion for the trial court to rely solely on the report.

## Standard of Review

Where a conservatorship has been imposed, it is an abuse of discretion for a trial court to deny a conservatee's request for a hearing on who should serve as conservator. (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088.)

## Standard of Prejudice

"The denial of a statutory right in a civil commitment proceeding is reviewed under [*People v. Watson* (1956) 46 Cal.2d 818]." (*People v. Hill* (2013) 219 Cal.App.4th 646, 652.)

### 5. Accepting a Stipulated Judgment

Issue: Whether it was error for the trial court to accept a stipulated judgment submitted by the attorneys without first conducting an on-the-record consultation with the conservatee and obtaining the conservatee's consent.

Holding: Yes - Accepting a stipulated judgment absent a hearing and the conservatee's consent is a violation of the conservatee's procedural due process rights.

*In re Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604: Christopher A. was found by a jury to be gravely disabled as a result of a mental disorder. Accordingly, the trial court established an LPS conservatorship. As part of its judgment, the trial court appointed a conservator, imposed disabilities, determined the least restrictive placement, and granted powers to the conservator. The trial court’s judgment was based on a proposed judgment submitted by the public conservator and the Christopher A.’s trial attorney. At no point did the trial court conduct a formal hearing on the issues of placement, disabilities, and powers of the conservator, or obtain on-the-record consent from Christopher A. regarding the contents and consequences of the judgment that had been approved by his attorney. The trial court’s failure to hold a hearing or obtain the conservatee’s consent was contrary to the principles of procedural due process given the significant liberty interests at risk by imposing LPS conservatorship. Thus, the portion of the judgment ordering the placement, disabilities, and conservator’s powers was reversed and remanded for further proceedings.

### **Standard of Review**

“The issue of whether procedural due process requires court consultation with and consent of a conservatee on the record before imposing the placement, disabilities, and conservator powers included in a judgment approved by the conservatee’s attorney (stipulated judgment) is a question of law. Therefore, we review this issue de novo.” (*In re Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 609–610.)

### **Standard of Prejudice**

“Federal constitutional violations in [civil commitment] proceedings are reviewed under [*Chapman v. California* (1967) 386 U.S. 18].” (*People v. Hill* (2013) 219 Cal.App.4th 646, 652.)

## **6. Choosing the Least Restrictive Placement**

**Issue:** Whether it was error for the trial court to not designate the least restrictive placement and to instead rely on the discretion given to a conservator to make that decision.

**Holding:** Yes - A trial court may not delegate to the conservator the court’s responsibility to make the initial designation of the least restrictive placement.

*In re Conservatorship of Amanda B.* (2007) 149 Cal.App.4th 342: A petition was filed to establish an LPS conservatorship for Amanda B. Following a jury trial, Amanda B. was found to be gravely disabled. As part of the trial court’s judgment and order, the court set Amanda’s level of placement as a “Locked Facility or Board and Care.” However, the trial court’s order did not meet the statutory requirement that it select the “least restrictive placement” for the conservatee. Rather, the order was ambiguous because it provided two different levels of care. By stating the least restrictive placement as a locked facility *or* board and care, the trial court failed to designate the least restrictive placement and instead impermissibly delegated its duty to the conservator. Accordingly, the matter was reversed and remanded to the trial court to designate a single level of placement.

## Standard of Review

Welfare and Institutions Code section 5358, subdivision (a)(1)(A), requires that the trial court designate the least restrictive alternative placement. A failure to do so is an error of law. On appeal, pure questions of law are reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

## Standard of Prejudice

A reviewing court “typically [applies] a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when [the court] deem[s] the error reversible per se. This practice derives from article VI, section 13 of the California Constitution, which provides: ‘No judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ ” (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.)

## Jury Instructions

### 1. Use of Physical Restraints

Issue: Whether the trial court must instruct the jury as to the use of physical restraints.

Holding: Yes - If the restraints are visible to the jury, the trial court has a sua sponte duty to instruct the jury that the restraints should have no bearing in the jury’s determination. If the restraints are not visible, then the instruction is upon the conservatee’s request.

*Conservatorship of Warrack* (1992) 11 Cal.App.4th 641: Although LPS trials are civil in nature, they share common elements with criminal trials including the prohibition against physical restraints in the presence of the jury. This means that a proposed LPS conservatee in a jury trial may not be shackled unless the trial court follows the procedures outlined in *People v. Duran* (1976) 16 Cal.3d 282. First, the proposed conservatee may not be shackled absent facts on the record that justify the trial court’s decision to require shackles. Second, where the trial court determines that a proposed conservatee must be shackled, and those shackles are visible, the court must sua sponte instruct the jury that the shackles are not evidence of disability.

## Standard of Review

“The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.” (*People v. Duran* (1976) 16 Cal.3d 282, 291.)

## Standard of Prejudice

The failure to sua sponte instruct on the use of physical restraints must be prejudicial to require reversal. (*Conservatorship of Warrack, supra*, 11 Cal.App.4th 641, 648.) To be prejudicial, it

must be “reasonably probable that a different result would have occurred if the instruction had been given.” (*Id.* at p. 649; see *People v. Watson* (1956) 46 Cal.2d 818.)

## **Due Process**

### **1. Imposing Special Disabilities**

Issue: Whether grave disability in-and-of-itself is sufficient to impose special disabilities upon a conservatee.

Holding: No - The conservator has the burden of producing evidence to support the special disabilities sought.

*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572: As part of its reappointment order extending Walker’s LPS commitment another year, the trial court reimposed the previously imposed special disabilities. On appeal, Walker argued that substantial evidence did not support the reimposition of the special disabilities. Respondent argued that any issue related to the special disabilities had been forfeited due to a failure to offer any evidence on the subject. The reviewing court pointed out that respondent had overlooked that it was its burden to produce evidence supporting the special disabilities sought. Further, the fact that Walker remained gravely disabled was not in-and-of-itself sufficient to satisfy the evidentiary requirements for imposing special disabilities. Because no factual basis was specifically offered to support the disabilities imposed, the reviewing court remanded the matter for further proceedings on the question of special disabilities to be imposed.

### **Standard of Review**

Challenges to the sufficiency of the evidence for a conservatorship are reviewed under the substantial evidence test. (*Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18.)

### **Standard of Prejudice**

Not applicable if there is insufficient evidence to support an order.

### **2. Request for Substitute Appointed Counsel**

Issue: Whether *People v. Marsden* (1970) 2 Cal.3d 118 applies to a proposed LPS conservatee who requests substitute appointed counsel.

Holding: Yes - Due process of law requires that a conservatee who requests substitute appointed counsel be afforded the full array of *Marsden* procedures as applied in the criminal courts.

*In re Conservatorship of Estate of David L.* (2008) 164 Cal.App.4th 701: During the bench trial on the question of David L.’s grave disability, and in his absence, the public defender informed the court that David L. had requested substitute counsel and summarized the reasons for the request. The request was denied. On appeal, David L. argued that his right to effective assistance

of counsel was violated when the trial court denied his *Marsden* motion without providing him the opportunity to be personally heard. The public guardian countered that the *Marsden* procedures applied in the criminal courts, including the opportunity to personally be heard, did not apply to LPS proceedings. The reviewing court held that while LPS proceedings are civil in nature, the reasoning expressed in *Marsden* is equally applicable to LPS conservatorship proceedings. Thus, a trial court must afford a prospective LPS conservatee a full opportunity to state the reasons for requesting substitute counsel in accordance with *Marsden*.

### **Standard of Review**

Questions of whether a due process violation occurred during a hearing on a petition to establish an LPS conservatorship are legal issues subject to de novo review. (*In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 142.)

### **Standard of Prejudice**

“[A]lthough the right to effective assistance of counsel in [commitment] proceedings is statutory, that right is protected by the due process clause of the federal Constitution. [Citation.] Accordingly, reversal is required unless [it can be found that] the denial of [a] defendant’s right to bring a *Marsden* motion harmless beyond a reasonable doubt [under *Chapman v. California* (1967) 386 U.S. 18].” (*People v. Hill* (2013) 219 Cal.App.4th 646, 652–653.)

## **3. Right to a Jury Trial**

Issue: Whether LPS commitment proceedings require the trial court to obtain a personal waiver of the right to a jury trial from the proposed conservatee.

Holding: Yes - The state due process clause requires a trial court to both advise a proposed conservatee of his or her right to a jury trial on the question of grave disability and to obtain a personal waiver before a court trial may be held.

*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378: Following the Public Guardian’s petition to be reappointed LPS conservator for Heather W., the trial court set the case for a court trial. Heather W.’s counsel did not request a jury trial. While the trial court advised Heather W. of her right to testify, it did not advise her that she had a right to a jury trial. The trial court’s failure to advise Heather W. of her right to a jury trial was error requiring reversal and remand for further proceedings. An LPS commitment order involves a conservatee’s loss of liberty. Thus, in an LPS conservatorship proceeding, the trial court must obtain a personal waiver of a jury trial from the conservatee. Absent such a waiver, the court must accord the conservatee a jury trial unless the court finds the conservatee lacks the capacity to make such a decision.

### **Standard of Review**

Questions of whether a due process violation occurred during a hearing on a petition to establish an LPS conservatorship are legal issues subject to de novo review. (*In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 142.)

## Standard of Prejudice

A trial court's error as to the question of whether a proposed conservatee's fundamental right to decide who hears the evidence to make the finding as to grave disability—a judge or a jury—is not harmless. (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 384.) “[A] complete denial of the defendant’s right to a jury trial on the entire cause in a commitment proceeding—is not susceptible to ordinary harmless error analysis and automatically requires reversal.” (*People v. Tran* (2015) 61 Cal.4th 1160, 1169.)

## Pending/Recent Supreme Court Cases

When reviewing an appellate record for issues, always check the recent and pending issues in both the California and United States Supreme Courts. CCAP maintains a directory of such cases at: [http://www.capcentral.org/high\\_court/index.asp](http://www.capcentral.org/high_court/index.asp). In addition, an attorney should perform his or her own research. The California Supreme Court maintains a list of pending issues at: <http://www.courts.ca.gov/13648.htm>. For information on cases pending in the United States Supreme Court, that website directs viewers to the American Bar Association’s webpage for its publication “Preview,” subtitled “Comprehensive Coverage of the U.S. Supreme Court.” The link is: [http://www.americanbar.org/publications/preview\\_home/alphabetical.html](http://www.americanbar.org/publications/preview_home/alphabetical.html). Although this site is organized by case, not issue, there is a wealth of information if one drills down, including questions presented, merit briefs, and amicus briefs. Each case also includes a “source” link, which directs the viewer to the U.S. Supreme Court’s docket for that case.

### California Supreme Court

No pending or recently decided LPS conservatorship cases. (As of August 21, 2016.)

### United States Supreme Court

No pending or recently decided LPS conservatorship cases. (As of August 21, 2016.)