Recent Case Law Developments in LPS Act Conservatorship Appeals

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Deadline for Holding a Trial Is Directory, but a Prejudicial Delay Is Subject to a Motion to Dismiss

A proposed LPS conservatee has a statutory right to a court or jury trial on a petition to appoint or reappoint a conservator. (Welf. & Inst. Code, § 5350, subd. (d)(1) & (d)(3).)[1] If a timely request for a court or jury trial is made, "trial shall commence within 10 days of the date of the demand, except that the court shall continue the trial date for a period not to exceed 15 days upon the request of counsel for the proposed conservatee." (§ 5350, subd. (d)(2).)

Non-compliance with this 10-day deadline routinely occurs. The question then arises: what, if anything, is the remedy for a violation of this speedy trial-like right?

In *Conservatorship of James M.* (1994) 30 Cal.App.4th 293, where trial on a reappointment petition did not take place until 14 days after the trial demand and the proposed conservatee did not request the delay, the reviewing court concluded "the 10-day time limit in section 5350 is directory, not mandatory, so that the trial court had jurisdiction to conduct the reappointment hearing."[2]

James M., however, did not close the door completely on obtaining relief from the failure to hold a timely trial. "[M]indful that a conservatee has a strong interest in a prompt determination of issues raised by a reappointment

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[1] All future statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] "Traditionally, the question of whether a public official's failure to comply with a statutory procedure should have the effect of invalidating a subsequent governmental action has been characterized as a question of whether the statute should be accorded 'mandatory' or 'directory' effect. If the failure is determined to have an invalidating effect, the statute is said to be mandatory; if the failure is determined not to invalidate subsequent action, the statute is said to be directory." (*People v. McGee* (1977) 19 Cal.3d 948, 958.) "Generally speaking, 'the "directory-mandatory" distinction is concerned only with whether a particular remedy – invalidation of the ultimate governmental action – is appropriate when a procedural requirement is violated[.]'" (*People v. Allen* (2007) 42 Cal. 4th 91, 101, quoting *Morris v. County of Marin* (1977) 18 Cal.3d 901, 909, fn. 4.) "Unless the Legislature clearly expresses a contrary intent, time limits are typically deemed directory." (*Allen*, *supra*, 42 Cal.4th at p. 102.)

petition," *James M.* observed that "this interest is sufficiently protected by the undisputed power of the superior court to dismiss the reappointment petition where the delay in the proceedings has proved prejudicial to the conservatee's interests."

Conservatorship of Jose B. (2020) 50 Cal.App.5th 963 also recently held that "the trial court's failure to commence trial within 10 days of Jose's jury trial demand does not support dismissal of the petition" because "[t]he time limit in section 5350, subdivision (d)(2), is directory, not mandatory[.]" *Jose B.* further rejected the conservatee's due process claim, citing a lack of prejudice. However, the appellate court emphasized that its holding "does not mean trial courts should blithely continue conservatorship trials for their judicial convenience." To the contrary, "the trial court should state on the record its justification for continuing a trial beyond the statutory deadline." Moreover, "[i]f a proposed conservatee contends he or she has been prejudiced by the delay, the proper remedy is to file a motion to dismiss for lack of a speedy trial."

In order to preserve an appellate challenge to the delay in holding in a timely trial, defense counsel must object to the delay and, in light of the prejudice requirement to obtain relief on appeal, upon making an objection counsel should provide an offer of proof as to how the delay has prejudiced the proposed conservatee. (See *Conservatorship of M.M.* (2019) 39 Cal.App.5th 496, 501 [finding the delay issue not preserved for appeal].)

A Proposed Conservatee Must Personally Waive Their Jury Right

In 2015, the California Supreme Court addressed the procedures that trial courts must follow prior to holding a bench trial in two types of civil commitment proceedings where the person has a statutory right to a jury trial. In *People v. Blackburn* (2015) 61 Cal.4th 1113, after examining the statutory framework for extending a mentally disordered offender (MDO) commitment (see Pen. Code, § 2972)[3], the Supreme Court held: "the trial court must advise the MDO defendant personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the defendant unless the court finds substantial evidence – that is, evidence sufficient to raise a reasonable doubt – that the defendant lacks the

[3] The Legislature recently replaced the term "mentally disordered offender" with "offender with a mental health disorder" (OMHD). (See Pen. Code, § 2962, subd. (d)(3); Stats.2019, ch. 9 (A.B.46), § 7.)

capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision." In a companion decision issued on the same day, the Supreme Court reached the identical conclusion with regard to extended insanity commitment proceedings in *People v. Tran* (2015) 61 Cal.4th 1160.

Shortly after *Blackburn* and *Tran*, in an LPS conservatorship appeal, the Fifth District Court of Appeal held that a trial court erred when it accepted a waiver of the proposed conservatee's jury trial right over his objection and request. (*Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241.)

To the extent one might be tempted to read *Kevin A.*'s adoption of the *Blackburn/Tran* personal waiver right in the LPS conservatorship context as limited to the scenario where the proposed conservatee personally objected to their attorney's waiver or otherwise expressed a desire for a jury trial, Division Six of the Second District Court of Appeal rejected such an argument in *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378. The Court of Appeal in *Heather W.* turned to *Blackburn*, *Tran*, and Probate Code section 1828, subdivision (a)(6), to find "the trial court erred by (1) not advising Heather W. of her right to a jury trial and (2) not obtaining Heather W.'s on-the-record personal waiver of that right without a finding that she lacked the capacity to make a jury waiver." Although the proposed conservatee in *Heather W.* did not ask for a jury trial, the Court of Appeal "decide[d] what is implicit in the holding in [] *Kevin A.* In conservatorship proceedings pursuant to the LPS Act, the trial court must obtain a personal waiver of a jury trial from the conservatee, *even when the conservatee expresses no preference for a jury trial*." (Emphasis added.)

Heather W. also suggested that *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265 – which found no error in the trial court's acceptance of counsel's waiver of the conservatee's jury trial right where "counsel stated he had spoken with his client and she wished to waive a jury trial" – was wrongly decided by emphasizing that it was "decided before *Blackburn* and *Tran*[.]" (*Heather W.*, *supra*, 245 Cal.App.4th at p. 384.) In this regard, it is noteworthy that *Mary K.* is cited once in *Blackburn* – in the dissent. (*Blackburn*, *supra*, 61 Cal.4th at p. 1148 (dis. opn. of Cantil-Sakauye, C.J.).) The Chief Justice cited *Mary K.* for the proposition that "[w]hen a defendant is represented by counsel, it is generally reasonable to assume that counsel has previously discussed the option of a jury trial with the defendant." (*Ibid*.) But her citation to *Mary K.* was not enough to sway the majority.

In *Conservatorship of B.C.* (2016) 6 Cal.App.5th 1028, on the other hand, the reviewing court held that *probate conservatorships* "do not require a personal waiver of the conservatee's right to a jury trial because the proceedings pose no threat of confinement and are conducted 'according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the proposed conservatee.' (§ 1827.) B.C.'s attorney had authority to waive a jury trial on her behalf, even if the trial court failed to recite that B.C. had a right to a jury."

A Jury Waiver Must Be Knowingly and Intelligently Made

Not only must there be a personal advisement of the general right to a jury trial, but the trial court must provide advisements sufficient to establish that a subsequent waiver of the right to a jury trial was knowing and intelligent. (See, e.g., *People v. Blancett* (2017) 15 Cal.App.5th 1200, 1205-1206 [finding reversible error in an OMHD proceeding where "the record indicates that Blancett did not waive his right to a jury trial with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it"].)

Although there is no particular script a trial court must follow in securing a jury trial waiver, a "robust oral colloquy" is important in eliciting a knowing, intelligent, and voluntary waiver. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 169.) The California Supreme Court has been recommended that trial courts advise defendants of "the basic mechanics of a jury trial in a waiver colloquy," including jury selection and jury unanimity. (*Ibid.*) More "[s]pecifically, . . . advisements [should] include statements that a jury consists of 12 members of the community; a defendant, through counsel, may participate in jury selection; all jury members must unanimously agree upon a verdict; and, if a defendant waives the right to a jury trial, the judge alone will decide [the truth of the allegations]." (*Blancett*, *supra*, 15 Cal.App.5th at pp. 1205-1206, citing *Sivongxxay*, *supra*, 3 Cal.5th at p. 169.)

It is "also recommended that the trial court take additional steps to ensure that the defendant comprehends what the jury trial right entails, e.g., ask the defendant whether he has consulted with his attorney, whether counsel has explained the differences between a jury and a bench trial, and whether the defendant understands the right he is waiving." (*Blancett*, *supra*, 15 Cal.App.5th at p. 1206, citing *Sivongxxay*, *supra*, 3 Cal.5th at pp. 169-170; see also *People v. Daniels* (2017) 3 Cal.5th 961, 990 (lead opn. of Cuellar, J.) [stating that, in analyzing the validity of a jury trial waiver, the appellate

court should look at the nature of the colloquy, the presence of counsel and references to discussions between defendant and counsel regarding the jury right, and the contents of any written waiver].)

While no published opinion has applied the principles announced in these recent cases to LPS conservatorship proceedings, decades ago, referring to the jury trial right advisements prescribed in Probate Code section 1828, subdivision (a)(6), *Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030 emphasized that "[t]he reason for the requirement of these formal advisements of the right to jury trial on the record is to safeguard against the loss of the fundamental right to jury trial whether by inadvertence, neglect, or paternalism." Thus, there is no reason to believe the aforementioned authorities do not apply with equal force in the LPS conservatorship context.[4]

A Stipulated Judgment Requires the Proposed Conservatee's Express Consent

In *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, Division One of the Fourth District Court of Appeal addressed "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[.]" *Christopher A.* answered this question in the affirmative and held: "Because of the significant liberty interests at risk by imposing LPS conservatorships, we conclude the court must obtain on the record the consent of the proposed conservatee regarding the terms and consequences of a stipulated judgment."

No published opinion has addressed whether this same rule applies at the grave disability stage. However, there does not appear to be any principled basis not to apply *Christopher A.* to a stipulated agreement to establish or reestablish an LPS conservatorship, as a proposed conservatee's liberty interests are at least as substantial, if not more substantial, at the grave disability adjudication phase of the proceedings as they are at the ensuing proceedings to determine placement, disabilities, and conservator powers.

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[4] There is also no reason to believe the advisement and waiver requirements do not apply with equal force to proceedings to *re*establish an LPS conservatorship. (See *Benvenuto*, *supra*, Cal.App.3d at p. 1038 ["the advisement of right to jury trial . . . is also applicable in proceedings to reestablish an LPS conservatorship," as "[t]he right to jury trial is no less important in such a proceeding that at the inception of the conservatorship"].)

One unpublished opinion has so held. (See *Conservatorship of D.B.* (July 30, 2015, A143412) 2015 WL 4575500.)

The holdings of these cases are consistent with Probate Code section 1828, subdivision (a)(6), pursuant to which the trial court must inform the proposed conservatee that he or she "has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel." (Prob. Code, § 1828, subd. (a)(6).) "After the court so informs the proposed conservatee and prior to the establishment of the conservatorship, the court shall consult the proposed conservatee to determine the proposed conservatee' s opinion concerning . . . (1) [t]he establishment of the conservatorship . . . [and] (2) [t]he appointment of the proposed conservator." (Prob. Code, § 1828, subd. (b).)

The California Supreme Court favorably cited *Christopher A.* for the proposition that an "attorney may not, *without the client's express consent*, enter into a stipulated judgment regarding placement, disabilities, and conservator powers." (*Conservatorship of John L.* (2010) 48 Cal. 4th 131, 156, emphasis in original.) *John L.* held that "a client who tells his appointed attorney he is unwilling to attend the hearing and does not wish to contest a proposed LPS conservatorship may reasonably expect his attorney to report such information to the court, with binding effect."[5]

Unlike the proposed conservatee in *Christopher A.*, the proposed conservatee in *John L.* was *voluntarily* absent when the stipulation was entered. This distinction is important because a proposed conservatee presence at a conservatorship trial is mandatory except in three scenarios, one of which is "[w]here the court investigator has reported to the court that the proposed conservatee has expressly communicated that the proposed conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the establishment of the conservatorship, and (iii) does not object to the proposed

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[5] One unpublished opinion has cast doubt on this aspect of *John L.*'s holding: "*John L.*'s reliance on the general presumption under Code of Civil Procedure section 283, subdivision 1, that an attorney in an ordinary civil action may bind his client (*John L.*, at p. 147) is not compelling in light of *Blackburn*'s rejection of that same principle as applied to jury trial waivers in civil commitment proceedings[.]" (*Conservatorship of D.C.* (June 27, 2019, A156144) 2019 WL 2647314.)

conservator or prefer that another person act as conservator, and the court makes an order that the proposed conservatee need not attend the hearing." (Prob. Code, § 1825, subd. (a)(3).) Because LPS conservatorship proceedings do not involve a "court investigator," *John L.* concluded that the proposed conservatee's attorney may perform the functions of the court investigator set forth in Probate Code section 1825, subdivision (a)(3), again relying on Code of Civil Procedure section 283, subdivision 1.

In *Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, the reviewing court distinguished *Christopher A.* and found no procedural due process violation where the trial court accepted the sworn statement of the proposed conservatee's attorney that the proposed conservatee willingly and knowingly consented to reestablishment of her conservatorship without a hearing on the matter.

Similarly, in *Conservatorship of Deidre B.* (2010) 180 Cal.App.4th 1306, the Court of Appeal distinguished *Christopher A.* and found no procedural due process violation where trial counsel provided the court with a sworn stipulation confirming that she had communicated with the proposed conservatee and that the proposed conservatee consented to reestablishment of the conservatorship as well as the proposed placement and disabilities without a formal hearing.

The common denominator running through all of these cases is that, whether the stipulation is personally entered by the proposed conservatee in open court or related by counsel orally or in writing in their absence, the stipulation must convey the person's *express* consent to the stipulation.

Whether the County Must Prove the Proposed Conservatee Is Unwilling or Unable Voluntarily to Accept Meaningful Treatment

"When the professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment determines that a person in his or her care is gravely disabled as a result of mental disorder or impairment by chronic alcoholism *and is unwilling to accept, or incapable of accepting, treatment voluntarily*, he or she may recommend conservatorship to the officer providing conservatorship investigation of the county of residence of the person prior to his or her admission as a patient in such facility." (§ 5352.) In addition, prior to the initiation of each of the shorter term commitments authorized under the LPS Act, the law requires a determination that the person is unwilling or unable

to voluntarily accept treatment. (See, e.g., §§ 5150, 5200, 5202, 5206, 5250, 5260, 5270.15.)

The California Supreme Court granted review in 2019 to resolve the following question: "Must the trier of fact find, beyond a reasonable doubt, that the objector is unwilling or unable voluntarily to accept meaningful treatment before a conservator may be appointed, or reappointed, under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.)?" (*Conservatorship of K.P.* (2019) 39 Cal.App.5th 254, review granted Nov. 26, 2019, S258212.)

Judicial Council of California Civil Jury Instructions (CACI) 4000 informs the jury that it must find beyond a reasonable doubt that a person is (1) gravely disabled (2) as a result of mental disorder and then provides an optional third element: "That [name of respondent] is unwilling or unable voluntarily to accept meaningful treatment."

Like the Court of Appeal in *K.P.*, *Conservatorship of D.P.* (2019) 41 Cal.App.5th 794 recently held that a proposed conservatee's "unwillingness or inability to accept voluntarily meaningful treatment was not a required element under section 5008, subdivision (h)(1)." Similarly, *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1469 held: "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability[.]"

On the other side of the equation, *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082 held: "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." In addition, it has been held that the LPS Act "necessarily require[s] the trier of fact . . . to determine the question of grave disability, not in a vacuum, but in the context of suitable alternatives, upon a consideration of the willingness and capability of the proposed conservatee to voluntarily accept treatment[.]" (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 325.)

Some of the case law – including *K.P.* and *D.P.* – finding no required third element concerning voluntary acceptance of meaningful treatment draws a

distinction between initial appointment and reappointment proceedings, suggesting if this element is ever required that would only be the case in initial appointment proceedings. This reasoning is questionable in light of the case law holding that, "[d]uring the reappointment proceedings, the conservatee is afforded the same procedural rights as at the appointment proceedings." (*Baber v. Superior Court* (1980) 113 Cal.App.3d 955, 960.) Moreover, there may be a colorable equal protection challenge to this distinction, as there is no rational basis for this distinction, let alone a compelling state interest justifying it.

K.P. will resolve this conflict shortly. Oral argument has been calendared in the Supreme Court for April 7, 2021.

A Viable Third Party Assistance Defense Need Not Establish the Third Party Can Manage the Proposed Conservatee's Symptoms Completely

"[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." (§ 5350, subd. (e)(1).)

In *Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, Division Two of the First District Court of Appeal concluded: "The totality of the evidence presented in this case thus did not support the court's finding that appellant was gravely disabled under the LPS Act. On the contrary, the evidence demonstrated that he would be able to 'survive safely without involuntary detention with the help of [a] responsible [friend] who [was] both willing and able to help provide for [his] basic personal needs for food, clothing, or shelter.' (§ 5350, subd. (e)(1).)"

In reaching this conclusion, *Jesse G.* observed that "'[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis.'" The Court of Appeal also rejected the notion that a person who works outside the home – and therefore cannot watch over the proposed conservatee at all hours – cannot meet the third party assistance defense requirements. "Were it otherwise, the offer of assistance by an employed third party would rarely if ever be enough to avoid

a finding of grave disability, which would defeat the purpose of section 5350, subdivision (e)(1), and of the LPS Act generally[.]"

Limitations on Expert Testimony Relating Case-Specific Hearsay Apply

In *People v. Sanchez* (2016) 63 Cal.4th 665, the California Supreme Court unanimously disapproved its own prior precedents that incorrectly perpetuated the notion that jurors can consider hearsay case-specific facts related by an expert witness solely for the purpose of evaluating the basis for the expert's opinion and without considering those facts for their truth. *Sanchez* reconsidered the mental gymnastics the prior rule asked jurors to perform when presented with hearsay expert basis testimony and concluded the rule could no longer stand. The Court in *Sanchez* recognized that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 682.) Now, according to *Sanchez*, "[l]ike any other hearsay evidence, [such case-specific hearsay] must be properly admitted through an applicable hearsay exception" or by way of "a properly worded hypothetical question." (*Id*. at p. 684.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686, emphasis in original.)

Appellate courts throughout the state have applied *Sanchez* to virtually every type of civil commitment proceeding, and LPS conservatorships are no exception. (See *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274; *Conservatorship of S.A.* (2018) 25 Cal.App.5th 438 [citing *K.W.* for the proposition that "*Sanchez* applies to conservatorship proceedings"].)

Perhaps in no area other than gang prosecutions is there more case law directed at hearsay expert testimony than in the civil commitment context. Long before *Sanchez*, appellate courts had grappled for years with the admissibility of case-specific hearsay offered as the basis for an expert's opinion in civil commitment cases. (See, e.g., *People v. Campos* (1995) 32 Cal.App.4th 304; *People v. Dodd* (2005) 133 Cal.App.4th 1564; *People v. Dean* (2009) 174 Cal.App.4th 186; *People v. Landau* (2016) 246 Cal.App.4th 850.)

Prior to *Sanchez*, it had been held that "[a] qualified expert is entitled to render an opinion on the criteria necessary for [a civil] commitment, and may

base that opinion on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject." (*Dodd*, *supra*, 133 Cal.App.4th at p. 1569; see also *Campos*, *supra*, 32 Cal.App.4th at pp. 307-308 ["Psychiatrists, like other expert witnesses, are entitled to rely upon reliable hearsay, including the statements of the patient and other treating professionals, in forming their opinion concerning a patient's mental state"].)

But even before *Sanchez Campos* also held that "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*Campos*, *supra*, 32 Cal.App.4th at p. 308.) *Campos* remarked that the reason behind this rule is "obvious." (*Ibid.*, internal quotation marks and citations omitted.) "The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse." (*Ibid.*, internal quotation marks and citations omitted.)

In civil commitment proceedings, include LPS conservatorship proceedings, where the evidence offered against the proposed committee is often substantially – if not wholly – comprised of expert testimony, the prohibitions against admitting case-specific hearsay and the contents of reports prepared by nontestifying experts play a uniquely important role in ensuring the reliability and the sufficiency of the evidence in support of commitment.

In order to overcome the *Sanchez* rule, the county often moves to introduce the proposed conservatee's psychiatric records from current or prior placements under the business records exception to the hearsay rule. (See Evid. Code, § 1271.) It is true that "[h]ospital . . . records, if properly authenticated, fall within the umbrella of the business record exception." (*Dean*, *supra*, 174 Cal.App.4th at p. 197, fn. 5.) But even when a document is admissible under the business records (or public records) exception to the hearsay rule, hearsay statements contained within the document are not admissible unless they, too, fall within an established hearsay exception. (See, e.g., *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 192 ["the summaries, even if they had been established as business records, themselves contained hearsay statements regarding the employees reasons for leaving for which no exception had been established"], citing *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1205 ["[w]hen multiple hearsay is offered, an exception for each level of hearsay must be found in order for the evidence to be admissible"] and *People v. Ayers* (2005) 125 Cal.App.4th 988, 995 [same].) According to Evidence Code section 1201: "A

statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule." (Evid. Code, § 1201; see also *People v. Arias* (1996) 13 Cal.4th 92, 149 ["multiple hearsay is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception"]; accord *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1074.)

Thus, when the county attempts to bring in the contents of a report under the business records exception, even if the report itself meets the requirements of the exception, much of its contents may be excludable as multiple hearsay. Objections should be made to individual items within the reports that are not themselves admissible under any hearsay exception.

Which brings us back to *S.A.*, a decision that found no error in the admission of entries in a business record written by a staff member lacking personal knowledge of the underlying information observed by other staff members. (*S.A.*, *supra*, 25 Cal.App.5th at p. 448.) *S.A.* should not be accepted as gospel. It appears to be irreconcilable with the multiple hearsay rule and creates an easy end-run around *Sanchez* for the county. Once multiple level hearsay contained in psychiatric records is deemed admissible, the county's experts can relay their case-specific contents without running afoul of *Sanchez*. Defense counsel should move to redact entries within business records that do not themselves fall within a hearsay exception and, to the extent trial courts refuse to make certain redactions in reliance on *S.A.*, should argue *S.A.* was wrongly decided. Such objections must be made to preserve these issues for appeal.

S.A. also left open another question: whether section 5008.2 – which allows consideration of "the patient's medical records as presented to the court, including psychiatric records" – created a hearsay exception for psychiatric records in LPS conservatorship proceedings. (See *S.A.*, *supra*, 25 Cal.App.5th at p. 447 ["we do not reach Public Guardian's further contention that section 5008.2 operates as an independent exception to the hearsay rule when medical records are offered to prove the historic course of a proposed conservatee's mental disorder"].) This theory of admissibility – particularly as it purports to pertain to multiple level hearsay – should be contested vigorously.

The Legislature knows how to create such hearsay exceptions in the civil commitment context, and it is obvious when it has chosen to do so. (See, e.g., § 6600, subd. (a)(3) ["The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals"]; Pen. Code, § 2962, subd. (f) ["The details underlying the commission of the offense that led to the conviction, including the use of force or violence, causing serious bodily injury, or the threat to use force or violence likely to produce substantial physical harm, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals"].)

Whereas the legislative history of section 6600, subdivision (a)(3), clearly indicates the Legislature intended to create an exception for the use of multiple level hearsay in sexually violent predator (SVP) civil commitment proceedings (see *People v. Otto* (2001) 26 Cal.4th 200, 208), the legislative history of section 5008.2 (see Stats.1986, c. 872, § 1) does not provide such clarity.

Moreover, after stating that the historical course of the person's mental disorder shall be considered, the statute provides: "The historical course shall include, but is not limited to, evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, *or evidence voluntarily presented by family members, the patient, or any other person designated by the patient*." (§ 5008.2, subd. (a).) By parity of reasoning, if section 5008.2 created a multiple level hearsay exception for medical records, then it also created one for any evidence presented by family members or the proposed conservatee, opening the gates to endless hearsay the Legislature could not have intended to be admitted at trial. Accordingly, this provision must be interpreted as an illustrative list of the types of evidence the trier of fact may consider when assessing the historical course of a proposed conservatee's mental disorder – subject to the ordinary hearsay rules set forth in the Evidence Code – not as a hearsay exception itself.

Whether the County Can Call the Proposed Conservatee as a Witness

No provision of the LPS Act grants a prospective conservatee the absolute right to refuse to testify, nor does the constitutional right not to testify that applies to criminal proceedings apply to conservatorship trials by virtue of the Due Process Clause. (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 550.)[6]

The California Supreme Court, however, has granted review to answer the following question: "Does equal protection require that persons subject to a conservatorship under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code, § 5350) have the same right to invoke the statutory privilege not to testify as persons subject to involuntary commitments under Penal Code section 1026.5 after a finding of not guilty by reason of insanity?" (*Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, review granted June 24, 2020, S261812.)

"[T]he constitutional foundation underlying the [Fifth Amendment privilege against self-incrimination] is the respect a government – state or federal – must accord to the dignity and integrity of its citizens." (*Miranda v. Arizona* (1966) 384 U.S. 436, 460.) When the privilege is viewed through this lens, its relevance to civil commitment proceedings is self-evident, as "civil commitment to a mental hospital, despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with criminal prosecutions." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223.) Indeed, the California Supreme Court recently recognized that "[t]he right not to testify in a proceeding where one is a defendant is a right that *could* meaningfully apply in any type of adversarial proceeding, though only in criminal cases is it constitutionally guaranteed." (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 832, emphasis in original.)

The Legislature granted the right to refuse to testify to individuals found not guilty by reason of insanity facing extended civil commitment proceedings (NGIs) by virtue of Penal Code section 1026.5, subdivision (b)(7), which expressly incorporates all constitutional rights afforded criminal defendants into the extended insanity commitment scheme. (*Id.* at p. 832.) Since *Hudec* so construed Penal Code section 1026.5, subdivision (b)(7), appellate courts

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[6] "This holding does not, in any way, intimate that a prospective conservatee will be compelled to answer questions which may incriminate him in a criminal matter." (*Ibid.*)

throughout the state have held that persons facing SVP and OMHD civil commitment proceedings are similarly situated to NGIs with respect to compelled testimony and therefore may have an equal protection right to refuse to testify as well. (See *People v. Flint* (2018) 22 Cal.App.5th 983, 990-991.)

In *E.B.*, the Supreme Court must decide whether individuals facing LPS conservatorship proceedings are similarly situated to NGIs when it comes to the right not to be compelled to testify. If so, the Court must then determine whether the county has met its burden under the strict scrutiny standard of establishing the state has a compelling interest that justifies this disparate treatment and that forced testimony is necessary to accomplish the purposes of the LPS Act.

Currently, there is a split of authority on this issue. In *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190, Division One of the First District Court of Appeal held that proposed LPS conservatees do not have an equal protection right to refuse to testify because they are not similarly situated to NGIs for this purpose. In *E.B.*, Division Five of the First District Court of Appeal disagreed with *Bryan S.* and concluded the two groups are similarly situated with respect to compelled testimony and the government has yet to justify the differential treatment accorded them by the Legislature. Division Two of the First District Court of Appeal joined *E.B.*'s reasoning and holding in *Conservatorship of J.Y.* (2020) 49 Cal.App.5th 220, 223 (J.Y.), review granted Aug. 19, 2020, S263044.

While LPS conservatorships are primarily intended to protect the well-being of the committed person (*Michael E.L. v. County of San Diego* (1986) 183 Cal.App.3d 515, 525, and NGI proceedings are primarily aimed at public protection (*People v. Lara* (2010) 48 Cal.4th 216, 228, fn. 18, both civil commitment schemes are mechanisms for providing involuntary treatment to individuals with mental disorders and may "assure in many cases an unbroken and indefinite period of state-sanctioned confinement." (*Roulet*, *supra*, 23 Cal.3d at p. 224; see also *People v. McIntyre* (1989) 209 Cal.App.3d 548, 553.)

Bryan S. quoted *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137-138, for the proposition that "'[t]he extension of the privilege [not to testify] to an area outside the criminal justice system . . . would contravene both the language and purpose of the privilege.'" (*Bryan S.*, *supra*, 42 Cal.App.5th at 197.) But this statement from *Cramer* cannot be reconciled with the Supreme Court's

more recent pronouncements in *Hudec* that "[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her" and "the right not to testify does *not* take its very meaning from the criminal context[.]" (*Hudec*, *supra*, 60 Cal.4th at p. 830, quotation marks omitted and emphasis added.)

In fact, the United States Supreme Court has identified important concerns underlying the right not to testify above and beyond forbidding forced incrimination. For example, "'[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass [a defendant] to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.'" (*Griffin v. California* (1965) 380 U.S. 609, 613, quoting *Wilson v. United States* (1893) 149 U.S. 60, 66.)

The appellate courts in *E.B.* and in *J.Y.* both understood that denying a proposed civil committee of any kind the right to refuse to testify implicates similar concerns of liberty, procedural fairness, and personal dignity. As *E.B.* pointed out: "LPS conservatees may have a different criminal history than NGI's, [OMHDs], and SVP's, but at root, like those groups, they are committed against their will for mental health treatment – possibly for the rest of their lives." (*E.B.*, *supra*, 45 Cal.App.5th at p. 997.) Therefore, the Court of Appeal reasoned, "before they are asked to be agents of their own incarceration, the state should be required to justify its decision to treat LPS conservatees differently with respect to compelled testimony." (*Ibid.*, internal quotation marks omitted.)

The unequal treatment afforded proposed LPS conservatees in terms of compelled testimony is not justified by a heightened need for truth in conservatorship proceedings. As *E.B.* explained: "This interest in an accurate verdict exists in all involuntary commitment schemes – indeed, it might be argued that the interest is even greater when the mental illness results in the person being a danger to others." (*E.B.*, *supra*, 45 Cal.App.5th at p. 996.)

"The proposed establishment of a conservatorship under the grave disability provisions of the LPS Act threatens a massive curtailment of liberty." (*Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1565.) In addition, the "'right to dignity'" is a core value protected by the LPS Act. (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1314, quoting

§ 5325.1, subd. (b).) The LPS Act must also be read "to safeguard against the loss of . . . fundamental right[s] . . . whether by inadvertence, neglect, or paternalism." (*Benvenuto*, *supra*, 180 Cal.App.3d at p. 1039.) Subjecting a person to involuntary inpatient treatment based on their compelled testimony over their express objection is paternalistic and a near total rejection of their dignity and personal autonomy. It is difficult to reconcile this coercive practice with the avowed aims of the LPS Act.

While the Legislature did not grant proposed LPS conservatees the right to be free from compelled testimony, the state has extended this right to NGIs. Given the state's unambiguous intention to protect the dignity and liberty interests of proposed LPS conservatees, equal protection principles cannot be construed to tolerate extending the right to refuse to testify to NGIs but not to proposed LPS conservatees. Whatever differences there may be between these two groups, they are similarly situated with respect to compelled testimony.

As of February 8, 2021, *E.B.* has been fully brief by the parties in the Supreme Court. An amicus brief in support of E.B. has been filed by Disability Rights California, California Association of Mental Health Patients' Rights Advocates, California Public Defenders Association, American Civil Liberties Union, American Civil Liberties Union of Northern California, Disability Rights Education and Defense Fund, Law Foundation of Silicon Valley and Mental Health Advocacy Services. The County Counsels' Association of California intends to file an amicus brief in support of the Public Guardian.

There are other important reasons – not addressed in the *E.B.* Supreme Court briefing – to oppose the county's efforts to call a proposed conservatee as part of its case-in-chief. First, if the proposed conservatee is to testify at all, there is no justification for ceding the course and scope of direct examination to the county. Defense counsel should guide the proposed conservatee's testimony. Second, by calling the proposed conservatee and eliciting responses that provide independent evidence that *Sanchez* would bar their expert from testifying to, the county can lay the foundation for their expert to bring in evidence that would otherwise be inadmissible. And lastly, the erroneous and unwanted admission of a person's own words against them is potentially the most damaging evidence the government can present to the trier of fact. The prejudicial impact of wrongly admitted compelled testimony is similar to that of an improperly admitted coerced confession in a criminal case. As the California Supreme Court has noted:

> The recognition that confessions, "as a class," "[a]lmost invariably" will provide persuasive evidence of a defendant's guilt ([citation omitted]), and that such confessions often operate "as a kind of evidentiary bombshell which shatters the defense" ([citation omitted]), simply means that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial under the traditional harmless-error standard.

(*People v. Cahill* (1993) 5 Cal.4th 478, 503.) Thus, whether a person is a defendant in a criminal case or in a civil commitment proceeding, when the person does not wish to take the stand and it is not in their best interests to do so, a prohibition on the state forcing their testimony is an essential protection against an unwanted outcome.

Jurors Should Not Be Instructed on the Possible Consequences of a Grave Disability Finding

In *Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, "[t]he trial court's instructions informed the jury about the duration and types of treatment that may be ordered if a conservatorship is established." The Court of Appeal held that "[i]t was error to give instructions concerning possible consequences should a party prevail" because "information about the consequences of conservatorship for P.D. was irrelevant to the only question before P.D.'s jury: whether, as a result of a mental disorder, he is unable to provide for his basic personal needs for food, clothing, or shelter."

Proposed LPS Conservatees Have a Right to a *Marsden* Hearing

Conservatorship of David L. (2008) 164 Cal.App.4th 701 held that "a prospective conservatee who requests substitute appointed counsel must be given a full opportunity to state the reasons for his request in accordance with [*People v. Marsden* (1970) 2 Cal.3d 118], and the trial court's failure to afford David a full opportunity to state his reasons for requesting substitute counsel here violated his right to due process of law." This is so because even if a person facing civil commitment has no constitutional right to effective assistance of counsel under the Sixth Amendment, once the right to counsel has been conferred by statute, a proposed committee has an interest in the

effective assistance of counsel that is protected by the Due Process Clause of the federal Constitution.

A Grave Disability Finding Does Not Automatically Render a Person Incompetent to Make Medical Decisions

The LPS Act "expressly guarantees a number of legal and civil rights, and provides that involuntarily detained patients retain all rights not specifically denied under the LPS." (*Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 526.) "Unless specifically stated, a person [detained under] the provisions of this part shall not forfeit any legal right or suffer legal disability by reason of the provisions of this part." (§ 5005.) "Every person involuntarily detained ... shall be entitled to all rights set forth in this part and shall retain all rights not specifically denied him[.]" (§ 5327.)

Thus, "[a] conservatee retains the right to refuse or consent to treatment related specifically to his or her being gravely disabled, and to routine medical treatment, unless the court specifically orders to the contrary." (*Edward W., supra*, 99 Cal.App.4th at p. 534.) "[T]he right of persons not adjudicated incompetent to give or withhold consent to medical treatment is protected by the common law of this state [citations] and by the constitutional right to privacy." (*Riese*, *supra*, 209 Cal.App.3d at p. 1317.) "Our Legislature has made it very clear that the patient's right to agree to or refuse a recommended treatment does not vanish even when the patient is involuntarily committed." (*Conservatorship of Pamela J.* (2005) 133 Cal.App.4th 807, 820.)

"The party seeking conservatorship has the burden of producing evidence to support the disabilities sought" (*Conservatorship of George H.* (2008) 169 Cal.App.4th 157), and before a trial court may impose a special disability denying a conservatee the right to refuse or consent to treatment related to their grave disability the county must prove the person lacks such competence by clear and convincing evidence (*Riese*, *supra*, 209 Cal.App.3d at p. 1322).

Division Two of the First District Court of Appeal set forth the test for determining whether a person lacks the capacity to make their treatment decisions such that an involuntary medication order is appropriate:

> Judicial determination of the specific competency to consent to drug treatment should focus primarily upon three factors: (a)

> whether the patient is aware of his or her situation (e.g., if the court is satisfied of the existence of psychosis, does the individual acknowledge that condition); (b) whether the patient is able to understand the benefits and the risks of, as well as the alternatives to, the proposed intervention . . .; and (c) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given patients whose informed consent is sought (§ 5326.2) and otherwise participate in the treatment decision by means of rational thought processes.

(*Riese*, *supra*, 209 Cal.App.3d at pp. 1322-1323.)

Two recent cases have found substantial evidence in support of trial court orders finding conservatees incapable of providing informed consent to treatment: *Conservatorship of S.A.* (2020) 57 Cal.App.5th 48 and *Conservatorship of D.C.* (2019) 39 Cal.App.5th 487.[7] *D.C.*, however, contains an important admonition:

> We recognize the trial court did not state in its order the specific factors it relied upon in finding by clear and convincing evidence that D.C. was incompetent to give or withhold informed consent. (*Riese*, *supra*, 209 Cal.App.3d at pp. 1322-1323, 271 Cal.Rptr. 199.) On this record, we find no reversible error. However, in future proceedings, we believe the trial court should state its findings as to the factors set out in *Riese*, so as to leave no doubt the court has adhered to the great value our society places on the autonomy of the individual, and has thoughtfully executed the Legislature's intent to place the forcible administration of powerful psychotropic drugs within the purview of the judiciary, rather than the medical profession.

(*D.C.*, *supra*, 39 Cal.App.5th at p. 495.)

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[7] For a case reversing imposition of the special disability denying a conservatee the right to refuse treatment related to their grave disability, see *Conservatorship of Walker* (1989) 206 Cal.App.3d 1572 [reversing even though the county's expert testified that "appellant did not think he was ill, [that] he would not take his medication or seek treatment[, and that w]ithout the medication, appellant would become agitated so that he would be unable to take care of his own physical needs"].)

It is the Duty of the Court to Set the Initial Level of Placement

"Section 5358 provides the framework for placement of a conservatee." (*Conservatorship of Amanda B.* (2007) 149 Cal.App.4th 342, 351.) Pursuant to section 5358, subdivision (a)(1)(A), "the court is to designate the least restrictive alternative placement for the conservatee." (*Ibid.*) Moreover, section 5358, subdivision (c)(1), provides, in relevant part: "if the conservatee is not to be placed in his or her own home or the home of a relative, first priority shall be to placement in a suitable facility as close as possible to his or her home or the home of a relative. For the purposes of this section, suitable facility means the least restrictive residential placement available and necessary to achieve the purpose of treatment." (§ 5358, subd. (c)(1).) Section 5358, subdivision (c)(1), "specifically identifies the court as having the responsibility to set the appropriate level of placement[.]" (*Amanda B.*, *supra*, 149 Cal.App.4th at p. 351.) The court may consider the conservatorship investigation report in determining "the least restrictive and most appropriate alternative placement for the conservatee." (§ 5358, subd. (c)(1).)[8] Lastly, "the fact that a conservator possesses the discretion to move the conservatee to a less restrictive placement does not eliminate the duty of the court to set the initial level of placement." (*Amanda B.*, *supra*, 149 Cal.App.4th at p. 351.)

[8] In *Conservatorship of Manton* (1985) 39 Cal.3d 645, however, the California Supreme Court held that "there is no statutory authorization for the introduction of the [conservatorship investigation] report during trial" on the question of grave disability.