The Wonderland of LPS –

“But I don’t want to go among mad people,” Alice remarked.
“Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.”
“How do you know I’m mad?” said Alice.
“You must be,” said the Cat, “or you wouldn’t have come here.”

A. LPS Act: An Overview

Division 5 of the California Welfare and Institutions Code addresses community mental health services. Part 1 of Division 5 (Welf & I C §§5000–5550) is the Lanterman-Petris-Short Act (LPS Act). The provisions of the LPS Act cover services to individuals who are gravely disabled, *i.e.,* persons

- Who are in need of treatment but are unwilling or incapable of accepting it voluntarily (Welf & I C §5352); and
- Who are recommended for conservatorship by the professional in charge of an LPS evaluation or treatment facility designated by the county (Welf & I C §5352).

In addition, the LPS Act provides for involuntary treatment of persons who are a danger either to others or themselves. Welf & I C §5150. Whether gravely disabled or a danger to self or others, a person involuntarily detained must be released within 72 hours unless he or she agrees to voluntary treatment, is certified for intensive treatment, or has an LPS conservator or LPS temporary conservator appointed

Conservatorships for gravely disabled persons are covered in Welf & I C §§5350–5371. The LPS Act also addresses protection of persons with mental health disorders and persons impaired by chronic alcoholism who may not be judicially committed (Welf & I C §§5002–5006); confidentiality of information and records obtained in the course of treatment under the LPS Act (Welf & I C §§5328–5330); patients' rights (Welf & I C §§5325–5326.1, 5327); informed consent (Welf & I C §§5326.2–5326.5); convulsive therapy (Welf & I C §§5326.7–5326.95); and psychosurgery (Welf & I C §5326.6).

Probate Code procedures (Prob C §§1400–3925) govern LPS conservatorships, except when they are superseded by specific provisions of the LPS Act. Welf & I C §5350. See §23.35. LPS conservatorships are initiated by public officials, not by private individuals. See §§23.45–23.46. LPS conservators have extensive powers, including placement powers authorized by the court under Welf & I C §§5358 and 5358.6. See §§23.99–23.125. LPS conservators with estate powers have the general powers defined in Prob C §§2400–2586, and such independent powers defined in Prob C §§2590–2595 as the court may authorize. Welf & I C §5357.

B. Chart: Summary of LPS Act - Holds who does them anymore?

Glendale Adventist (Address: 1509 Wilson Terrace, Glendale, CA 91206; Phone: (818) 409-8000) or Harbor UCLA (Address: 1000 W Carson St, Torrance, CA 90509; Phone: (310) 222-2345)are two hospitals that can make the referral. Another private hospital that can make the referral is Las Encinas (Address: 2900 E Del Mar Blvd, Pasadena, CA 91107; Phone: (626) 795-9901).

C. Definition of Gravely Disabled

1. Inability, as Result of Mental Health Disorder, to Provide for Basic Personal Needs

"Gravely disabled," as defined in Welf & I C §5008(h), is a condition in which a person, as a result of a mental health disorder or impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter. The "historical course" of the patient's mental disorder must be considered when applying the definition of mental disorder. Welf & I C §5008.2, Resistance to involuntary commitment does not, in itself, imply presence of a mental disorder. Welf & I C §5256.4(e). The assistance of willing and responsible family members, friends, or other third parties must be considered when assessing whether the person can provide for his or her needs.

2. Evidence of Third Party Assistance Must Be Considered . Unless family, friends, and others specifically indicate in writing their willingness and ability to help, however, they must not be considered willing and able to provide this help. Welf & I C §5350(e)(2). The writing requirement is intended to alleviate the painful necessity of public testimony from family members who are unwilling to provide third party assistance. Welf & I C §5350(e)(3). However, if the third party member does want to testify, it seems that a writing would not be required. See, *e.g.,* *Conservatorship of Johnson* (1991) 235 CA3d 693, 699 n5; Even if a third party offers assistance, the court may still determine that the assistance offered, though well-intentioned, is not sufficient to permit the conservatee to survive safely. *Conservatorship of Johnson,* 235 CA3d at 698 (court upheld finding of grave disability despite conservatee's mother's offer of assistance; conservatee's condition was severe and required placement in locked psychiatric facility). However, one trial court found that the proposed conservatee's condition was not "beyond an ordinary person's ability to deal with" because the person was able to provide the proposed conservatee with food, clothing, and shelter on a regular basis. *Conservatorship of Jesse G.* (2016) 248 CA4th 453

3. Issue Is Whether LPS Conservatee Is Presently Gravely Disabled When determining a person's present ability to provide for his or her needs, the courts of appeal have differed about whether consideration should be given to whether the person will, of his or her own volition, continue to take needed medication. When involuntary treatment is successful, it can significantly ameliorate the symptoms of mental illness, which affects the individual's functioning. This usually means that the person being treated has responded positively to medications. However, a significant legal question is posed when treating professionals are of the opinion that the symptoms will recur if the person does not continue involuntary treatment. This issue usually arises during litigation to establish, terminate, or reappoint an LPS conservatorship.

Some courts have held that a person is gravely disabled if, but for medication, the conservatee would be gravely disabled, and the conservatee would not take the medication without supervision. *Conservatorship of Guerrero* (1999) 69 CA4th 442; *Conservatorship of Walker* (1989) 206 CA3d 1572. Other courts have found it error to find a conservatee gravely disabled based on the possibility of failing to take medication in the future. *Conservatorship of Benvenuto* (1986) 180 CA3d 1030; *Conservatorship of Murphy* (1982) 134 CA3d 15 (conservatee was not gravely disabled; likelihood that conservatee would return to alcoholism was insufficient ground for reappointment of a conservator because pivotal issue is whether conservatee is *presently* gravely disabled, not the perceived likelihood of future relapse).

Grave disability can be proven by showing the conservatee cannot provide for food, clothing, or shelter. *Conservatorship of Carol K.* (2010) 188 CA4th 123, 135 ("grave disability can be based on an inability to provide for food, clothing, *or* shelter. It does not require a finding that a proposed conservatee cannot provide for her food, clothing, *and*shelter").

The court noted that proof must be made beyond a reasonable doubt and must be reviewed on appeal under the substantial evidence rule. *Conservatorship of Murphy, supra*. The involuntary commitment power of the state should be used sparingly. The threshold is not whether the proposed conservatee would benefit from conservatorship, but whether his or her basic needs for food, clothing, and shelter cannot be met except by imposing some limitations on that person's liberty. See *Conservatorship of Jesse G.* (2016) 248 CA4th 453.

In *Conservatorship of Guerrero, supra,* decided after *Walker* and *Benvenuto,* the court clarified the evidence that would be considered for a determination of present grave disability (69 CA4th at 445):

- The patient lacks insight of his or her mental illness;
- The patient feels that he or she does not need medication;

- The patient cannot provide for himself or herself without medication; and
- The patient will not take medication without supervision of a conservator.

NOTE: Under Welf & I C §5008.2, the historical course of the proposed LPS conservatee's disorder may be considered in determining whether a person is gravely disabled.

D. Appointment of Counsel in LPS Proceedings – Ethical Issues if no panel appointment.

E. ADMINISTRATION OF ANTIPSYCHOTIC DRUGS BEFORE LPS CONSERVATORSHIP

1. Right of Involuntarily Detained Person With Capacity to Refuse Antipsychotic Drugs

2. Riese Hearings to Determine Capacity to Refuse to Consent to Antipsychotic Drugs: Procedure

If a person who is subject to detention under Welf & I C §5150, §5250, §5260, or §5270.15 (refuses treatment with antipsychotic medication, and the treating physician believes that the patient does not have capacity to refuse to consent to antipsychotic medication, the physician may file a petition for a capacity hearing under Welf & I C §§5332–5337. See Welf & I C §§5325.2, 5333. The hearing, often referred to as a *Riese* hearing (*Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303, is held only before the appointment of an LPS conservator. Capacity hearings are conducted by a superior court judge, a court-appointed commissioner or referee, or a court-appointed hearing officer. Commissioners, referees, and hearing officers appointed to conduct capacity hearings must be attorneys. Welf & I C §5334(c).

3. Riese Hearings: Standards for Determining Capacity to Give Informed Consent

The factors that the *Riese* court relied on in determining whether a patient has the capacity to give informed consent are as follows (*Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303, 1322):

- Is the patient aware of his or her situation?
- Can the patient understand the benefits and risks of, and the alternatives to, the proposed treatment?
- Can the patient understand and knowingly and intelligently evaluate the information required to be given patients whose voluntary informed consent is sought (by Welf & I C §5326.2), and otherwise participate in the treatment decisions through rational thought processes?

In determining whether the individual has the capacity to make informed medical consent decisions, the court or hearing officer must decide whether the person is able to understand and to act knowingly and intelligently on the information available (including the importance of any alternatives to the treatment). The issue is not whether the treatment is definitively needed or whether it is the least drastic alternative; it is strictly a question of capacity.

The evidence on these points must be clear and convincing. 209 CA3d at 1322.

F. WRIT OF HABEAS CORPUS BEFORE LPS CONSERVATORSHIP ESTABLISHED

At any time during the period of intensive treatment, a person who has been certified for 14 days under Welf & I C §5250, for an additional 14 days as suicidal under Welf & I C §5260, or for an additional 30 days of intensive treatment under Welf & I C §5270.10, or who has been detained by a temporary conservator under Welf & I C §5352.1, is entitled to petition the court for a writ of habeas corpus to obtain release from involuntary commitment. Welf & I C §§5275, 5353. Persons detained on a 72-hour hold under Welf & I C §5150 do not have a specific statutory right to a writ of habeas corpus. They do, however, retain their constitutional right to petition the court for a writ of habeas corpus. Cal Const art I, §11; US Const art I, §9, cl 2. As a practical matter, writs are rarely filed challenging the 72-hour hold, because the time is too short. Either the patient or the patient's representative may initiate the writ process by requesting release to any staff member of the facility. Welf & I C §5275. The staff member receiving the release request must provide to the patient a form substantially like the form set out in Welf & I C §5275 and must notify the superior court in which the facility is located as soon as possible. With regard to a writ requested while the person is on a Welf & I C §5250, §5260, or §5270.10 hold, venue is limited to the superior court for the county in which the treatment facility is located or in which the 72-hour evaluation was conducted. Welf & I C §5276. Also, a conservatee detained in a treatment facility by a temporary LPS conservator pending determination of conservatorship has a right to judicial review by habeas corpus under the procedures in Welf & I C §§5275–5278. Welf & I C §5353. The issues are similar to those in writ hearings conducted before the establishment of a temporary conservatorship, e.g., during a 72-hour or 14-day hold. Although there is no statute that so specifies, most counties allow only one writ hearing per statutory hold, including the temporary conservatorship unless the conservatee alleges a significant change in circumstances since the previous writ hearing that amounts to extraordinary circumstances. See *In re Gandolfo* (1984) 36 C3d 889.

G. Petition for Appointment of Conservator and Temporary LPS Conservator

1. Responsibility for Preparation and Filing of Report and Petition

Welfare and Institutions Code §5352 provides that, if a county's conservatorship investigator concurs with the original recommendation, he or she files the petition for an LPS conservatorship. However, practice varies from county to county. In some counties, if the conservatorship investigator concurs in the recommendation for conservatorship, he or she prepares the petition and forwards it and the report to the appropriate agency (the county counsel, district attorney, or other attorney designated by the county) to review and sign the petition, and then file it and the report. See Welf & I C §§5352, 5354. In other counties, county counsel prepares the petition, which is filed with the doctor's recommendation and the request for temporary conservatorship while the conservatorship investigator prepares and files his or her report. When, as is often the case, the conservatorship investigator's report is not yet ready, the conservatorship investigator may still send the referral to the county counsel who prepares the petition. In this situation, the conservatorship report must be presented before the hearing on the petition. Welf & I C §5354.

2. Confidentiality

Information obtained in the course of providing state-funded mental health services is subject to the special protections of the Lanterman-Petris-Short Act (Welf & I C §§5000–5550), and in particular of Welf & I C §§5328–5330. For a detailed discussion of the Lanterman-Petris-Short Act and the release of mental health information, see California Hospital Association (CHA), Mental Health Law (11th ed 2017). Patient designation. Welfare and Institutions Code §5328 provides that information obtained in the course of providing state-funded mental health services is confidential and may be disclosed only for the limited purposes specified in the statute, unless the patient, with the

approval of his or her mental health professional, or the patient's parent, guardian, guardian ad litem, or conservator designates persons to whom information or records may be released. Welf & I C §5328(b), (d). In practice, only the patient consent will result in disclosure, until an LPS Conservator is appointed. [NOTE: There is no prescribed form for such a designation; an authorization that complies with the HIPAA Privacy Rule should suffice, as long as the approval of the mental health professional is also obtained if the patient is making the designation.]

Exceptions to patient designation. Section 5328 creates several exceptions to the requirement for patient designation. These include the following: Communications are permitted between qualified professionals (including members of multidisciplinary teams) providing services or referrals, or in the course of conservatorship proceedings. However, the consent of the patient, or his or her guardian or conservator, must be obtained before information or records may be disclosed by a professional employed by a facility to a professional not employed by the facility who does not have the medical or psychological responsibility for the patient's care. Welf & I C §5328(a), (l). When the patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim, information may be released to the potential victim and to law enforcement agencies. Welf & I C §5328(r); Tarasoff v Regents of Univ. of Cal. (1976) 17 C3d 425. Disclosure to the courts as needed for the administration of justice. Welf & I C §5328(f). NOTE: The Lanterman-Petris-Short Act has no provision for disclosure to parties to an action in response to a subpoena duces tecum. Only disclosure to the court is permitted. Disclosure may be made to the patient's attorney on presentation of a release signed by the patient. If the patient is unable to sign the release, the facility's staff may release the information to the attorney once it has satisfied itself of the attorney's identity and that the attorney does represent the patient's interests. Welf & I C §5328(j).

Other privacy laws that severely restrict accessibility to private information about the conservatee include the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104–191, 110 Stat 1936), particularly the HIPAA privacy provisions found in 42 USC §1320d–2 and 45 CFR pts 160, 164. California's Confidentiality of Medical Information Act (CMIA) (CC §§56–56.37) also contains provisions limiting disclosure of protected medical information. For a comparison of HIPAA and Welf & I C §5328, see California Hospital Association (CHA), California Health Information Privacy Manual, available on the CHA website, http://www.calhospital.org (click on Publications/Manuals). See also CHA Consent Manual (published annually), If the LPS conservatee is in treatment at an alcohol or drug abuse treatment facility, then 45 CFR pt 2 (governing the confidentiality of alcohol and drug abuse patient records) may also apply.

3. Venue: County in Which Patient Resided Before Admission The proper venue for a petition for an LPS conservatorship is the superior court in the county of the person's residence, *i.e.,* where the patient resided before admission to an involuntary treatment facility. Welf & I C §5352. Although §5352 clarifies the venue question, it presents some logistical and procedural problems.

One problem is determining the person's "residence." It is not uncommon for the person to be found in a county different from his or her residence because the person intended to move to the county where the facility is located. In other cases, the person may already have been residing, before the hospitalization, at a temporary placement in the county where the facility is located although the permanent residence is in another county. The county where the patient has benefits directed may be considered the residence.

H. Relationship of LPS and Probate Code Conservatorship Appointments

1. LPS Conservator of the Person and Probate Conservator of the Estate No LPS conservatorship of the estate may be established if a Probate Code conservatorship of the estate already exists. Welf & I C §5350(c). In that case, an LPS conservator of the person only may be appointed, with the special power for placement in a mental health treatment facility against the will of the conservatee. This is the primary special power of an LPS conservatorship that a probate conservator of the person lacks. When the proposed conservatee has property requiring protection, some counties obtain the appointment of an LPS conservator of the person and a Probate Code conservator of the estate. Because LPS conservatorships automatically terminate after 1 year this may be a practical choice. The LPS conservatorship may be allowed to terminate automatically at the end of the year, or it may be continued by petitioning for reappointment if continued involuntary treatment is required while the more complicated estate conservatorship may continue without interruption under the Probate Code for as long as property management is needed.

2. Probate and LPS Conservators of the Person If there is already a Probate Code conservator of the person, an LPS conservatorship proceeding does not terminate the prior conservatorship but is concurrent with and superior to it. Welf & I C §5350(c). There is no legal reason that a Probate Code conservator or guardian of the person or another person cannot be appointed as LPS conservator. See Welf & I C §5350(c).

When the proposed conservatee has no property requiring conservatorship protection, some counties obtain the appointment of an LPS conservator of the person only. This appointment includes the power of involuntary placement in a mental health facility, which a Probate Code conservator of the person does not have. If, at the end of the 1-year period, the conservatee has recovered or has voluntarily accepted treatment and no longer requires involuntary placement, the conservatorship of the person may be allowed to terminate automatically.

I. Hearing or Trial

1. Hearing Within 30 Days The hearing for appointment of an LPS conservator may be held at any place and time on which the parties agree, as long as it is held within 30 days of the date the petition is filed. Welf & I C §§5118, 5365

2. Advising Conservatee of Right to Trial The proposed LPS conservatee must be given notice of the right to a court or jury trial on the issue of whether he or she is gravely disabled. Welf & I C §5350(d). See *Conservatorship of Benvenuto* (1986) 180 CA3d 1030. The court must get the proposed conservatee's on-the-record waiver of a jury trial. If no waiver is on the record, the court must make a finding that the proposed conservatee lacked the capacity to make a "knowing and voluntary" waiver of a jury trial.

3 When Demand Must Be Made The demand for a trial must be made within 5 days following the hearing on the conservatorship petition. If the demand is made before the date of the hearing on the conservatorship petition, the demand constitutes a waiver of the hearing. Welf & I C §5350(d). The 5-day deadline for demanding a trial is mandatory, and the superior court may not institute procedures purporting to reserve the right to request a trial beyond that deadline. *Conservatorship of Kevin M.* (1996) 49 CA4th 79. Jury fees are not required to be posted for an LPS conservatorship jury trial. *Conservatorship of the Person of John D.*(2014) 224 CA4th 410

4 When Trial Must Begin The court or jury trial "shall" begin within 10 days of the date of the demand, but may be continued for up to 15 days on the request of counsel for the proposed conservatee. Welf & I C §5350(d). The procedures in Welf & I C §5350(d) suggest that the trier of fact will begin to hear the matter within 60 days after the date of the petition. This calculation includes the 30-day requirement for the hearing (Welf & I C §5365), the right to demand a trial within 5 days after the hearing, the requirement to begin a jury or court trial within 10 days after the demand, and the option for the proposed conservatee's attorney to request a 15-day continuance of any trial. Welf & I C §5350(d). However, despite the "shall" language, the statute apparently is directory and not mandatory because it states no consequences or penalty for noncompliance with the 10-day requirement. See *Conservatorship of James M.* (1994) 30 CA4th 293. In practice, counties differ radically in their rules regarding when trials must commence. In some counties, trials must be held within 10 days from the date of demand for trial; in other counties, 30 days from the date of the demand. In still other counties, there is apparently no time limit, except the limitation that a temporary conservatorship cannot last more than 180 days

5. Standard and Burden of Proof That Person Is Gravely Disabled Whether the matter is heard in a nontestimonial hearing or at a court or jury trial, the burden is on the party seeking imposition (or reestablishment) of the conservatorship to prove that the proposed conservatee is gravely disabled beyond a reasonable doubt. *Conservatorship of Roulet* (1979) 23 C3d 219, criticized on other grounds in *People v Beeson* (2002) 99 CA4th 1393, 1404. See also *Conservatorship of Kevin M.* (1996) 49 CA4th 79; *Conservatorship of Johnson* (1991) 235 CA3d 693.

6. Evidence That Person Is Gravely Disabled. The rules of evidence applicable to civil trials apply at hearings and trials under the LPS Act. See Welf & I C §5350; Prob C §1827If live testimony is required, clinicians, most frequently psychiatrists and psychologists, are ordinarily called to give opinions about the proposed conservatee's mental condition. Although it is good practice to call the clinicians who have treated the proposed conservatee, it is not required under the LPS Act, and other forensic experts may testify. See Evid C §801. If the proposed conservatee refuses to cooperate with an examination by a clinician, it may be necessary to pursue an order under CCP §2032.310 to compel the conservatee to cooperate with the exam.

In *Conservatorship of G.H.* (2014) 227 CA4th 1435, the court reversed an order reappointing the Public Guardian as conservator of the person of G.H., because the trial court had erroneously imposed a terminating sanction on G.H. and entered judgment in the Public Guardian's favor. G.H. had requested an evidentiary hearing on the petition for reappointment and had refused to submit to a mental examination. The trial court entered an order holding that the failure to submit to a mental exam authorized the court to enter an evidentiary or terminating sanction under CCP §2032.410. The court of appeal reversed, holding that although the proceedings are civil in nature and a party could be subject to the sanction provisions of §2032.410, the Public Guardian had not made a motion to compel an examination under §2032.310. The sanction could only be imposed if the party violated a court order to submit to an examination and in this case, no such order had been made.

7. **Hearsay; Sanchez** An LPS conservatorship investigation report containing hearsay statements from doctors, relatives, and other third parties can be admitted at a hearing; to the extent that the report contains inadmissible hearsay, however, it cannot be admitted into evidence in a contested trial on the issue of whether the person is gravely disabled. Conservatorship of Manton (1985) 39 C3d 645. The Manton court held that a court may consider the report at the hearing because of the provision in Welf & I C §5354—which applies only to hearings—that the court may receive the report in evidence and may read and consider the contents in rendering its judgment. However, §5354 contains no exception to the general rules of evidence to allow use of the reports at contested trials. In the past a finding of grave disability at trial may be based on a psychiatrist's expert testimony derived from hearsay. Conservatorship of Isaac O. (1987) 190 CA3d 50; Conservatorship of Torres (1986) 180 CA3d 1159. See also Evid C §801(b); People v Campos (1995) 32 CA4th 304, 308. The expert witness may testify on direct examination as to the content of reports prepared or statements made by nontestifying nonexperts. The testifying expert can rely on another doctor's notes of his or her interview with the patient, but cannot rely on the other doctor's opinion as the basis for the testifying doctor's opinion. People v Bordelon (2008) 162 CA4th 1311 – this was all overruled by the recent landmark case of People v. Sanchez, 63 Cal.4th 665 (2016), where the California Supreme Court while holding that an expert witness could not relate case specific facts not within the experts personal knowledge, also held that "Nothing in our opinion today changes the basic understanding of the definition of hearsay." [Id. at 674.].

8. Historical Course of Disorder The "historical course" of the proposed conservatee's mental disorder must be considered if it directly bears on the determination of whether the person is gravely disabled. Welf & I C §5008.2. Historical course may include, but is not limited to, evidence presented by those who have provided, or are providing, mental health or support services to the patient, or evidence presented by family members or other persons designated by the patient. The court or hearing officer may exclude evidence it considers irrelevant because of the remoteness of time or dissimilarity of circumstances. Welf & I C §5008.2.

9. Evidence of Proposed Conservatee's Anticipated Refusal to Accept Medication The issue of a proposed conservatee's willingness to take medication is significant whenever the court has before it the issue of whether a person is gravely disabled, *i.e.,* establishing, terminating, or renewing an LPS conservatorship. Although a finding that the proposed conservatee is unable or unwilling to accept treatment is not a prerequisite to establishing an LPS conservatorship (*Conservatorship of Symington* (1989) 209 CA3d 1464), evidence that the proposed conservatee lacks insight into his or her mental illness, does not believe he or she needs medication and will not take medication without supervision, and as a result will be unable to provide for his or her own basic needs, may be sufficient to establish an LPS conservatorship. *Conservatorship of Guerrero* (1999) 69 CA4th 442 (jury instruction); *Conservatorship of Walker* (1989) 206 CA3d 1572. Conversely, evidence that a proposed conservatee is willing to accept medication will not preclude the establishment of a conservatorship. A trial court's failure to instruct the jury that a mental patient was willing to accept treatment was held not to be reversible error, because the instruction would serve only to prove further that she was gravely disabled. *Conservatorship of Law* (1988) 202 CA3d 1336.

10. No Fifth Amendment Right to Refuse to Testify In a contested proceeding, however, a proposed LPS conservatee does not have a Fifth Amendment right to refuse to testify at the proceeding to establish the conservatorship, because the trier of fact needs to be informed of the individual's relevant physical and mental characteristics. *Conservatorship of Baber* (1984) 153 CA3d 542. The *Baber* court drew an analogy between conservatorship trials and commitment hearings, because both serve the same public purpose and threaten the same liberty interest. Thus an individual in a conservatorship hearing, like a person with an intellectual disability in a commitment hearing, does not have the right to refuse to testify, despite the significant liberty interest at stake. See also *Conservatorship of Bones* (1987) 189 CA3d 1010

J POWERS, DUTIES, AND RIGHTS

An LPS conservator of the person and estate has the power of placement of the conservatee (see §§23.103–23.109), as well as the same general powers granted a Probate Code conservator under Prob C §§2400–2586, and any of the additional powers specified in Prob C §2591 that the investigating officer recommends and the court designates in its order of appointment. Welf & I C §§5357, 5360. He or she also has the same duties and responsibilities as those imposed on Probate Code conservators, including the duty of the conservator of the person, on the establishment of the conservatorship and annually thereafter, to photograph the conservatee and preserve the photos for identification purposes should the conservatee become lost (Prob C §2360). An LPS conservatee has a number of important statutory rights, including the right to an individualized treatment plan the right to test the legality of his or her detention the right to challenge placement and conditions of confinement rights regarding medical treatment and medications, and rights that affect his or her quality of life. An LPS conservatee does not automatically lose his or her right or privilege to possess a driver's license (Welf & I C §5357(a)), to enter into contracts (Welf & I C §5357(b)), to vote (Welf & I C §5357(c)), or to possess a firearm (Welf & I C §5357(f)). On the recommendations of the conservatorship investigator, however, the court may limit one or more of these rights or privileges. Welf & I C §5357. The conservatee, in turn, has the right to contest the denial of rights imposed under the provisions of Welf & I C §5357 (see §23.109) and may also contest the powers granted to the conservator under the provisions of Welf & I C §5358 regarding placement and treatment Welf & I C §5358.3. See §§23.87, 23.136 on burden and standard of proof for imposition of special disabilities. In some counties, the deciding authority regarding a conservatee's rights and privileges that the court relies on is the doctor's declaration.

1. Placement The primary special power of an LPS conservator is the right of placement, provided by Welf & I C §5358(a), as follows:

> (1) When ordered by the court after the hearing required by this section, a conservator appointed pursuant to this chapter shall place his or her conservatee as follows:
>
> (A) For a conservatee who is gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, in the least restrictive alternative placement, as designated by the court.
>
> (B) For a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, in a placement that achieves the purposes of treatment of the conservatee and protection of the public.
>
> (2) The placement may include a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Health Care Services or an agency accredited by the State Department of Health Care Services, or in addition to any of the foregoing, in cases of chronic alcoholism, to a county alcoholic treatment center.

The selected placement will largely depend on the conservatee's psychiatric and medical needs. The officer providing the conservatorship investigation must make a recommendation for the proper placement of the conservatee. Welf & I C §5356..

The conservatorship investigator's recommendation should be for a single level of placement. *Conservatorship of Amanda B.* (2007) 149 CA4th 342. The court may not delegate the decision about the proper level of placement to the conservator..

The local behavioral health director, if requested, must assist the court or the conservator in selecting placement facilities for the conservatee. When the conservatee receives services from the local mental health program, the conservator must inform the local behavioral health director of the location of any facility in which the conservatee is placed. Welf & I C §5358(c)(3).

a. **Priority Must Be Given to Suitable Facilities** If the conservatee is not placed in his or her own home or the home of a relative, priority must be given to suitable facilities as close as possible to the conservatee's or relative's home. Welf & I C §5358(c). A "suitable facility" is one that provides the least restrictive residential placement consistent with achieving the purposes of treatment.

The requirement of giving priority to the placement of the conservatee in a facility as close as possible to his or her home or a relative's home is consonant with increasing medical awareness of the importance of not taking mental patients away from their relatives and friends, and with other California mental health legislation. See the Bronzan-McCorquodale Act (Welf & I C §§5600–5772).

Conservators may have a difficult time finding a suitable placement for a conservatee who is a registered sex offender (RSO). Many facilities will not accept RSOs, and the law restricts where RSOs may live. See, *e.g.,* Health & S C §1564(a); Welf & I C §6608.5(f); Pen C §§3003(g), 3003.5(b).

b. Power of Conservator to Return Conservatee to the Facility If the conservatee leaves the facility without the approval of the conservator or the person in charge of the facility, the conservator may take the conservatee into custody and return the conservatee to the facility. Alternatively, the conservator may request that a peace officer detain the conservatee and return him or her to the facility in which he or she was placed or transfer the conservatee to the county-designated facility. Welf & I C §5358.5. Any request to a peace officer must be in writing and be accompanied by a certified copy of the letters of conservatorship. Either the conservator or the assistant or deputy may request detention. Welf & I C §5358.5. See also Welf & I C §7325 regarding an escapee from a facility.

LPS conservators (temporary and 1-year), public guardians, and peace officers who apprehend conservatees under Welf & I C §5358.5 are free from civil or criminal liability for any actions taken by the conservatee. Welf & I C §5358.1.]

c. Duty to Find Alternative Placement If the person in charge of the facility treating the conservatee notifies the LPS conservator that the conservatee no longer needs the care or treatment offered by that facility, the conservator must find alternative placement within 7 days after the notification. However, a 30-day extension is provided for "unusual conditions or circumstances," and, if alternative placement cannot be found by the end of that period, an additional extension may be obtained by conferring with the person in charge of the facility to "determine the earliest practicable date." Welf & I C §5359.

2. Medical Treatment and Medications

The two issues that are determined at the hearing on the petition are whether the conservatee has the capacity to consent or refuse to consent to routine medical care and whether the conservatee has the capacity to consent or refuse to consent to the administration of psychotropic medication. Nonroutine medical procedures are generally decided by the court as the issues arise, although if the need for a procedure is reflected in the investigation report, the conservator may be granted the power to consent to such procedure on appointment. At the hearing, if the court finds grave disability, it will order that the conservator has the power to require the conservatee to receive treatment related specifically to the conservatee's being gravely disabled. See Welf & I C §5357(d). Welf & I C §5358(b). A conservatee retains the right to make medical decisions unless the court makes a specific determination that the conservatee cannot make those decisions. See *Riese v St. Mary's Hosp. & Med. Ctr.* (1987) 209 CA3d 1303. The court must find that the conservatee lacks the mental capacity to rationally understand the nature of the medical problem, the proposed treatment, and the attendant risks. 60 Ops Cal Atty Gen 375 (1977). The Attorney General opinion states that, with respect to conservatorships for the gravely disabled, the specific and detailed procedures set forth in Welf & I C §§5357–5358 and 5358.2 constitute the exclusive means by which the conservator is given the power to make necessary medical decisions for the conservatee. 60 Ops Cal Atty Gen at 378.

a. Conservatee's Capacity to Consent

A person, including an LPS conservatee, is deemed to have capacity to consent to treatment unless a court orders otherwise. A psychiatric or medical diagnosis does not affect the general premise that a person is deemed to have capacity to consent or refuse to consent to treatment. Prob C §§810, 813; 9 Cal Code Regs §840. A person is deemed to have capacity to consent if it is determined that he or she has actually understood and can knowingly and intelligently act on the information specified in Welf & I C §5326.2. See also Welf & I C §5326.5(c). Understanding the potential benefits and risks of the proposed treatment or surgery is the primary factor in determining capacity to consent. 9 Cal Code Regs §840.

b. Medical Procedures

The report of the officer providing conservatorship investigation must contain recommendations concerning powers to be granted to the conservator, including the right to require the conservatee to receive treatment that is routine and unrelated to the grave disability. Welf & I C §§5356, 5357(e). See §23.113. Unless the court order gives the conservator exclusive authority to consent to a particular kind of treatment unrelated to the grave disability, whether routine or not, the conservatee retains that right. See Welf & I C §5357(e). Absent a specific determination by the court that the conservatee cannot make a specific medical decision, a conservatee is not divested of the right to make his or her own medical decisions. Prob C §§810, 813; 60 Ops Cal Atty Gen 375, 377 (1977).

If a conservatee requires medical treatment and the conservator has not been specifically authorized by the court to require the conservatee to receive that medical treatment, the treating physician should rely on the informed consent of the conservatee. If the physician concludes that the conservatee lacks capacity to give or refuse informed consent, the conservator, after notice to the conservatee, must obtain a court order authorizing the conservator to consent to the medical treatment. Welf & I C §5358.2. See §§23.114–23.116. For discussion of emergency cases, see §23.113. If the conservatee chooses to object to the request, the court must hold a hearing before granting the order. Welf & I C §5358.2

(1) Power of Conservator to Consent to Routine and Nonroutine Medical Procedures After finding grave disability, if specified in the court's order, the conservator will have the right to require the conservatee to receive routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee's condition of being gravely disabled. Welf & I C §5358(b). A court order can also authorize the conservator to consent to nonroutine treatment, including surgery, for a specific medical condition. See Welf & I C §§5358(b), 5358.2. In emergency cases, however, in which the conservatee faces loss of life or serious bodily injury, the procedure, including surgery, may be performed on the conservatee without the conservatee's prior consent or a court order specifically authorizing the procedure. Welf & I C §5358(b). Except in emergency situations, surgery may be performed on the conservatee without the conservatee's prior consent only if a court order is obtained under Welf & I C §5358.2. Unlike probate conservators, who may be granted broad, discretionary medical powers by the court, an LPS conservator must return to court to seek specific approval for even minor procedures, such as dental work, that are not deemed to be routine, unless the conservator obtained authority to consent to such procedures when he or she was appointed or reappointed. See Welf & I C §§5359(b), 5358.2

(2) Problem of Defining "Routine" Medical Procedures – is the procedure invasive

(3) Procedure for Obtaining Court Order for Specific Medical Treatment , The procedure for obtaining an order under Welf & I C §5358.2 authorizing surgery or nonroutine medical treatment begins with a written declaration from the doctor describing the mental incapacity, setting forth the nature of the conservatee's medical condition requiring treatment, the recommended course of treatment deemed medically appropriate, the nature of the threat to the conservatee's health if such consent is denied, the predictable or probable outcome of the recommended course of treatment, the efforts made by the physician to obtain informed consent from the conservatee, and the mental deficits that evidence the conservatee's inability to give informed consent. Prob C §§811–813. The declaration should address the Prob C §813 deficits and show a correlation between the deficit(s) and the decision or act in question. The declaration should also demonstrate that the conservatee's medical condition "requires the recommended course of medical treatment," and "a probability [exists] that the condition will become life-endangering or result in a serious threat to the [conservatee's] physical or mental health." Prob C §2357(h)(1)–(2). A detailed declaration from the doctor is necessary because a conservator must demonstrate medical necessity in a petition for an order under Welf & I C §5358.2. *Scott S. v Superior Court* (2012) 204 CA4th 326, 338. in *Scott S. v Superior Court, ,* the Fourth Appellate District held that an LPS conservator seeking judicial authorization to obtain medical treatment over the conservatee's objection under Welf & I C §5358.2 must show, through admissible evidence, not only that the conservatee lacks capacity to consent to or refuse the treatment, but also that the proposed treatment is medically necessary. Proving medical necessity requires the court to find that without the treatment, the condition will probably become life-endangering or result in a serious threat to the conservatee's physical or mental health. Prob C §2357(h)(1)–(2). The court also held that, in a contested hearing, declarations are inadmissible hearsay. There must be testimony taken at trial, allowing the conservatee to cross-examine the expert. *Scott S.,* 204 CA4th at 342.

c. Electroconvulsive Treatment (ECT)

The procedures governing the administration of electroconvulsive treatment (ECT) differ depending on the patient's status as a voluntary or involuntary patient. A voluntary patient must give written informed consent, as defined in Welf & I C §5326.5, to the treatment; a responsible relative or conservator must be informed of the treatment; and the treating physician must document the reasons for the treatment and that it is the least drastic alternative available. Welf & I C §5326.75(a). In addition, a second psychiatrist or neurologist must examine the patient and verify that the patient has the capacity to give informed consent. Welf & I C §5326.75(b). If the second physician cannot make the verification or if the patient lacks capacity to give informed consent, the treating physician must proceed as if the patient were an involuntary patient. Welf & I C §5326.75(c). For purposes of ECT, all conservatees are considered involuntary patients. See Welf & I C §5326.7.. The procedures to be followed when the LPS conservatee is an involuntary patient are set out in Welf & I C §§5325 and 5326.7

1 If Conservatee Lacks Capacity to Give Informed Consent

All conservatees are treated as if they are involuntary patients for purposes of receiving ECT. See Welf & I C §5326.7. The following are the steps to take when the physician determines that the conservatee is in need of convulsive treatment and the patient has capacity to give informed consent to ECT:

- *Step One:* The attending physician must document in the conservatee's record the reason for the procedure, that all reasonable treatment modalities have been carefully considered, that the treatment is definitely indicated, and that ECT is the least drastic alternative available for this conservatee at this time. The statement in the treatment record must be signed by the attending and treating physician or physicians. Welf & I C §5326.7(c).
- *Step Two:* A "committee" of two additional physicians (at least one of whom must have personally examined the conservatee) must also complete a statement. See §23.139 for form. One physician must be appointed by the facility and one must be appointed by the local behavioral health director. Both must be either board-certified or board-eligible psychiatrists or board-certified or board-eligible neurologists. The committee must review the conservatee's treatment record and unanimously agree with the treating physician's determinations. Their agreement must be documented in the conservatee's treatment record and must be signed by both physicians. Welf & I C §5326.7(b).
- *Step Three:* The attending physician must give the oral explanation as required by Welf & I C §5326.2 to both a responsible relative of the person's choosing and the conservator. If the conservatee does not want to inform a relative, or if such a relative is unavailable, this requirement is dispensed with as to the relative. Welf & I C §5326.7(c). The required §5326.2 oral explanation includes certain specific information that must be given in a clear and explicit manner in order to constitute voluntary informed consent.
- a hearing must be held under Welf & I C §5326.7(f).

2 Petition & Hearing to Determine Capacity

At the hearing, held within 3 judicial days after filing the petition, the court must determine the patient's capacity to give informed consent. Welf & I C §5326.7(f). The patient must be present at the hearing, and if the patient is unable to come to court, the hearing must be held at the facility in the patient's presence. *Conservatorship of Pamela J.* (2005) 133 CA4th 807. In *Conservatorship of Pamela J.,* the doctor's testimony that the conservatee refused to come to court was not considered a waiver of her presence, because the ECT statute explicitly and uniquely requires it. The conservatee's attorney had repeatedly objected to continuing with the proceedings without the conservatee being present. The *Pamela J.* court also found that it was permissible for the court to

question witnesses as part of the judge's authority "to control the presentation of testimony," making sure to get the information in a rapid and concise manner so that the truth can be ascertained. The court also noted that counsel could object to any question. Clear and convincing evidence must be presented to support an order that a person lacks capacity to consent to or refuse electroconvulsive treatment (ECT). *Lillian F. v Superior Court* (1984) 160 CA3d 314. In *Conservatorship of Fadley* (1984) 159 CA3d 440, the court held that a trial court's sole duty at Welf & I C §5326.7(f) evidentiary hearings is to determine the patient's ability to give informed consent; the court is not to decide whether ECT is definitely indicated or determine the least drastic alternative available. See also *Conservatorship of Waltz* (1986) 180 CA3d 722 (mere disagreement between physician and conservatee regarding treatment with ECT did not show conservatee's inability to make informed treatment decision). If the court finds the person incapable of giving consent, the conservator or a responsible relative may give written informed consent to ECT. Welf & I C §5326.7(g). If, after a court hearing on the issue of capacity, the court finds the patient capable of giving informed consent and the patient refuses to give consent, ECT may not be administered. Welf & I C §5326.85.

M. TERMINATION OF LPS CONSERVATORSHIP

1. Probate Code Conservatorship Distinguished

A Probate Code conservatorship continues indefinitely unless terminated by court order when the court determines that the conservatorship is no longer needed or that the estate is entirely exhausted through proper expenditures or, subject to certain accounting procedures, by the death of the conservatee. Prob C §§1860, 2626, 2630. In contrast, an LPS conservatorship automatically terminates 1 year after appointment of the conservator (Welf & I C §5361), unless terminated sooner by the conservatee's death (Prob C §1860, made applicable by Welf & I C §5350) or by the court on petition for rehearing by the conservatee (Welf & I C §5364); or on the conservator's petition for termination (Welf & I C §5352.6). For the conservatorship to continue, the conservator must petition for reappointment for a succeeding 1-year period, including in the petition the opinion of two physicians or qualified licensed psychologists that the conservatee is still gravely disabled. Welf & I C §5361.

2. Automatic Termination 1 Year After Appointment

An LPS conservatorship terminates 1 year after appointment of the conservator by the superior court. This 1-year period does not include the service period of the temporary conservator. Welf & I C §5361. If the conservatorship will not be reestablished but further time beyond the 1-year expiration date will be necessary to wind up the estate, the conservator may petition for an extension for a reasonable time to collect accrued assets or income, to pay expenses, and to transfer title in a completed sale of real property. Welf & I C §5361. If the conservator is a private party and does not petition for reappointment, the county officer providing conservatorship investigation may recommend another conservator. Welf & I C §5362

3. Termination of Placement Power; Holdover

The conservator's power to place the conservatee in a treatment facility (see §§23.103–23.109) terminates with the termination of the conservatorship. A treatment facility must release a conservatee on his or her request when the conservatorship terminates. If the conservator files a petition for reappointment, a copy of the petition must be sent to the facility at least 30 days before the automatic termination date. The facility may detain the conservatee after the termination date only if (1) the conservatorship proceedings have not been completed and (2) the court orders that the conservatee be held until the proceedings are completed. Welf & I C §5361