



Lanterman-Petris-Short Act Conservatorship Understanding the LPS Procedures

Presented by:

Sean Rashkis, Attorney

Michael Stortz, Senior Attorney

Debi Davis, Peer Self Advocacy Trainer

Disability Rights California Introduction and History

Who we are:

A non-profit protection and advocacy system founded in May of 1978, who started with one office in Sacramento with under a dozen employees and expanded to 5 regional offices, 26 satellite offices, and 250 employees serving Californians with disabilities.

Why we are:

In 1975, renowned journalist, attorney, and reporter; Geraldo Rivera, exposed horrific conditions of abuse and neglect at Willowbrook, an institution for people with cognitive disabilities on Staten Island, New York. As a result of the shocking conditions discovered there, and that of many other mental institutions to follow, Senator Jacob Javits successfully pushed Congress to mandate and fund Protection and Advocacy systems in each state.

Disability Rights California Mission and Vision

Mission Statement

Advance the rights of Californians with disabilities.

Vision Statement

Create a barrier free, inclusive world that values diversity, culture, and each individual.

Mental Health Stigma & Discrimination Reduction Project

In 2011, Disability Rights California was awarded a three year prevention and early intervention (PEI) stigma and discrimination reduction funding by the California Mental Health Services Authority (CaMHSA). CaMHSA administers programs funded by the Mental Health Services Act (MHSA) on a statewide, regional and local basis. PEI initiatives aim at preventing suicides, reducing stigma and discrimination, and improving student mental health.

Stigma & Discrimination Associated with Mental Health Commitment

The California Supreme Court has long recognized that stigma is associated with mental health commitment.

- People are treated with suspicion, distrust and even loathing.
- People are socially ostracized.
- People face employment & educational discrimination.
- Hospitalization may cause lost self-confidence & self-esteem.
- Such stigma is as debilitating as a criminal conviction.
- People also face threats to their reputation.

Conservatorship of Roulet (1979) 23 Cal.3d 219; see also *In re Carol K.* (App. 3 Dist. 2010) 115 Cal.Rptr.3d 343 (stigma of wrongful commitment continues after termination).

LPS Conservatorship Overview of Today's Training

Today's training will include:

- a) Overview of different LPS holds and procedures – Sean Rashkis;
- b) “Willing and able” to receive voluntary mental health services – Michael Stortz;
- c) Array of available mental health services – Michael Stortz;
- d) Third-Party Assistance – Michael Stortz;
- e) Communicating with a Public Defender – Debi Davis;
- f) Duties of Public Guardians – Debi Davis; and
- g) Temporary Conservator specific issues – Michael Stortz
 - Advanced Notice
 - Notice Report
 - Legal Disabilities
 - Least Restrictive Environmental Placement

The objective of this training is to protect and advance the rights of individuals subject to LPS conservatorship and minimize resultant stigma and discrimination from unnecessary involuntary, hospital or institutional treatment.

LPS Conservatorship Overview

Involuntary Mental Health Treatment

72-Hour Involuntary Hold WIC 5150-Evaluation and Treatment-No Court Intervention Criteria:

- i) Grave Disability: Individual not able to provide for own food, clothing or shelter *as a result of a mental disorder or impairment by chronic alcoholism*. WIC § 5008(h).
- ii) Danger to Self: Deliberate intent to injure oneself or a disregard of personal safety to the point where injury is imminent *due to a mental disorder*. Danger must be present, immediate, substantial, physical, and demonstrable.
- iii) Danger to Others: Based on words or actions that indicate the person in question either intends to cause harm to a particular individual or intends to engage in dangerous acts with gross disregard for the safety of others *due to a mental disorder*.

Involuntary Mental Health Treatment

72-Hour Involuntary Hold WIC 5150-Evaluation and Treatment-No Court Intervention

Probable Cause

- To constitute probable cause to detain a person pursuant to § 5150, it must be shown by specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant belief or suspicion, that as a result of a mental disorder an individual is a danger to self, others, or gravely disabled.

- *Heater v. Southwood Psychiatric Ctr.* (1996) 42 Cal.App.4th 1068, 1080; *People v. Triblett* (1983) 144 Cal.App.3d 283, 286-87; see also *Bias v. Moynihan* (9th Cir. 2007) 508 F.3d 1212, 1220.

Involuntary Mental Health Treatment

Where Can an Individual Under a 72-Hour Hold Be Taken

- To a County designated 72-Hour evaluation facility

Who Can Place an Individual Under a 72-Hour Hold

- Peace officer
- Attending staff of an evaluation facility designated by the County
- Designated members of a mobile crisis unit
- Other professional person designated by the County

Other Items of Note

- No probable cause hearing
- Individual may request a *Riese* hearing (Decision regarding *Riese* carries through a 14-day hold)

Involuntary Mental Health Treatment-Court-Ordered Evaluation-WIC § 5200

- Any person may make an application to the responsible county agency or person (usually the public guardian or conservator) and request an evaluation of a person thought to be gravely disabled.
- Once the application is made, the responsible county entity must engage in a reasonable investigation and an attempt to interview the subject of the petition must be made to determine whether the person will voluntarily receive crisis intervention services or will allow an evaluation in the person's home or in an approved facility. See WIC § 5202.
- After investigation, if the agency determines there is probable cause to believe that the person, as a result of a mental illness, is gravely disabled or a danger to self or others and that the person will not voluntarily consent to receive services, it must file the petition with the court along with the prepetition report.

Involuntary Mental Health Treatment

14-Day Hold-WIC § 5250

Criteria

- GD, Danger to self, danger to others

- Probably cause hearing must be held during first 4 days of hold unless:
- Individual requests by-pass writ of habeas corpus;
- 48 hr postponement request by attorney or advocate representing individual (county with population of 100,000 or less, postponement to next regularly scheduled hearing date);
- Individual voluntarily agrees to treatment; or individual is discharged
- Probable cause hearing overseen by a hearing officer-WIC § 5256.1

Involuntary Mental Health Treatment

14-Day Hold-WIC § 5250

- Individual's rights at this certification hearing-WIC § 5256.4
- Burden of proof-Generally facility seeking the certification hearing-WIC § 5256.2
- Hearing officer must find probable cause that the individual meets the criteria for an additional 14-day hold.
- Individual may challenge granting of 14-day hold by filing a writ of habeas corpus with the Superior Court any time during the 14-day hold.
- If not already requested, a *Riese* hearing can be requested at any time during the 14-day hold. Each subsequent hold requires a new *Riese* hearing
- Note that *Riese* hearings have different burden of proof, clear and convincing, than certification hearing.

Involuntary Mental Health Treatment

Additional 14-Day Hold-WIC § 5260

- No probable cause hearing required
- Only applicable to danger to self criteria-must be based on observations during either the 5150 or 5250 hold.
- Individual may file writ of habeas corpus anytime during hold
 - New *Riese* hearing may be requested anytime during hold

Additional 30-Day Hold-WIC § 5270

- Can only be used after authorization by County Board of Supervisors
- Probable cause hearing similar to 5250 hearing must be held
- Only applicable to gravely disabled criteria
- Individual may file writ of habeas corpus any time during hold
- New *Riese* hearing may be requested any time during hold

Involuntary Mental Health Treatment

Additional 180-Day Hold-WIC § 5300

- Court hearing required-Finding usually based on proof beyond a reasonable doubt because the person will be subject to confinement. See *Conservatorship of Roulet*.

- Only applicable to danger to others criteria
- New *Riese* hearing may be requested any time during 180-day period

Temporary Conservatorship-30 days to 6 months

- Requires application by treating physician to Public Guardian's Office
- Only applicable to grave disability
- Judge reviews application and determines whether to grant or deny T-Con
- Individual may request writ of habeas corpus any time during T-Con period
- New *Riese* petition may be filed with County Counsel

Full Conservatorship-One Year with possible re-petitions

Willing and Able Factual Showing

Advisement of opportunity to receive services on a voluntary basis

- All civilly committed involuntary individuals must be advised of ability to receive mental health treatment on a voluntary basis. This involves constitutional and state statutory rights.

72 Hour Hold: includes evaluation if person "can be properly served without being detained..." If so, s/he "shall be provided evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis."(5151)

14 Day Hold: person must be "advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis." The 14-day certification notice is supposed to specify what "referral" the person was unwilling or able to accept. (5250(c), 5252)

T-Con / Full Con Petition: "unwilling to accept, or incapable of accepting, treatment voluntarily" (5352)

See also Investigator Report: "shall investigate all available alternatives" (5354)

Rights of Voluntary Patients

- Right to discharge at any time (W&I § 6005; Title 9, C.C.R. § 865(d));
- Right to refuse antipsychotic medication(Title 9, C.C.R. §§ 850-856);
- Right to not be placed in seclusion and/or restraint absent an emergency.

LPS Conservatorship

Array of Available Mental Health Services

Medi-Cal Specialty Mental Health Services (Title 9, Cal. Code of Regs., 1810.100 et seq.)

Mental Health Services Act (Title 9, Cal. Code of Regs., 3100 et seq.)

See Full Service Partnership (FSP) (3200.130 - 3200.160)

Bronzan-McCorquodale Act (Welf. & Inst. Code 5600 et seq.)

DRC, "Voluntary Services as Alternative to Involuntary Detention under LPS Act" (March 2010, Pub # 5487.01), Attachments 2 & 3, available at <http://www.disabilityrightsca.org/pubs/548701.pdf>

Third-Party Assistance

California Judges Benchguide, Benchguide 120, LPS Proceedings available at <http://www2.courtinfo.ca.gov/protem/pubs/bg120.pdf>

Section 120.78, Third Party Assistance Considered

Person is not gravely disabled for LPS conservatorship if s/he can survive safely with help of responsible family, friends or others who are willing and able to help provide for basic needs for food, shelter and clothing. Welf. & Inst. Code 5350(e)(1)

Need to state willingness and ability in writing. (5350(e)(2) [avoid stigma no one can])

Neither board and care operator nor Department of Corrections qualifies as third party assistance to proposed conservatee. (citations omitted and can be distinguished)

The issue remains: who may be the "other" under third party assistance. For example, a person may put on evidence that s/he is willing and able to accept mental health services at home and in the community. There an argument that the responsible mental health agency has a duty to provide such "third party" assistance, assuming that the person qualifies for services that the agency has a duty to provide. There may be additional constitutional and/or state and federal statutory claims.

Communicating with One's Public Defender

<http://www.psychologytoday.com/blog/threat-management/201010/communicating-people-mental-illness-the-publics-guide>

- 1) Treat adults as adults
- 2) Be respectful. Call the person by their last name unless they ask you to call them by their first name. When someone feels respected and heard, they are more likely to return your respect and consider what you say.
- 3) Mental illness has nothing to do with a person's intelligence level. Do not lie to them or mislead them, as it will usually break any rapport you might want to establish.
- 4) Listen to the person and try to understand what they are communicating. Often, if you don't turn off your communication skills, you will be able to understand.

- 5) Offer the person a pad of paper to write things down during the court hearing. Let them know if this is the best way to communicate during the hearing.
- 6) Some people may be frightened about being in court, so be aware that they may need more body space than you. Ask them if they have questions about the court proceedings.
- 7) If a person is experiencing events such as hallucinations or delusions, be aware that the hallucination or delusions are their reality. You will not be able to talk them out of their reality.
- 8) If needed, set limits like you would with any other person. For example, “I only have 5 minutes to talk with you before court starts” or If you yell or shout in court, you will probably lose your hearing.

Duties of the Public Guardian

An LPS conservatorship gives legal authority to one adult (called a conservator) to make certain decisions for a seriously mentally ill person who has been found to be gravely disabled. The conservator is appointed to make sure the conservatee has food, clothing, shelter and services to meet their needs. The court usually grants a conservatorship of the person and the estate.

1) Who can be a conservator?

Only a public guardian or public conservator can be appointed if a person is placed on a temporary conservatorship. If a person is placed on a permanent conservatorship, then the conservator can be a relative, friend or a public or private guardian.

2) What is a conservator required to do?

- A) Make sure a person's needs are met by
 - 1) Protecting a person's finances or managing the person's money by:
 - a) Controlling assets
 - b) Paying the person's bills
 - c) Making a budget
 - d) Providing, from the budget personal money
 - 2) Protect the person from abuse and/or neglect
 - 3) Help a person integrate into society
 - 4) Arrange for services for the conservatee:
 - a) Health care
 - b) Meals
 - c) Clothing
 - d) Personal care
 - e) Transportation

- f) Recreation
- g) Housekeeping

3) Medical treatment

- Make mental health treatment decisions
- Consent to the conservatee being given antipsychotic medications
- In the case of surgery, except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery shall be performed upon the conservatee without the conservatee's prior consent or a court order authorizing that surgery.

4) Placement

- Can place the conservatee in a locked facility if a psychiatrist says it is needed and the hospital agrees to take the person
- The conservator also decides where the mentally ill person will live when he or she is not in a locked psychiatric facility.

LPS Conservatorship T-Con Specific Issues

Advanced Notice

Probate Code procedures for establishing conservatorship apply absent controlling provision under Welfare and Institutions Code.

Probate Code section 2250.2(c) provides for five days advance notice to the proposed of a petition for appointment of a temporary conservator, unless the court for good cause orders otherwise.

Probate Code section 2250.2(c) applies to LPS proceedings. Edward W. v. Lamkins (2002) 122 Cal.Rptr. 1 (public guardian's routine practice of seeking good cause shortening or dispensing with advance notice violated state law).

See DRC, "Advance Notice for Individuals Subject to Temporary LPS Conservatorship – Denial of Statutory & Constitutional Rights" (March 2011), available at:

http://www.disabilityrightsca.org/news/2011_newsaboutus/attachments/T-Con%20Notice%20Report%20Final%20-%20March2011.pdf

Napa County reported that its Public Guardian filed 24 temporary conservatorship petitions during the period January 2, 2009 and December 31, 2009, and asserted good cause for not providing a full 5-day notice only two times.

Legal Disabilities

The LPS Act authorizes courts to designate certain “disabilities” to which a conservatee may be subject, including decisional disabilities relating to medical treatment related to being gravely disabled or relating to medical treatment unrelated to being gravely disabled. (Section 5357(d)&(e), respectively). Treatment for a grave disability may include administration of antipsychotic medications.

K.G. v. Larry Meredith (2012) 204 Cal.App.4th 164, 138 Cal.Rptr.3d 645:

- 1) LPS Act medical treatment disability requires a finding of decisional incapacity. Before a court may impose a medical disability under section 5357(d), the court must find that a proposed conservatee is incapable of making rational decisions about medical treatment related to his or her own grave disability, that is, lacks the mental capacity to rationally understand the nature of the problem, the proposed treatment, and the attendant risks. The record must reflect that the court considered evidence relevant to the applicable standard, and that the court made a finding utilizing that standard.
- 2) Practice of imposing decisional disabilities ex parte on temporary conservatees violated due process.

Placement in the Least Restrictive, Most Integrated Setting

The LPS Act provides for placement of conservatees in the least restrictive setting. A person subject to temporary conservatorship has a right to arrangements that “allow the person to return to his [or her] home, family or friends.” (Section 5353).

Similarly, the preferred setting for an individual on full conservatorship is in his or her home or the home of a relative. (Section 5358(c)(1)).

If not placed in his or her 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.” (Id.). A “suitable facility means the least restrictive residential placement available and necessary to achieve the purpose of treatment.” (Id.) See DRC, “Home & Community-Based Services for Individuals Subject to Temporary LPS Conservatorship – An Unfulfilled Promise?”, (November 2011), available at <http://www.disabilityrightsca.org/pubs/550301.pdf>

The federal Americans with Disabilities Act (ADA) provides that government services must be provided in the most integrated setting appropriate to individual need. (42 U.S.C. section 12132; 28 C.F.R. section 35.130(d).

Most integrated setting is one that “enables individuals to interact with nondisabled persons to the fullest extent possible...” (28 C.F.R. Pt. 35, App. B (2011) (addressing section 35.130)

The Supreme Court held that public entities are required to provide home and community-based services to individuals with disabilities when (a) such services are appropriate; (b) the affected individual does not oppose community-based assistance; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who receive assistance through the entity. *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

See “Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*”, available at http://www.ada.gov/olmstead/q&a_olmstead.htm

Conclusion

Mental Health Stigma & Discrimination Reduction Project

See our website at:

<http://www.disabilityrightsca.org/CalMHSA/CalMHSA.html>

Fact Sheets include:

Integration Mandate of the ADA and *Olmstead* Decision (July 2012), available at

<http://www.disabilityrightsca.org/pubs/CM0601.pdf>

Mental Health Facility Diversion & Aftercare that Focuses on Recovery (July 2012), available at <http://www.disabilityrightsca.org/pubs/CM0501.pdf>

CalMHSA

The California Mental Health Services Authority (CalMHSA) is an organization of county governments working to improve mental health outcomes for individuals, families and communities. Prevention and Early Intervention programs implemented by CalMHSA are funded by counties through the voter-approved Mental Health Services Act (Prop 63). Prop. 63 provides the funding and framework needed to expand mental health services to previously underserved populations and all of California’s diverse communities.



CalMHSA

California Mental Health Services Authority

Compassion. Action. Change.