

ROLE OF PUBLIC DEFENDERS IN LPS COMMITMENT PROCESS

Introduction

- In work as a PRA, sometimes there can be confusion about how and when PDs get involved in the process.
- There can also be confusion about when writs should be filed, and who should file them.
- In this class, we will try to clarify the respective roles of the PRA and the PD, and the role of writs, throughout the various stages of LPS civil commitments.
- Note that some procedures vary county to county, so we will just try to present the basic procedures.
- Note: not dealing with minors.
- Note that this handout uses the following abbreviations: “WHC” = writ of habeas corpus; “WIC” = California Welfare and Institutions Code; “BOS” = Board of Supervisors; “PD” = Public Defender.

Overview of the Role of the Public Defender

- Public Defenders are court appointed attorneys assigned to represent individuals who have a sixth amendment right to counsel and who cannot afford their own attorneys.
- All individuals on LPS conservatorships (or being considered for LPS conservatorships) have a right to court-appointed attorney. However, when an individual is on a temporary psychiatric hold, the determination of when this right attaches is not always clear.
- We hope to clarify some of this ambiguity and offer PRAs tips on how they can assist clients who have a public defender and as well as those that do not.

Overview of Writs of Habeas Corpus

- Generally speaking, there is both a constitutional right to WHC during each period of detention (U.S. Const., art. 1, section 9; Cal. Const., art 6, section 10), as well as statutory right when detained under WIC sections 5250, 5260 or 5270.10 (WIC section 5275). Thus, people on 72-hour holds and placed involuntarily by LPS conservators only have the constitutional right; people on 14-day and 30-day holds, have both the statutory and the constitutional

right to file for WHC. In other words, anyone on any LPS hold, including conservatorship, always has the right, separate from certification proceedings or statutory placement review hearings, to file a petition for a WHC to challenge confinement or conditions of confinement (denial of rights).

- Individuals held in state hospitals also have a specific statutory right to petition for WHC (WIC 7250). This applies to people on forensic commitments (e.g. PC 1026—Not Guilty by Reason of Insanity; PC 1370—Incompetent to Stand Trial; PC 2962—Mentally Disordered Offender; PC 2684—state prison transferees) to challenge legitimacy of confinement or conditions of confinement.
- Also, every person unlawfully imprisoned or restrained of liberty under any pretense whatsoever may bring WHC to challenge (PC 1473).
- Generally (unless there is language governing a statutory-based writ), the Courts' procedure for processing writs of habeas corpus is as follows: after filing WHC, court will respond within 30 days: (1) patient wins outright and court issues writ; (2) court denies writ; (3) court issues OSC and county then has opportunity to "return" and show why writ should not be issued; patient then has right to file "denial to the return;" court then has 30 days to decide and will either deny, grant, or set evidentiary hearing.
- If the habeas petition is filed on general, constitutional grounds (such as those filed by clients on LPS conservatorships), the superior court may deny the petition without ordering a hearing if it determines that the petition fails to state a claim. The petitioner may then choose to file a habeas writ with the appellate court.
- However, it is important to note that where a statutory right to WHC attaches, such as for those held on 14-day holds, the procedures are different and the hearing is automatic (WIC 5275).
- In all cases, a client has the right to request representation by a PD/court-appointed attorney.

Overview of WIC 5275 Writs of Habeas Corpus (for Individuals on 14- and 30-day holds)

As discussed above, individuals on 14 and 30 day holds have a statutory right to a habeas hearing (WIC 5275-5276). The procedure is as follows:

- Client or client's representative initiates WHC by requesting release to any facility staff member.

- Facility must notify superior court as soon as possible.
- Facility must make reasonable efforts to notify family members or anyone else designated by client of time and place of writ hearing unless client directs otherwise (and facility must advise client of right to request that information not be provided to family).
- Client must be advised of right to counsel by staff member and court; if client elects, court shall immediately appoint PD/atty to assist in preparing WHC and, if client elects, to represent at hearing.
- Standard practice is for courts to routinely issue writs and set a hearing. See Cal Rule of Court 4.551.
- Heard in court, often in a court mental health department (or in LA County, in mental health court); hearing held in County of current placement or County where client was held on initial 72-hour hold.
- Following petition, court must either release client or set evidentiary hearing within 2 judicial days.
- State bears burden of proof by preponderance of evidence the legality of the detention.

Overview of Role of the Patients' Rights Advocate when Patient Wants to File Writ:

- This will depend on how involved the PD's office in your county is with individuals on psychiatric holds.
- May also depend somewhat on the type of writ the client is filing (e.g. a statutory or a constitutional writ).
- In some counties clients may make direct contact with the PD, who will make arrangements for a hearing.
- If your PD's office is not very accessible to clients on psychiatric holds, the PRA can assist the client with filing the writ and notifying the PD's office of the filing.
- The PRA can supply the writ form, can help client fill out petition, and otherwise help to make arrangements. However, the PRA should advise the client to contact his/her PD since the client will have the right to counsel if a hearing is set.

Outline of Various LPS Commitment Procedures and Roles of PRAs/PDs

We have discussed habeas procedures and this section will discuss the various LPS commitment procedures starting when someone is placed on a 72 hour hold. We

will also discuss the interplay between the individual's LPS procedural rights and their rights to habeas relief.

WIC § 5150 72 Hour Hold (Grave Disability, DTS, DTO)

- There is no probable cause hearing.
- However, client may request Riese hearing at any time during hold.
- Also, while on a 72 hour hold, client also has a right to file a WHC. There is no specific statutory right but all persons retain fundamental constitutional rights to petition courts for WHC.
- With a WHC, client can challenge either conditions of confinement (patients' right violations) or the confinement itself.
- A client can request a WHC by notifying the person who gave him/her the certification notice or any member of treatment staff.
- **So what is PRA role? PRA can supply the WHC form, can help client fill out petition, and otherwise help to make arrangements, but should advise the client to contact his/her public defender (see Challenging LPS Conservatorship PAI publication for list of PD offices). A client may be entitled to representation by a PD if a hearing is set.**
- Alternatively, some clients choose to file WHCs and proceed in pro per, without legal representation, and PRAs may assist the client in filling out and filing forms.
- As always, where a client on a 72 hour hold has a conditions issue – e.g. not receiving mail or visitors – **the PRA has an investigative role re possible patients' rights violation.**

WIC §5250 14 Day Hold (Grave Disability, DTS, DTO)

- 14 day certification must be filed with court and served on patient or PRA/attorney. Client has right to be notified of right to judicial review of certification via a WHC. WIC 5254.1.
- Certification review hearing (Gallinot): within first 4 days of hold, hearing must be conducted to determine legal grounds for continued detention¹.
- Client can ask to file a WHC right at the time of being given certification notice. Then, certification hearing will not go forward. Client (or any person acting on behalf) may do so by requesting release of any member of staff or to person who delivered notice of certification (WIC 5275). Staff

¹ Unless hearing postponed by client or advocate or unless in a county with population for 100,000 or less

member must then forward request for release to director of facility/designee, who must then “as soon as possible” inform superior court of request for release. If patient asks to file WHC, hospital staff must assist patient, and may not deny right to file on ground that certification review hearing is pending. Court must hold hearing w/in 2 judicial days of filing WHC. However, it is advisable for clients to wait and see how the certification hearing goes before filing for a WHC. Certification hearings will generally be scheduled sooner than WHC hearings. Also, if a client loses at a certification hearing, s/he can still choose to file a WHC.

- Even if client does not choose to bypass certification review hearing via a WHC, client does have recourse to state court at any point during detention via WHC (e.g. may request 1 WHC hearing at any point during 14 day period). WIC 5275-5276.
- In writ proceedings, client may have right to representation by atty/PD
- **So what is PRA role? In many counties, PRAs represent clients at the certification review hearings. Where client wants to file a WHC (either to bypass the certification review hearing or following an unfavorable certification review hearing result), PRA can assist the client in contacting PD, filling out and filing writ forms, etc. At minimum, PRAs can assist by explaining the various procedural rights and options to clients and discussing potential strategies.**
- Note: patient may request (new) Riese hearing at any time during hold.

Riese Hearings (applies to WIC 5150, 5250, 5260, and 5270.15 holds)

- Facility physician may file petition for capacity hearing; hearing to be held w/in 24hrs of filing.
- Hearings generally held before court-appointed officer at facility.
- Presumption of competency, unless specific showing of lack of capacity is made.
- Clients have right to representation by legal counsel or “advocate.” (WIC 5333). Most counties designate PRAs to handle Riese hearings, though some designate PDs.
- If hearing officer rules against client, client has right to immediate judicial review to superior court or court of appeal. WIC 5334. Also, the doctor/facility has a right of review. The client maintains her right to counsel on appeal, which at this point will result in representation by the public defender.

- Also, any client being held on a 14-day or 30-day hold still has a right to bring petition for WHC (WIC 5275) during Riese proceedings.
- So what is role of PRA? PRA may represent client at capacity hearing. Also, if client decides to pursue judicial review or to file a writ, PRA may assist client in contacting PD to request appeal by judicial review or filling out and filing writ paperwork. If PD represents at judicial review, PRA may provide technical assistance to PD, especially if PRA participated in Riese hearing.

WIC 5260 Additional 14 Day Hold (DTS/Suicidality)

- Follows the end of first 14 day period.
- No probable cause or court hearing required.
- Requires second notice of certification, with affidavits and copies given to client's atty/PD, and mental health court (WI 5263).
- WHC procedures: same as above (see WI 5275, et seq) – client has right to request WHC. Per WIC 5275, hearing is not automatic. Individual must request hearing by informing person delivering certification notice or staff member.
- Also, client has right to new Riese hearing at any time during 14 day period.
- **So what is role of PRA? PRA can advise patients of their right to request a writ hearing, can help them contact PD, and can help them with filling out and filing writ forms.**

WIC § 5270.15 30-Day Certification (Grave Disability)

- This procedure is only operative in those counties whose BOS authorize its application. WIC 5270.12.
- Clients should receive additional notice of certification and are entitled to another certification review/probable cause hearing. Hearing must be held during first 4 days of hold.
- Clients can file a WHC to bypass certification review hearing.
- If a client chooses not to bypass certification review hearing, still can file a petition for WHC (WIC 5270.15(b), 5275, et seq) at any time during 30 day period.
- Clients may also request new Riese hearing at any time during 30 day period.

- **So what is role of PRA? PRA can advise clients of their right to request a writ hearing, can help them contact PD, and can help them with filling out and filing writ forms.**

WIC § 5300 180-Day Post-Certification (DTO)

- At expiration of 14 day hold, psychiatrist may file petition for post certification of a “dangerous” person.
- DA must file petition with court and there will be a mandatory court hearing: decision to commit person for post-certification treatment must be made by court (WIC 5303.1).
- Client has right to representation by atty/PD and right to jury trial.
- Hearing must take place within 4 working days after petition filed, or within 10 days if jury trial requested.
- If no decision is made within 30 days, client must be released.
- As always, client has a right to file petition for WHC at any time, using not the statutory but the constitutional procedure.
- Client may also request new Riese hearing anytime during 180 day period.
- **So what is the role of PRA? PRA can advise clients of their right to request a writ hearing, can help them contact PD, and can help them with filling out and filing writ forms, and can provide technical assistance to PD in post-certification proceedings.**

WIC § 5352.1 Temporary Conservatorship Proceedings (Grave Disability)

- Requires application by treating physician to PG’s office.
- An ex parte court hearing is held, initiated by petition to court.
- If hearing held at facility, PRA may represent; if held in court, PD represents.²
- Court may establish T-con not to exceed 30 days based on report filed by county conservatorship investigator or on basis of affidavit from professional person in charge of facility stating reasons for recommendation (WI 5352.1).
- By the end of 30 days: (1) conservatee must be released from MH system; (2) conservatee may volunteer for treatment; or (3) conservatee may be recommended for permanent conservatorship.

² In how many counties are T-Con hearings held at facilities?

- In some counties, attorneys are not appointed when T-con petitions are filed. However, WIC 5365 states, “The court shall appoint the public defender or the attorney for the conservatee or proposed conservatee within five days after the date of the petition.”
- Client has right request WHC at any time during T-con period. Client may be entitled to representation by a PD. Strategically, it may not make sense to request a WHC at this point given that that the individual may be heard on the conservatorship before a writ hearing.
- Also, client may file new Riese petition with county counsel.
- **So what is the role of the PRA? The PRA may represent the client at the T-Con hearing, if held at the facility; the PRA may put the client in contact with the PD, may assist in the filing of a writ, and provide technical assistance to the PD.**

WIC § 5350 “Permanent” Conservatorship Proceedings (Grave Disability)

- When county conservatorship investigation recommends conservatorship, conservatorship petition is filed.
- Client has right to appointed PD/atty and PD/atty must be appointed within five days after petition filed. WIC 5365.
- Hearing on petition must be held within 30 days of petition (WIC 5365).
- Depending on county, hearing may be held at mental health court, at superior court, or at facility. Right to jury trial (following or in lieu of the hearing).
- Primary role of representing client at this stage is PD’s. PD may take the following steps:
 - Written response to petition
 - Engage in informal discovery
 - Interview patient/others
 - Review records and other reports
 - Appointment of defense experts (court may order at county expense) (Evid. C sections 730-733; Prob C sections 1470-1472)
 - Investigate alternatives (including working with PAI)
- **So what is the PRA role? The PRA can be involved in following ways:**
 - **Help client to get in contact with PD.**
 - **Meet with client to develop plan of action, declaration, statement of third party assistance, and other materials to be used to contest conservatorship.**
 - **Help client fill out WHC paperwork.**

- **Possibly to provide testimony at conservatorship reestablishment hearing.**
- **Get into dialogue with conservator, provide new facts, and possibly persuade not to go forward with reestablishment.**
- Once on a conservatorship, clients can make the following kinds of challenges (and again, primary role is PD but PRA can assist in above-described ways):
 - Challenge conservatorship by opposing reestablishment (conservatorship orders are renewable every 12 months but automatically terminated unless reestablished via another petition).
 - Challenge conservatorship by filing a petition for rehearing (once every six months).
 - Challenge conservatorship by WHC.³
 - Challenge conditions of confinement by WHC; WHC may be brought either in county in which conservatorship was established or county of confinement (WIC 5387.7).
 - Challenge placement by Petition for a Placement Review Hearing if they think they should be in a less restrictive placement.
 - Challenge denial of certain rights by Petition to Contest Rights Denied Conservatee.

³ Recommended strategy: to challenge the conservatorship by opposing yearly reestablishment or by petition for rehearing before filing a WHC