Disability Rights California
California's Protection & Advocacy System
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Consent Rights of Psychiatric Patients on Long-Term Commitments

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QUESTION

What are the informed consent rights of psychiatric patients who are not on 72-hour or 14-day holds?

BRIEF ANSWER

All people subject to the Lanterman-Petris-Short (LPS) Act, including conservatees, retain their fundamental rights to make informed treatment decisions with antipsychotic medications absent an emergency or a judicial determination of incompetence. In the event that a person has been adjudicated incompetent and is subject to involuntary detention for a period longer than 14 days, substituted judgment is required.

ANALYSIS

In Riese v. St. Mary's Hospital and Medical Center (1987) 209 Cal.App.3d 1303,[1] the California Court of Appeal for the First Appellate District unanimously held that persons involuntarily detained pursuant to Welfare and Institutions Code[2] Sections 5150 (72-hour holds) and 5250 (14-day

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[1] The California Supreme Court granted review of the case on March 3, 1988. See 245 Cal.Rptr. 627. On June 22, 1989, the Supreme Court unanimously issued an order dismissing review of the case as improvidently granted and ordered that the Court of Appeal's decision be published in the Official Appellate Reports. See 259 Cal.Rptr. 669. The decision of the Court of Appeal became final on June 29, 1989. See republished decision at 271 Cal.Rptr. 199.
[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

certifications) retain their rights under the LPS Act to make informed treatment decisions with antipsychotic medication[3] absent an emergency[4] or a judicial determination of incompetence. [Id. at 1308, 1320.] Although the decision was specifically limited to the class of persons on 72-hour and 14-day holds who were being treated with antipsychotic medications over their objections, the Riese decision, the principles underlying it and related case law and other authorities makes clear that all persons whose rights are protected by the LPS Act retain their fundamental rights to make informed treatment decisions with antipsychotic medications in nonemergency situations absent a judicial determination of incompetence.

I.

LPS PROTECTS THE RIGHT OF ALL PERSONS SUBJECT TO ITS PROVISIONS TO MAKE INFORMED TREATMENT DECISIONS WITH ANTIPSYCHOTIC MEDICATIONS

A.

Retention of Rights

In enacting the LPS Act, the Legislature specifically declared their intent to "eliminate legal disabilities," [§ 5001(a)] and "[t]o safeguard individual rights through judicial review" [§ 5001(d) (emphasis added)]. The California Supreme Court has held that the provisions of the LPS Act "demonstrate the concern of the Legislature that the patients' rights receive full protection at all times." [Thorn v. Superior Court (1970) 1 Cal.3d 666, 674 (emphasis added).] And, the Riese court recognized that "[t]he rights of involuntarily detained mentally disordered people in California are

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[3] "Antipsychotic medication" means "any drug customarily used for the treatment of symptoms of psychoses and other severe mental and emotional disorders." §5008(l); California Code of Regulations, Title 9, Section 856; Riese, 209 Cal.App.3d at 1310.

[4] "Emergency" means "a situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent." §5008(m); see also California Code of Regulations, Title 9, Section 853; Riese, 209 Cal.App.3d at 1308, n.2.

scrupulously protected by the Lanterman-Petris-Short Act." [209 Cal.App.3d at 1312.]

As the Court of Appeal stated: "throughout the statutory scheme the Legislature repeatedly admonishes that the failure of LPS to explicitly confer a particular right cannot provide a basis upon which to deny it." [Riese, 209 Cal.App.3d at 1316-1317.] Section 5005 provides:

> Unless specifically stated, a person complained against in any petition or proceeding initiated by virtue of the provisions of this part shall not forfeit any legal right of suffer legal disability by reason of the provisions of this part. [§ 5005 (emphasis added).]

And, the Legislature has declared:

> Persons with mental illness have the same legal rights and responsibilities guaranteed all other persons by the Federal constitution and laws and the Constitution and laws of the State of California unless specifically limited by federal or state law or regulations. [§ 5325.1 (emphasis added).]

Section 5327 reinforces this basic proposition by making it clear that persons subject to LPS retain all of their rights unless they are specifically taken away, regardless of the nature of the particular detention:

> Every person involuntarily detained under provisions of this part or under certification for intensive treatment or postcertification treatment in any public or private mental institution or hospital, including a conservatee placed in any medical, psychiatric or nursing facility, shall be entitled to all rights set forth in this part and shall retain all rights not specifically denied him under this part. [§ 5327 (emphasis added).]

The Riese court concluded that "the foregoing provisions were obviously calculated to prohibit the use of legislative silence as a basis upon which to deprive mentally ill persons not adjudicated incompetent of any right enjoyed by others." [209 Cal.App.3d at 1317.]

B.

Presumption of Competence

With the passage of LPS, the legal disability of incompetence which was automatically imposed under the old civil commitment scheme was removed. [Thorn v. Superior Court (1970) 1 Cal.3d 666, 668; see The Dilemma of Mental Commitments in California: A Background Document (Nov. 1966) Subcommittee on Mental Health Services, Assembly Interim Committee on Ways and Means at 52, 53, 55, 90.] As the Riese court noted, "[i]t is one of the cardinal principles of LPS that mental patients may not be presumed incompetent solely because of their hospitalization.' [209 Cal.App.3d at 1315, citing §§ 5331 and 5326.5(d).]

The presumption that persons considered mentally ill are competent and free to exercise their fundamental personal rights unless explicitly proscribed by law remains unchanged despite the imposition of involuntary hospitalization and despite their status as detainees. As stated in Section 5331:

> No person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder . . . regardless of whether such evaluation or treatment was voluntarily or involuntarily received." (emphasis added).

Similarly, Section 5326.5(d) reiterates the basic premise that "[a] person confined shall not be deemed incapable of refusal [of proposed therapy] solely by virtue of being diagnosed as a mentally ill, disordered, abnormal, or mentally defective person." [See also Cal. Code Regs., Title 9, § 840(b) ("A person shall not be deemed to lack capacity to consent or refuse consent solely by virtue of any psychiatric or medical diagnosis.")] Thus, "LPS recognizes that patients may be involuntarily committed yet nevertheless remain capable of giving informed consent." [Riese, 209 Cal.App.3d at 1319 (citation and footnote omitted).]

As the Court of Appeal recently observed: "The LPS Act conspicuously does not state that persons are gravely disabled solely because they refuse treatment for a mental illness." [Conservatorship of

Walker (1987) 196 Cal.App.3d 1082, 1093 (emphasis in original; citations omitted).] In fact, the refusal to consent to the administration of antipsychotic medications shall not, in itself, constitute grounds for initiating an involuntary commitment. [Cal. Code Regs., Title. 9, § 855.]

Like individuals subject to detention under Sections 5150 and 5250, persons detained pursuant to Sections 5200 (court-ordered 72-hour evaluation), 5260 (14-day additional intensive treatment for suicidal persons), 5270.10 (30-day certification for additional intensive treatment) and 5300 (18-day postcertification for imminently dangerous persons) have not been adjudicated incompetent by virtue of their commitment alone. The sole issue for each of these holds is whether, as it result of a mental disorder, the person constitutes a danger to self or to others or is gravely disabled; none of the commitment criteria address the issue of the individual's capacity to make informed treatment decisions. The statutory provisions cited above make clear that in nonemergency situations, persons subject to LPS retain their fundamental rights to make informed treatment decisions with antipsychotic medications, regardless of the nature of the particular detention, absent a judicial determination of incompetence.

C.

LPS Conservatees

1. Temporary Conservatees (§ 5352.1)

An individual may be placed on a 30-day temporary conservatorship on the basis of either a comprehensive report of the officer providing conservatorship investigation or on the basis of an affidavit of the professional person who recommended conservatorship. [§ 5352.1.] The proceedings establishing a temporary conservatorship are conducted ex parte, that is, without the conservatee's presence in a nonadversarial hearing. [Id.] The powers granted to the temporary conservator may be as broad as the powers which may be granted a "permanent" conservator. [§ 5353.] However, the ex parte establishment of a temporary conservatorship under section 5352.1 does not address in any way the issue of a temporary conservatee's capacity to make informed treatment decisions. Thus, absent

an emergency or an explicit judicial determination of incompetence, temporary conservatees, like those subject to other LPS detentions, retain their rights to give or withhold consent to antipsychotic medications.

2. "Permanent" or One-year Conservatees (§ 5350)

In *Keyhea v. Rushen* (1986) 178 Cal.App.3d 526, 542, the California Court of Appeal for the First Appellate District unanimously determined that LPS conservatees have a statutory right to refuse antipsychotic drugs absent a judicial determination of incompetence, which right extended through Penal Code Section 2600 to prisoners. In reaching this conclusion, the *Keyhea* court relied primarily on Section 5357(d), which provides that an investigating officer making recommendations to the court as to the conservator's powers and duties is to recommend for or against proposing the disability of "[t]he right to refuse or consent to treatment related specifically to the conservatee's being gravely disabled." (Emphasis added.) Thus, "[u]nder the present statutory scheme an LPS conservator can require the conservatee to receive medical treatment, but only if such treatment is authorized in the court order of conservatorship or in a subsequent court-order (except in emergencies)." [*Keyhea*, 178 Cal.App.3d at 535, citing §§ 5358, 5358.2 (emphasis added).]

The *Keyhea* court also cited with approval a 1977 Attorney General Opinion which concluded that, under LPS,

> the conservatee is not divested of the right to make his or her own medical decisions absent a specific determination by the court that the conservatee cannot make those decisions (emphasis supplied by court). In view of the fundamental nature of the right affected, the court should not make such a determination unless it finds 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, 377 (1977); Id. (emphasis added; citation omitted).]

After reviewing the present statutory definition of grave disability, the Keyhea court concluded that "by affording a qualified right to refuse treatment related to being gravely disabled, LPS affords a right to refuse

psychiatric treatment for the mental disorder causing the grave disability, absent a court order." [Id. at 536 (emphasis added).]

In *Aden v. Younger* (1976) 57 Cal.App.3d 662, 672, the Court of Appeal emphasized that under LPS "mental patients' incompetence may not be presumed solely by their hospitalization." Indeed, numerous California courts have clearly stated that even a judicial determination of the need for conservatorship is insufficient to determine incompetence. In *Board of Regents v. Davis* (1975) 14 Cal.3d 33, the California Supreme Court held that an LPS conservatee retains the capacity to contract which can only be limited by explicit judicial declaration. The Court recognized that a gravely disabled person may be an individual who is neither insane nor incompetent, but who, for a variety of reasons, needs guidance in the conduct of his or her affairs. [Id. at 39, 43.]

In *Baber v. Napa State Hospital* (1984) 154 Cal.App.3d 514, 519, the court declared that "the mere status of conservatee does not, ipso facto, establish incompetence." Similarly, in *Conservatorship of Moore* (1986) 185 Cal.App.3d 718, 732, the court held that "conservatees are not, by reason of their conservatorship, automatically considered incompetent."

The rule that LPS conservatorship does not establish incompetence was again made clear in the case of *Conservatorship of Waltz* (1986) 180 Cal.App.3d 722. In *Waltz*, the trial court had made an order allowing the conservator the power to consent to or refuse ECT. The Court of Appeals affirmed the appointment of conservator but reversed the determination of incapacity to consent to ECT. In deciding the capacity question, the court summarized its findings as follows:

> In short, Waltz has both a psychotic and a rational fear of ECT (emphasis in original). Section 5326.5, subdivision (d) makes it clear the mere fact Waltz has been diagnosed as having a mental illness is not enough to deem him incapable of consent. It follows that even though he has a mental illness which causes him to be paranoid about ECT and many other things, this fact alone cannot be used to negate the presence of a rational fear of ECT which causes him to refuse the treatment even during his nonpsychotic moments. It is not per se irrational to fear possibly irreversible memory loss, which is

> one of the required consent items in Section 5326.2, nor is it per se irrational to fear death, even if its occurrence during ECT is rare.
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> . . . Here, the evidence indicates a disagreement between Waltz, who believes the medications will make him better, and his physician, who believes the drugs have not been effective. This disagreement does not show Waltz' inability to give informed consent. [180 Cal.App.3d at 732-734 (emphasis added).]

The Attorney General has recognized that competence to make treatment decisions is a determination specific to the particular treatment being proposed:

> The finding of incompetence under the doctrine of informed consent may, depending on the state of mind of the conservatee, be restricted to the particular facts surrounding the proposed medical procedure. For example, a conservatee may be unable to rationally understand the necessity for a thyroidectomy but may be competent to refuse another form of medical treatment. [58 Ops.Cal.Atty.Gen. 849, 852 (1975).]

More recently, the Court of Appeal made clear that even in conservatorship reappointment proceedings, the conservatee cannot be deprived of his or her personal decision making rights absent a specific finding of incapacity. In *Conservatorship of Alfred Marvin W*. (1989) 206 Cal.App.3d 1572, the Fifth District Court of Appeal held that "the fact that [the conservatee] continued to be gravely disabled did not by itself satisfy the evidentiary requirements for the imposition of special disabilities under section 5357. A conservatee does not forfeit any legal right nor suffer legal disability by reason of the LPS commitment alone." [Id. at 1578 (emphasis added).] The court also ruled that the petitioner in a conservatorship reestablishment proceeding had the burden of producing evidence to support the special disabilities which he sought. [Id.]

In summary, the above authorities conclusively demonstrate that individuals on conservatorships, including temporary conservatorships, retain their fundamental rights under LPS to give or withhold consent to

antipsychotic medications absent an emergency or a specific judicial determination of incompetence.

II.

THE RIGHT TO GIVE OR WITHHOLD CONSENT TO ANTIPSYCHOTIC MEDICATIONS IS ALSO PROTECTED BY THE COMMON LAW AND THE CONSTITUTIONAL RIGHT TO PRIVACY

The *Riese* court recognized that, *entirely apart from LPS*, the right to give or withhold consent to medical treatment, including psychiatric treatment, is protected by the common law of this state and by the constitutional right to privacy. [209 Cal.App.3d at 1317-1318.] In the landmark case of *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243-244, the California Supreme Court held that patients could be denied informed consent only where "there is an emergency or the patient is . . . incompetent."

The rationale is simple:

> A medical doctor, being the expert, appreciates the risks inherent in the procedure he is prescribing, the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment. But once this information has been disclosed, that aspect of the doctor's expert function has been performed. Weighing of these risks against the individual subjective fears and hopes of the patient is not an expert's skill. Such evaluation and decision is a non-medical judgment reserved to the patient alone. [Cobbs, 8 Cal.3d at 243 (emphasis added).]

See also *Jarvis v. Levine* (Minn. 1988) 418 N.W.2d 139, 148 ("The doctor may recommend, but does not dictate the final decision.").

The legally competent person's right of self-determination to make medical treatment decisions even outweighs the state' interest in saving life. [See *Barber v. Superior Court* (1983) 147 Cal.App.3d 1006; *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, on remand *Bartling v. Glendale*

Adventist Medical Center (1986) 184 Cal.App.3d 97; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127; *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, cert. denied 109 S.Ct. 399, rehrg. denied 109 S.Ct. 828.]

In *Bartling*, the Court of Appeal held that the right of a competent adult to refuse medical treatment is a constitutionally protected right that must not be abridged. [163 Cal.App.3d at 195.] The Bartling court further held that the right of a competent adult to make medical decisions outweighs the state's interests in "the preservation of life, the need to protect innocent third parties, the prevention of suicide, and maintaining the ethics of the medical profession." [Id.] See also Health and Safety Code Section 7186 (The Legislature had found that adults have the fundamental right to control their medical care decisions, including the decision to withhold or withdraw life sustaining procedures in the instance of a terminal condition).

California, unlike other states, has an explicit constitutional right to privacy. [See Cal.Const., Art. I, § 1.] California courts have specifically recognized the constitutional dimensions of a mentally ill person's right to refuse treatment. As the Court of Appeal stated:

> Generally, every person has a right arising out of both common law and the state constitutional guarantee of privacy to give or withhold informed consent with respect to a proposed medical treatment. [*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 11, citing, inter alia, *Cobbs v. Grant*, supra, 8 Cal.3d at 242-244.]

In discussing the rights of conservatees to effective treatment, the Court of Appeal declared: "[T]hat right, we will add, here includes the right to elect or reject the treatment which itself can invade the constitutional right of privacy." [*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 321 (emphasis added).]

The California Attorney General has recognized that conservatees retain their constitutional rights to give or withhold consent to medical treatment unless there has been a judicial determination to the contrary:

> A conservatee, like any patient, may rationally understand the nature of the proposed treatment, but may refuse such treatment for reasons which a conservator may think absurd. If no hearing is held on the issue of whether the conservatee is competent to give or withhold medical consent, both the conservator and the physician run the risk of forcing medical treatment on a competent conservatee in violation of his constitutional right of privacy. [58 Ops.Cal.Atty.Gen. 849, 852 (1975) (emphasis added).]

More recently, the California Supreme Court, in a unanimous decision, strongly reaffirmed this "basic and fundamental right" even when a refusal of the proposed medical treatment may cause or hasten death, holding:

> [U]nder California law a competent, informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment of any form irrespective of the personal consequences. [Thor v. Superior Court (1993) 21 Cal.Rptr. 357, 360 (emphasis added).]

Thus, in addition to LPS, the fundamental right to make informed treatment decisions with antipsychotic medications is protected by the common law of this state and the constitutional right to privacy.

III.
SUBSTITUTED JUDGMENT

In California, absent an emergency, "if the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." [Cobbs, 8 Cal.3d at 244.] On the issue of substituted judgment, the Riese court ruled as follows:

> If the patient is judicially determined incapable of giving informed consent, and if he or she is being detained for 72-hour treatment and evaluation under section 5150 or for not more than 14 days of intensive treatment under section 5250, the patient may thereupon be required to accept the drug treatment that has been medically prescribed. If confinement of a patient determined incapable of giving

> informed consent has been authorized for a period longer than 14 days, such consent must be obtained from the responsible relative or the guardian or the conservator of the patient." [Cf. § 5326.7, subd. (g).] "[A]ny surrogate . . . ought to be guided in his or her decisions first by his knowledge of the patient's own desires and feelings, to the extent that they were expressed before the patient became incompetent. [¶] If it is not possible to ascertain the choice the patient would have mode, the surrogate ought to be guided in his decision by the patient's best interests." [Barber v. Superior Court, supra, 147 Cal.App.3d at p.1021; 209 Cal.App.3d at 1323 (footnote omitted).]

Under California law, the legal incompetence of a person identified as mentally disabled does not result in loss of this important decision-making right, but merely its transfer and vicarious exercise. [See e.g., *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143; *Foy v. Greenblott* (1983) 141 Cal.App.3d 1; In re Hop (1981) 29 Cal.3d 82.] Substituted judgment attempts to reflect, as closely as possible, the individual preferences or wishes of the patient. [See generally *J. Parry, A Unified Theory of Substituted Consent, Incompetent Patients' Right to Individualized Health Care Decision Making* (1987) 11 Ment. & Phys. Disab.L.Rep. 378, 381 (hereafter "Parry").]

In the most recent California case on the rights of persons adjudicated incompetent to have treatment decisions made on their behalf, it was stated:

> Under California law, however, human beings are not the passive subjects of medical technology. The line of decisions beginning with Cobbs v. Grant and continuing with Barber, Bartling and Bouvia compels this conclusion. These cases recognize that medical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatments is an important way in which society respects persons as individuals. Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions. [Conservatorship of Drabick, 200 Cal.App.3d at 208 (emphasis added).]

And, as the Colorado Supreme Court concluded:

> The disruption of bodily integrity is no less real in the case of an incompetent patient; nor, for that matter, are the risks from the antipsychotic medication any less for a patient who is unable to give an informed consent to the proposed treatment. . . . If anything, the state has a greater responsibility towards those who are unable to protect themselves . . . [*People v. Medina* (Colo. 1985) 705 P.2d 961, 971 (emphasis added; citations omitted).]

For persons who have been adjudicated incompetent and are subject to LPS detentions in excess of 14 days, substituted judgment is required. The conservator or other court-appointed surrogate decision maker must be guided by the individual's wishes and desires regarding the medications. In the absence of any clear evidence of the person's wishes regarding the drug treatment, the decision should be based on the patient's best interests: what a reasonable member of the patient's community would do, taking into consideration the patient's family, friends, moral and religious values, medical risks and benefits, recent history of abuses, if any, of the medical procedure in question, and any other factors that appear relevant to the patient or the specific decision in question. Thus, the best interests test is not a narrow examination of medical concerns, but a broad examination of moral, medical, psychological and legal concerns expressed as much as possible from the patient's point of view. [Parry, supra, at 379.]

IV.

CONCLUSION

Individuals subject to the provisions of LPS, regardless of the nature of any particular detention, retain their fundamental rights to make their own treatment decisions with antipsychotic medications absent an emergency or a specific adjudication of incompetence. For persons who have been judicially determined incompetent and are subject to LPS detentions in excess of 14 days, substituted judgment is required.

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