S258212

FILED WITH PERMISSION

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S258212

PUBLIC GUARDIAN OF THE COUNTY OF LOS ANGELES,
Petitioner and Respondent,

v.

K. P.,
Objector and Appellant.

Court of Appeal of California
Second District, Division Two
No. B291510

Superior Court of California
Los Angeles County
No. ZE032603
Robert Harrison

Answer Brief on the Merits

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I. INTRODUCTION

This case arises under the Lanterman-Petris-Short Act ("LPS Act"), Welf. & Inst. Code section 5000 et. seq.,[1] governing the treatment of the severely mentally ill who are found to be "gravely disabled" under the LPS Act. The fundamental question presented is whether a principle that first emerged from a jury instruction of dubious provenance should become integrated into the LPS Act where the Legislature has not seen fit to make it so.

In the original trial court proceedings discussed below the issue arose from the application of Judicial Council of California Civil Jury Trial Instruction 4000. In 2016, the Judicial Council acknowledged a split in authorities as to whether a petition under the LPS Act must plead and prove that a person is unwilling or unable to voluntarily accept meaningful treatment before a conservator may be appointed under the LPS Act. The Judicial Council referred to the disputed language as "element 3" ("Element 3".)

The Public Guardian's analysis of the decisional law and statutory framework demonstrates that Due Process does not require the trier of fact to find, beyond a reasonable doubt, whether a person is unwilling or unable voluntarily to accept meaningful treatment in a petition to appoint or reappoint a conservator under the LPS Act.

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[1] All statutory references are to the California Welfare and Institutions Code unless otherwise stated.

Element 3 arose from a line of cases that specifically focused on jury instructions. None of the cases held that Element 3 was appropriately addressed as element to be proven to establish an LPS conservatorship. Element 3, as a jury instruction, was essentially a defensive device. If the jury found facts in support of Element 3, the jury could then find that the person was not gravely disabled consistent with the reasoning in the reported cases. Thus, Element 3 allowed a person to defend against the allegation of grave disability. However, this application was flawed.

The concept of grave disability is the inability of a person to provide for his basic needs for food, clothing or shelter. A person who is willing and able voluntarily to accept treatment for mental health is certainly better off than a person who cannot accept such treatment. However, treatment for mental illness, even if it is received voluntarily, is not a proxy for the person's ability to provide for his or her needs for food, clothing or shelter. Element 3 rests the false assumption that voluntary treatment is logical proxy for food, clothing or shelter.

The development of the decisional law as analyzed below illustrates that Element 3 should not become part of the statutory definition of grave disability.

II. STATEMENT OF FACTS

1. The filing of the petition for re-appointment.

The Public Guardian for the County of Los Angeles filed a Petition for Re-Appointment of Conservator of the Person and

Estate of K.P. and Notice on April 19, 2018. (CT 205–207, 208–216.) At the initial hearing held on May 8, 2018 K.P. requested a jury trial. The case was set for a trial readiness hearing on June 14, 2018 and the jury trial on June 18, 2018. (CT 217.)(RT 901–902.)

At the trial readiness conference K.P. appeared with the Deputy Public Defender specifically assigned to conduct his trial. (RT 1001–1003.) K.P.'s counsel explained that he would be engaged in a court trial in another matter. The court continued the trial to June 20, 2018. (RT 1002.)

For the trial readiness conference, the Public Guardian filed a memorandum, dated June 13, 2018, written by Dr. Sara Mehraban, the program coordinator at the facility treating K.P. (CT 218.) It indicated that K.P. had been grazed by a basketball as he sat outdoors while other residents were playing basketball nearby. In response, he tried to stab the person who he believed had intentionally hit him with the basketball. (CT 218.) Dr. Mehraban's also reported her observations of K.P.'s mother. K.P.'s mother demonstrated manic behaviors. She expressed her belief that K.P. did not have mental illness. She believed his behaviors were caused by medications. She also did not believe that the attempted stabbing incident had occurred. Dr. Mehraban reported that because his mother was a negative influence on K.P. her visitations would be revoked until K.P. improved. Dr. Mehraban wanted the court to have the information because she was aware of the jury trial. (CT 218.)

2. The parties argued whether the jury could hear evidence about the treatment and conditions of the LPS conservatorship and Element 3 in CACI No. 4000.

Pretrial instructions were discussed by the court and counsel on June 20, 2018. (RT 1101.) The court emphasized the jurors need to decide whether K.P. was currently gravely disabled. (RT 1101.) The court asked both counsel not to talk about the duration, the treatment, or circumstances of conservatorship. (RT 1101.) The court indicated those factors were irrelevant to the determination of grave disability. (RT 1101.) The court indicated counsel should not refer to involuntary medication or institutional confinement. (RT 1101.) The court said it was permissible to comment on K.P.'s personal liberty in light of the unanimous jury verdict and the burden of proof. (RT 1101.) K.P.'s history of illness in the previous one-year period was relevant as a matter of local practice. (RT 1102.) His history of prior hospitalizations would be allowed as relevant to the issue of whether K.P. could maintain himself without the conservatorship. (RT 1102.)

K.P.'s counsel argued the jury should know the LPS conservatorship lasted for a year and can be renewed annually. (RT 1102.) He argued the jury should hear about involuntary medication and placement in a locked facility. (RT 1102.) Counsel described the forced medication as the "booty juice" that could be administered against a person's will. (RT 1103.) K.P.'s counsel explained the jury would otherwise be denied the opportunity of balancing the burden of proof in deciding whether K.P. was

gravely disabled. (RT 1103.) The court countered the issues identified were not probative of the issue of grave disability. (RT 1103.)

The court cited CACI No. 4000 and suggested counsel remain within its framework. (RT 1103.) K.P.'s counsel objected to the instruction. (RT 1103.)

The court referred to the first paragraph in CACI NO. 4000 and read it aloud: "The conservator is appointed to oversee under the direction of the court the care of persons who are gravely disabled." (RT 1104.) The court explained that this language limited the arguments because otherwise the Public Guardian would be prejudiced by raising the fear among the jurors that if they vote for grave disability that they are also forcing medication on K.P. (RT 1103.) The court noted the jury instructions stated clearly that the jury may not consider the circumstances of conservatorship in deciding grave disability. (RT 1104.)

K.P.'s counsel renewed his request for the jury to hear the conservatorship can be renewed annually. (RT 1105.) He argued the jurors should know the consequences of a guilty verdict for a murder charge is life in prison. (RT 1105.) By analogy, the present jury should be told a conservatorship is possibly a life sentence if the case is renewed year after year. (RT 1105.)

The court indicated usually the attorneys for conservatees argue against letting the jury know about the one-year term of the conservatorship. (RT 1105.) Counsel asked the court if the court was prepared to allow for the argument. (RT 1105.) The court commented the Public Guardian would be prejudiced if the time limit were explained to the jury because there were other

issues in a conservatorship. (RT 1105.) The sole question for the jury was whether someone was gravely disabled. (RT 1106.) K.P."s counsel asked whether the court was asking or ordering him not to refer to the time limit. (RT 1106.) The court ordered counsel not to refer to the time limit. (RT 1106.)

K.P.'s counsel raised the issue of Element 3 in CACI No. 4000. He recalled that Element 3 had previously appeared in jury instructions. (RT 1106.) He explained that a year ago, the court removed Element 3 based on county counsel's advocacy. (RT 1106.) He recalled that Element 3 then came back and in the present case it had been removed again. (RT 1106.) Counsel objected to its removal and referred to his written objection. (RT 1106; CT 222–225.) He distinguished the case of *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464 (*Symington)* on the basis that it was not a jury trial in which the conservatee stated that she did not want the assistance of third parties. (RT 1106.) He argued the court's reference to Element 3 was dicta and was not authoritative. (RT 1106.) He said in K.P.'s case the evidence would show that he was willing to voluntarily accept treatment. (RT 1107.) K.P.'s counsel argued it is important that the jury instruction include Element 3.

K.P.'s counsel argued that placing the language of "meaningful treatment" in CACI No. 4002 was a "Missouri Compromise" imposed by the court. (RT 1107; CT 249.) He argued Element 3 appeared at the bottom of a less consequential jury instruction. (RT 1107.) He explained that he liked the third element when it appeared in a big instruction with a number as compared to having the language at the bottom of another instruction. (RT 1107.)

The court stated that CACI No. 4000 laid out the elements that the Public Guardian needed to prove that someone was gravely disabled. (CT 1107.) The court explained that the reason it placed the language of the third element in CACI No. 4002 was based on an appellate case. (RT 1107.) The court did not have the case citation readily available. (RT 1107.) The court explained that opinion held that the jury should be allowed to consider all factors that are relevant to the issue of grave disability. (RT 1108.) The court indicated it would try to find the case. (CT 1108.)

The court recalled the decision was a 1981 case which held that the jury can consider voluntary (third) party assistance. (RT 1108.) The third-party assistance was based on an actual code section and appeared in CACI No. 4007. (CT 253.) The court stated that the only code section that referred to a person willing to submit to voluntary treatment appeared in a code section that pertained to the Public Guardian's investigation. (RT 1108.)

K.P.'s counsel asked why the court had changed the instruction. (RT 1108.) He argued that the court made the decision in the previous year to change what had been a long-standing policy in the jury instructions after one trial. (RT 1103.) Thereafter, he argued, the court backtracked and allowed the third element which is now absent. (RT 1108.)

The court indicated that the Public Guardian was asking for the different instruction. (RT 1108.) K.P.'s counsel renewed his objection once again and then submitted. (RT 1108.)

3. K.P.'s counsel argues the Public Guardian has the burden of showing that K.P. is unwilling to seek treatment as an element of being gravely disabled.

The court described the case in general terms to the jury at the beginning of voir dire. (RT 1109–1111.) Once the jury had been empaneled, the court had counsel introduce themselves and their respective witnesses. (RT 1111–1112.) After the jury had been selected K.P.'s counsel requested that K.P.'s mother be called as a witness out of order. (RT 1113.) The court and counsel had been advised, out of the jury's presence, that K.P.'s mother was starting a new job on the following day and would not be available to return to court and testify. (RT 1109.) The court agreed that the witness could be called out of order and then requested that counsel give their opening statements. (RT 1113.)

The County Counsel outlined what he expected the Public Guardian's evidence would show at trial. (RT 1113–1116.)

K.P.'s counsel outlined the evidence that he claimed would show K.P. was not gravely disabled. K.P.'s counsel argued the Public Guardian has the burden of proving that there was no third party assistance and that K.P. was unwilling to seek treatment. (RT 1118.)

4. K.P.'s mother testifies that she will assist K.P. as an alternative to the conservatorship.

K.P.'s counsel called K.P.'s mother to testify. (RT 1119.) In response to direct examination she testified that she agreed that:

1. he had a mental illness;
2. she was willing to help him see a psychiatrist;
3. She was willing to take him or set up appointments to see a therapist or psychologist;
4. she believed he needed to continue to take his medications; and
5. she would insist that he take his medications if he was resisting taking them. (RT 1120.)

She had seen him before when he was off his medications. (RT 1120.) She believed it was best if he continued to take his psychotropic medications. (RT 1121.) She agreed to help him fill his prescriptions for psychiatric medications. (RT 1121.) She agreed to take him to doctor's appointments for medical conditions. (RT 1121.)

She could not provide housing for K.P.. (RT 1121.) She agreed that she would help him find an apartment or a board and care. (RT 1121.) She agreed to take him to a mental hospital if his symptoms returned or he was being resistant to taking his medications. (RT 1121.)

On cross-examination K.P.'s mother testified that if K.P. won his jury trial that she would find housing for him. (RT 1122.) She would look for different apartment, talk to people, and get quotes. (RT 1122.) She thought it would take a couple of weeks or a week or so. (RT 1122.) She intended to leave him in his current facility while she looked for a place for him. (RT 1123.) She did not know how that plan would work but it was her intent that he remain there while she looked for housing for him. (RT 1123.)

She testified that she had previously served as K.P.'s conservator. (RT 1123.) She explained that she was no longer his

conservator because of a lack of communication. (RT 1123.) She did not file his renewal papers. (RT 1123.) The case was turned over to the Public Guardian which was appointed as K.P.'s conservator. (RT 1123.) She told the jury that it would not happen again because she would make sure that she had everything correct. (RT 1124.)

She testified that there was a private doctor available to help him. ((RT 1124.) He had been seen by the private doctor when she was the conservator. (RT 1124.) She had a medical doctor for internal medicine and a dentist. (RT 1124.) Those doctors had referrals for psychiatric and mental health issues. (RT 1124.) She would use the same process to help him that she had previously used. (RT 1124.)

On redirect examination, K.P.'s mother testified that she was willing to work with the social worker at the current facility on discharge planning. (RT 1125.) She testified that she had visited with K.P. twice a week since he had been at his current placement. (RT 1125.) She worked during the week and so visited on the weekends. (RT 1125.)

K.P.'s mother's testimony ended. The court trailed the case to the following day. (RT 1126–1127.)

5. Dr. Mehraban, a clinical psychologist, qualifies as an expert and testifies that K.P. is gravely disabled.

Sara Mehraban, a licensed clinical psychologist, was called by the Public Guardian to offer her expert opinion. (RT 1129.) She had four years and ten months of post-graduate experience in the diagnosis and treatment of emotional and mental disorders. (RT

1129.) She estimated that she had evaluated approximately 200 or more patients during that time. (RT 1130.) She was familiar with the effects of psychiatric medications but beyond a basic understanding, the topic was outside of the scope of her practice. (RT 1130.)

Dr. Mehraban worked as a supervisor. (RT 1131.) She worked with K.P.'s individual therapist and supervised the therapist on how best to treat him based on his symptoms. (RT 1132.) She testified her compensation for testimony in court was merely her regular salary. (RT 1132.) There was no incentive for her to do anything but provide objective and unbiased testimony. (RT 1132.) She had previously found that a patient was not gravely disabled. (RT 1132.)

K.P.'s counsel asked questions on voir dire regarding her qualification. (RT 1133–1137.) He concluded his examination and indicated that he did not object to Dr. Mehraban testifying as an expert. (RT 1138.)

Dr. Mehraban testified she had seen K.P. five days a week and during the majority of the day. (RT 1139.) She walked through the facility and made rounds a couple of times each day during the week. (RT 1139.)

Dr. Mehraban's most recent examination of K.P. was conducted earlier in the morning before she came to court. (RT 1139.) She met with him at the facility. (RT 1139.)

She had reviewed K.P.'s medical and psychiatric records before she formed her opinion on his diagnosis. (RT 1138.) The purpose of the document review was to obtain a comprehensive understanding of the individual; a full picture, as opposed to focusing on the symptoms. (RT 1140.) She reviewed K.P.'s chart.

(RT 1140.) She discussed his case with members of the treating staff. (RT 1140.) She explained that understanding the medical history was also important in forming her opinion. (RT 1140.) His medical history addressed his strengths, abilities, and challenges. (RT 1140.)

Dr. Mehraban diagnosed K.P. with Schizophrenia. (RT 1141.) She testified described K.P.'s symptoms that she had personally observed. (RT 1141.) He had auditory hallucinations. (RT 1141.) He admitted to her that he heard voices. (RT 1141.) She had also seen him responding aloud to the voices. (RT 1141.)

K.P. had delusions which she defined as false beliefs that were in contradiction with reality. (RT 1141.) K.P.'s delusions were of the paranoid type. (RT 1141.) He believed that people were out to get him and to hurt him. (RT 1141.) He was legitimately very scared of people hurting him and was scared all the time. (RT 1141.)

Dr. Mehraban testified that he had admitted to having a delusion earlier in the morning before the trial began. (RT 1142.) K.P. had asked to be placed in the witness protection program. (RT 1142.) The doctor explained that the specific individual who triggers K.P.'s paranoia changes and can be a different peer at different times. (RT 1142.) In the morning before the trial, he referred to another person who had spoken to him but who stands nearby and around him. (RT 1142.) He believes this person is trying to attack him. (RT 1142.) He wanted to enter the witness protection program because he was afraid of this person. (RT 1142.)

Dr. Mehraban was asked to explain the DSM-5. (RT 1142.) She testified that it was a reference manual. (RT 1142.) It

provides an understanding of different clinical symptoms and the different ways people behave or explain what is happening to them. (RT 1142.) It is research based and used to develop a diagnosis and treatment plan. (RT 1142–1143.) It is the standard used in the psychiatric industry. (RT 1143.)

Dr. Mehraban testified that schizophrenia was a mental disorder described in the DSM-5. (RT 1143.) She testified about the typical symptoms of schizophrenia. (RT 1143.) K.P. exhibited auditory hallucinations, he heard voices and had delusions. (RT 1144.) He believed things that were not real. (RT 1144.) He had grossly disorganized behaviors and negative symptoms. (RT 1144.) He was not motivated. (RT 1144.) He was not able to socialize with other people. (RT 1144.) He had difficulty with speaking and poverty of speech. (RT 1144.) These were the main negative symptoms that he presented. (RT 1144.)

Dr. Mehraban described a recent incident that required a hospitalization. (RT 1145.) K.P. had told Dr. Mehraban about the incident earlier in the day and they had discussed it. (RT 1145.) K.P. believed that he had been intentionally hit with a basketball. (RT 1145.) He perceived it as an attack and chased the person with a pen. (RT 1145.) He could not be redirected. (RT 1145.) The other person had to run into an office to get K.P. to stop chasing after him. (RT 1145.) K.P. continued to be difficult and could not be redirected. (RT 1145.) He continued to be very upset and threatened the person if he came near to him. (RT 1145.) As a result of his paranoia and a concern that K.P. would act out on the basis of his delusion of fear, K.P. was hospitalized. (RT 1145.)

The medications used to treat K.P.'s schizophrenia were described by Dr. Mehraban. (RT 1145 - 1146.) He was taking Wellbutrin, Clozapine, and Invega. (RT 1145.) Invega is an intramuscular shot that is given every three months. (RT 1145.) (RT 1146.) The Wellburtin is prescribed for individuals who have heightened anxiety. (RT 1146.)

K.P. had discussed his medications with her earlier that day in the morning. (RT 1146.) At times, K.P. indicated that he would take his medications if he were released from conservatorship, and on other occasions, he would say the opposite. (RT 1146–1147.)

Dr. Mehraban opined that K.P. could not provide for his basic food, shelter or clothing without taking the medication. (RT 1147.) In her opinion, based on his past history and circumstantial evidence, he would not take his medications without the supervision of a conservator. (RT 1147.)

Dr. Meharban explained the clinical term "insight" as it applied to a mentally ill person. (RT 1147.) She explained that it can be defined in four different levels. (RT 1147.) The most basic level is whether the patient has some understanding that they have symptoms. (RT 1147.) K.P. has this basic understanding. (RT 1147.) He admitted hearing voices and having symptoms. (RT 1147.) The next level would be whether he has symptoms but minimized them. (RT 1147.) K.P. meets this criteria. (RT 1147.) He minimizes his symptoms and does not really understand where they come from. (RT 1147.) He had previously expressed his belief that his symptoms were caused by his medications. (RT 1147.) Then there is the understanding of the cause and effect when it comes to insight. (RT 1147.) Above that level is the

understanding of how to effectively manage the mental health symptoms. (RT 1148.) K.P. meets the very basic level of insight. (RT 1148.) The lack of insight can limit a person's ability and interest in accessing medication, therapy, and other services to help with the management of a person's mental health symptoms. (RT 1148.)

She opined that K.P. lacked significant insight into his mental illness. (RT 1148.) She explained that he demonstrated his lack insight through his belief that his medications caused his symptoms. (RT 1148.) He had said he believes the medications are helping. (RT 1148.) However, he also said that they do not help him. (RT 1148.) He had previously said that he was not feeling well and would not come for his medication. (RT 1148.) He had been told multiple times that the most important things for him when he is not feeling well are to continue taking his medications and to eat. (RT 1148.)

She discussed K.P.'s explanation of his plans if he were released from the facility and the conservatorship. (RT 1149.) He described living in an apartment. (RT 1149.) His mother would help him. (RT 1149.) He had not taken any steps to look for an apartment. (RT 1149.)

In Dr. Mehraban's opinion, K.P.'s plan for self-care was not viable because of his mental condition. (RT 1149.) She explained that individuals at the facility have a lot of freedom. (RT 1149.) People can go out into the community. (RT 1149.) They can gain passes and go out and buy things. (RT 1149.) K.P. has been in the facility for a year and a half and he has not gone out on his own. (RT 1149.) He will not go into the community without his therapist or his mother. (RT 1149.) Dr. Mehraban explained that

it would be very concerning for her, if he went to a level of care where he would not have anyone who would be able to help him with outings in the community. (RT 1150.) She believed that K.P. needed a team of individuals to help him. (RT 1150.) He needed 24-hour, 7-day a week care and constant supervision. (RT 1150.) She was concerned that being in an apartment that he would not have that level of assistance. (RT 1150.)

Dr. Mehraban had spoken with K.P.'s mother earlier in the day. (RT 1150.) She also had spoken with her approximately three weeks earlier when K.P. was hospitalized. (RT 1150.) K.P.'s mother did not discuss his plans for self-care with Dr. Mehraban. (RT 1150.)

Dr. Mehraban explained that K.P. did not have sufficient insight to be a meaningful voluntary patient. (RT 1151.) He lacked the ability to have initiative to make appointments or to call the pharmacy. (RT 1150.) K.P. had not demonstrated that he had a sufficient level of initiative or insight where he could manage self-care. (RT 1152.)

Dr. Mehraban testified that a month earlier K.P. had stated he wanted to get off of his medications. (RT 1152.) He only wanted to take one of his medications and not any of the others. (RT 1152.) However, earlier in the morning, before the trial, he had explained that he wanted to take his medications. (RT 1152.) He also said that sometimes he did not want to take his medications. (RT 1152.) His different comments about taking his medications were very concerning because his medications were incredibly important for him. (RT 1152.)

K.P.'s mother and Dr. Mehraban had discussed his medications. K.P.'s mother explained that she thought the

medications were causing his hallucinations. (RT 1153.) She also thought the medications were causing his other mental health symptoms. (RT 1152.)

Dr. Mehraban did not know of any other alternatives to conservatorship for K.P. (RT 1152.)

K.P.'s counsel cross-examined Dr. Mehraban. (RT 1153.) Dr. Meharban agreed that insight into a person's mental illness was an important issue in assessing grave disability. (RT 1153.) She agreed that the lack of insight or the presence of good insight were important factors in determining whether a person is gravely disabled. (RT 1154.) It depended on the circumstances whether either factor weighed towards or against grave disability. (RT 1154.)

Dr. Meharban explained that schizophrenia is characterized by psychosis. (RT 1154.) It includes hearing voices that are not there. It can include seeing things that are not there. (RT 1155.) Bi-polar disorder is characterized by rapid fluctuations in mood. (RT 1155.) There are many different types of bipolar disorders. (RT 1155.) There is "mania" which is one with massive highs. (RT 1155.) There is another form described as a very extreme form of depression. (RT 1155.) There are components of each in both disorders. (RT 1155.)

Dr. Meharban agreed that a patient's insight into their medications is important for the patient to acquire during treatment. (RT 1155.) She agreed that medications can help a person control the symptoms. (RT 1155.) She testified that there is no known cure for schizophrenia. (RT 1155.)

On cross-examination, K.P.'s counsel asked Dr. Meharban about her testimony that K.P. had waffled when he commented

about taking his medications. (RT 1156–1158.) Dr. Meharban explained that K.P. would agree to take his medications because, right now, he would have secondary gain in making that statement. (RT 1158.) Dr. Meharban did not believe that K.P. had insight into the importance of his medications. (RT 1158.)

Dr. Meharban indicated that she did not ask K.P. if he would follow up with a psychiatrist as part of his plan for self-care. (RT 1159.) She did not ask him if he would follow up with a therapist or a psychologist if he were released. (RT 1159.) She explained that a month earlier, K.P. had told her that he would think about whether he would follow-up with his treatment. (RT 1159.)

Dr. Mehraban testified that when she asked K.P. earlier that same day in morning if he wanted to get out of the conservatorship, he said yes. (RT 1159.)

K.P.'s counsel asked if K.P. was eating his food. (RT 1159.) Dr. Meharban testified that sometimes he would eat. (RT 1159.) She was asked about the quality of the food at the facility. She explained that she would eat the same meals if she was hungry. (RT 1159.)

On re-direct examination, Dr. Meharban testified that she was monitoring K.P. as he was taking his medications. (RT 1160.) Once, he had dispensed a double dose of his medications. (RT 1160.) The medications had a known toxicity. (RT 1160.) Dr. Meharban said she told K.P. that he could not take the medication because he had already taken it. (RT 1160.) K.P. disagreed and Dr. Meharban pointed out to K.P. that his pills were numbered to help staff keep track of them. (RT 1160.)

At the closing of re-examination, K.P.'s counsel said "1118 motion." (RT 1161.) The court recessed the trial for a fifteen minute break. (RT 1161.)

6. K.P.'s 1118 Motion to dismiss for insufficiency of the evidence is denied.

K.P.'s counsel argued that the heart of case was the third-party alternative. (RT 1162.) He argued that there had not been any evidence to contradict the evidence of third-party assistance and the Public Guardian's failure to provide rebuttal evidence supported the motion. (RT 1162.)

The Public Guardian argued that the K.P. mother's testimony had not reached the level where the jury could be assured that K.P. would be safe under her care. (RT 1162.) The doctor testified that K.P. needed an entire team of people given his mental condition. (RT 1162–1163.) The Public Guardian argued there was insufficient evidence to support a finding of third-party assistance. (RT 1163.)

The trial court indicated that the witness's credibility was an issue. (RT 1163.) If the jury chose not to believe the witness, then they could find that there was no third-party assistance. (RT 1163.) The trial court disagreed that rebuttal evidence was required. (RT 1164.) The trial court denied the 1118 motion. (RT 1164.)

7. K.P. testifies at trial.

K.P. was called to testify at his jury trial. K.P.'s counsel asked K.P. whether he was willing to remain in the facility until he and

his mother could find him another place to say. (RT 1165.) K.P. said "no." (RT 1165.) The question was asked again. (RT 1165.) He said "yes." (RT 1165.) K.P. testified he was not willing to take psychiatric medications if he were released from the hospital. (RT 1165.) K.P. agreed that he needed a psychiatrist. (RT 1166.) K.P. answered "no-yes" when he was asked if he would see a therapist or psychologist. (RT 1166.) K.P. testified that he did not think he had a mental illness. (RT 1166.) He did not think that he had schizophrenia as the doctor had testified. (RT 1166.) He explained that he was doing better without the psychotropic medications. (RT 1166.) He explained both that his medications benefited him and then they did not. (RT 1166.) K.P.'s counsel concluded his direct examination. (RT 1166.)

On cross-examination, K.P. testified about the incident with the basketball. (RT 1167.) He explained that he was walking across the courtyard when another patient threw the ball at him. (RT 1167.) He did not know why the person threw ball at him, but he believed the person had attacked him. (RT 1167.) K.P. explained that the ball had been thrown hard and it was like an attack. (RT 1167.) He believed the ball was thrown at him on purpose. (RT 1167.) He admitted becoming upset and outraged. (RT 1167.) He went after the person with a pen. (RT 1168.) A staff member called him. (RT 1168.) They took the pen away from him. (RT 1168.) At the trial, he still believed that the person acted on purpose. (RT 1168.) He did not think it was an accident. (RT 1168.)

K.P. testified that if he were released from the conservatorship, he would look for an apartment with his mother's help. (RT 1168.)

K.P. explained that the last time he lived by himself, in the community, was in 2013. (RT 1168.) He had never lived on his own since that time. (RT 1169.) He had been either in a facility or a hospital since 2013. (RT 1169.)

K.P. explained that the medication worked. (RT 1169.) He believed that he had reached a point where he had taken enough medication that that he needed to stop. (RT 1169.) He did not intend on taking medication in the future. (RT 1169.)

K.P. testified that he had brain damage. (RT 1169.) He did not have schizophrenia. (RT 1169.) He explained that he could have brain trauma from childhood. (RT 1169.) He did not have schizophrenia. (RT 1169.)

K.P. testified that he thought he received $800.00 in monthly Social Security Benefits. (RT 1170.) He did not have any other income. (RT 1170.) He intended to be an entrepreneur, a businessman. (RT 1170.) He had sold candy before in 1995. (RT 1170.) He had worked in a place like a boys and girls club. (RT 1170.) He had worked as an entrepreneur in 1997. (RT 1171.)

K.P. explained that his mother had been his conservator in the past. (RT 1171.) He believed that her role as conservator terminated because she had moved away and was homeless. (RT 1171.) He believed that was the reason that the conservatorship was terminated. (RT 1171.)

The Public Guardian concluded its cross-examination. (RT 1171.) K.P.'s counsel did not ask any questions on re-direct. (RT 1171.) Both sides rested. (RT 1172.)

8. The court reads the jury instructions and counsel make their closing arguments.

The jury instructions appear at pages 233–260 of the clerk's transcript. The jury instructions were read but not recorded. (RT 1176.) The Public Guardian used final argument to remind the jurors of the beginning of the trial when it identified the three factors that would be proven beyond a reasonable doubt were described. (RT 1177.) Number one was that K.P. suffered from a mental disorder, schizophrenia. (RT 1177.) Number two was that as a result of the mental disorder, K.P. could not provide for his basic needs for food, clothing, or shelter on his own without the assistance of a conservator. (RT 1177.) Number three was that there were no reasonably viable alternatives to a conservatorship. (RT 1177.) The Public Guardian added that it had also been shown that due to K.P.'s lack of insight, he would not continue to take his medications unless he was under a conservatorship. (RT 1177.)

The Public Guardian referred to Dr. Sara Mehraban's testimony and diagnosis of schizophrenia. (RT 1177–1178.) The doctor's testimony of the nexus between K.P.'s mental disorder and his inability to provide for his basic needs for food, clothing and shelter was recalled for the jury. (RT 1178–1180.)

K.P.'s lack of insight into his mental illness was also identified as a factor that demonstrated that his plan for self-care was not a realistic alternative to a conservatorship. (RT 1180.)

The Public Guardian read selected lines from the jury instructions which addressed how K.P.'s reluctance to take his medications without supervision and his inability to provide for

his basic needs for food, clothing and shelter without his medications was a basis for finding that he was gravely disabled. (RT 1180–1181.) The Public Guardian also quoted language from a jury instruction which stated the jury could consider the failure to take medications in the past and K.P.'s lack of insight in determining whether K.P. was presently gravely disabled. K.P.'s testimony that he would discontinue taking his psychiatric medications was argued to the jury as well as his testimony that he did not believe that he had schizophrenia. (RT 1181.)

In rebuttal argument, K.P.'s counsel asked that the jury not act as a rubber stamp. (RT 1182.) He argued that the "third-party assistance" jury instruction was an important one. (RT 1182.) He asked the jury to take that instruction into consideration. (RT 1182.)

K.P.'s counsel referred to Jury Instruction 4002 and quoted the language that the likelihood of future deterioration or relapse may not be considered. (RT 1183.) He argued the jury could not consider the possibility of relapse based on the instruction that the Judge had given them. (RT 1183.) He quoted the language that stated the jury could consider whether K.P. was unable or unwilling voluntarily to accept meaningful treatment. (RT 1183.) He directed the jury's attention to the bottom of Jury Instruction 4002. (RT 1183.)

K.P.'s counsel argued that K.P. was currently taking his medications; that he had his mother to assist him with his medications and doctors if he were released; and therefore, the circumstances demonstrated that he would accept meaningful treatment. (RT 1183.) He argued that there are plenty of people who will deny that they have a condition but who will still follow

a doctor's instructions with family members to help with treatment. (RT 1183.) He concluded that those factors created reasonable doubt in this case. (RT 1183.)

The Public Guardian returned the jury's attention to the jury instruction on third-party assistance. (RT 1184.) The Public Guardian quoted the jury instruction that stated well intended offers were not sufficient unless they would ensure the person could survive safely. (RT 1184.) The Public Guardian reminded the jury that K.P.'s mother had testified that she had been the conservator but allowed the conservatorship to lapse. (RT 1184.) The Public Guardian recalled K.P.'s testimony that his mother had become homeless and this caused the termination of his conservatorship. (RT 1184.) The Public Guardian argued that the mother's testimony did not rise to the level of ensuring that K.P. could survive safely under the current circumstances. (RT 1184.) The Public Guardian also referred the jury to the jury instruction that they must decide the facts from the evidence at trial. (RT 1184.) The Public Guardian closed by arguing that despite the arguments of K.P.'s counsel, there was a jury instruction that defined "gravely disabled" and it was easily understood. (RT 1185.)

The court read its concluding jury instructions. (RT 1185). The jury returned a verdict that K.P. was gravely disabled. (RT 1187.) The jury was not polled. (RT 1187.) After the jury was discharged, the court ordered the establishment of conservatorship and ordered the powers and disabilities, the due date for the accounting, and the termination date for the conservatorship. (RT 1188.)

III. STANDARD OF REVIEW

The standard of review is disputed in these proceedings. The Public Guardian submits that the civil standard for evaluating jury instructions should apply. K.P. argues the standard applicable to criminal cases should apply.

In the proceedings below the Public Guardian cited *Conservatorship of George H.* (2008) 169 Cal.App.4th 157, 162–165 (*George H.*) In *George H.* the appellant argued that the court had a sua sponte duty to instruct the jury that if he was able to accept voluntary treatment, there was no need for a conservatorship. The appellant cited *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082 which relied on cases arising from criminal procedure in its evaluation of proposed jury instructions. In *George H.* the court analyzed the issue of the appropriate standard in an LPS conservatorship case.

> "*Walker* clearly understood *Roulet* to mean that LPS conservatorships are sufficiently like criminal proceedings that criminal law procedural protections automatically apply. However, the Supreme Court has since explained that *Roulet* did not create any such rule. Instead, the court has found that "the analogy between criminal proceedings and proceedings under the LPS is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." *Conservatorship of Ben C.., supra,* 40 Cal. 4th at p. 539.) In fact, since Roulet, the Supreme Court and Courts of Appeal which have considered the application of various criminal-law due process protections to LPS conservatorships have consistently found that the criminal law rules do not apply. (*Id.* at p. 163.)

Thus, *George H,* held that LPS conservatorship trials are treated as civil proceedings and the civil trial procedural rules are the one which apply regarding jury instructions. (*George H., supra,* 80 Cal. App. 4th at p.162.) Appellate courts apply a de novo standard when deciding whether a trial court's jury instructions are proper. (*Cristier v. Express Messenger Sys., Inc.* (2009) 171 Cal.App.4th 72 (*Cristier.))* "On appeal, we review the propriety of the jury instructions de novo. [Citation.] In considering the accuracy or completeness of a jury instruction, we evaluate it in the context of all of the court's instructions." *(Caldera v. Dep't of Corr. & Rehab.* (2018) 25 Cal.App. 5th 31, 44–45.)

An appellant must establish that the trial court's error in giving an improper jury instruction was prejudicial, resulting in a miscarriage of justice, to obtain reversal of a judgment. *(Adams v. MHC Colony Park Ltd. P'ship* (2014) 224 Cal.App.4th 601, 613.)

"The trial court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision. [Citations omitted]. A party is not entitled to have the jury instructed in any particular fashion or phraseology. And may not complain if the court gives the substance of the applicable law.(citation omitted.) " *(Cristier, supra.,* 171 Cal.App.4th at p. 82.)

1. The civil standard for evaluating jury instructions should apply because LPS conservatorship trials are fairly treated as civil proceedings.

The evaluation of jury instructions in an LPS trial should be treated as civil proceedings and not as if they are criminal

proceedings. The law in the LPS area has numerous cases addressing when and if the procedural protections afforded to criminal defendants should be extended to LPS conservatees.

> "A trial court's duty with respect to jury instructions is of course quite different in criminal cases than it is in civil cases. In criminal cases, the court must instruct on the general principles of law relevant to the issues raised by the evidence, even in the absence of a request. [Citations omitted.] In a civil case, the parties must propose complete and comprehensive instructions in accord with their theories. If they do not, the court has no duty to instruct on its own motion. [Citations omitted.] *Walker* thus held that the criminal law rule applies to LPS conservatorship. We think the law is to the contrary. An LPS conservatee has due process rights under the Act and the California Constitution. [Citation omitted.] However, the proceedings are civil, not criminal, and the civil trial procedural rules are the ones which apply." (*George H., supra*, 169 Cal.App.4th at p. 162.)

The circumstances in this case are properly addressed under the civil standard for reviewing jury instructions. Under a civil standard, the parties are responsible for providing their own instructions. The parties have to justify the proposed jury instructions only as being relevant. The parties have to demonstrate that the proposed jury instructions are supported by sufficient credible evidence in the record.

The United States Supreme Court in *Addington v. Texas* (1978) 441 U.S. 418 has addressed the Due Process Clause and the burden of proof as serving to allocate the risk of error and to indicate the relative importance of the ultimate decision. (*Id.* at p. 423.*)*

> "The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. [Citation omitted.] The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. [Citation omitted.] However, even though an erroneous conviction should be avoided in the first instance, the layers of professional review and observations of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is not worse for the individual than the failure to convict the guilty. One is suffering from a debilitating mental illness and in need to treatment is neither wholly at liberty nor free of stigma. [Citations omitted.] It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed." (Id. at p. 428-429.)

Accordingly, the adoption of a criminal standard is unwarranted in this case.

IV. ARGUMENT

1. The statutory language that provides for the initial appointment and for the reappointment of a LPS conservator is unambiguous.

The initial appointment of an LPS conservatorship is governed by Section 5008, subd. (h)(1).

> "For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), "gravely disabled" means either of the following:
>
> (A) A condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter[2]."

The statutory language for the reappointment of a LPS conservator is found in Section 5361.

> "Conservatorship initiated pursuant to this chapter shall automatically terminate one year after the appointment of the conservator by the superior court. The period of a temporary conservator shall not be included in the one-year period. . . . If upon the termination of an initial or a succeeding period of conservatorship the conservator determines that conservatorship is still required, he may petition the superior court for his reappointment as conservator for a succeeding one-year period. **The petition must include the opinion of two physicians or licensed psychologist who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism.** In the event that the

[2] Section 5008(h)(1)(B) involves "Murphy" conservatorships and is not implicated by the issues in this case.

> conservator is unable to obtain the opinion of two physicians or psychologists, he shall request that the court appoint them." (Section 5361, emphasis added.)

The development of cases that interpreted these statutes and the disputed language of Element 3 is discussed below.

2. Neither decisional law nor Due Process mandate the trier of fact find, beyond a reasonable doubt that a proposed conservatee is "unwilling or unable voluntarily to accept meaningful treatment."

Element 3 emerged from decisional law as one of two principles that addressed jury instructions in jury trials and court trials of LPS conservatorship cases. The first principle provided a person is not gravely disabled if the person could obtain assistance from a responsible family, friends or others in securing the basic needs for food, clothing or shelter. The second principle provided a person was not gravely disabled if the person was willing and capable of committing voluntarily to a meaningful plan of treatment. The following examination of the decisional law illustrate that extending Element 3 as a factor to establish an LPS conservatorship is not supported by the decisional law and is incongruent with the statutory scheme.

The first principle, which became known as the third party assistance rule, together with the second principle, which embodied the language of Element 3, were first affirmatively embraced in *Conservatorship of Davis* (1981) 124 Cal.App.3d 313 (Davis).

a. *Conservatorship of Davis.*

In *Davis,* the Court of Appeal held that the trial court did not commit prejudicial error in giving jury instructions requested by the respondent. (*Ibid.*) The case involved the initial petition to establish an LPS conservatorship. (*Ibid.)* The respondent was a married woman who had lived with her husband continuously in the 18-year period before the Public Guardian filed its petition. (*Id.* at p. 317.)

The husband testified that he was willing to have her live with him at his home and that she would be welcomed to return. (*Davis*, *supra*, 124 Cal.App.3d at p. 318.)

The respondent's treating psychiatrist testified that she suffered from chronic paranoid schizophrenia and was gravely disabled as a result. (*Davis*, *supra*, 124 Cal. App. 3d at p. 318.) He explained that her symptoms were being controlled by medications she willingly took at the hospital. (*Ibid.*) She was in an open ward and could have walked out but she never attempted to leave. (*Ibid.*) She told him that she would continue to take her medications at home. (*Ibid.*) He doubted she would continue to take her medications. (*Ibid.*)

A second psychiatrist testified that while she was mentally ill she was not gravely disabled. (*Davis*, *supra*, 124 Cal.App.3d at p. 318.) He based his opinion on: (1) her understanding that she was mentally ill and had problems; (2) she was doing well; (3) she thought the medication was helping and wanted to continue taking medication at least until her doctor told her she no longer needed it. (*Ibid.*) He shared his belief that she was willing and able to voluntarily accept voluntary treatment including

medication is needed. (*Ibid.*) He also testified that she would have a psychiatric breakdown after a period of time if she discontinued her medication. (*Ibid.*)

The respondent testified that she had stopped taking different medications from a prior hospitalization because of the side effects. (*Davis*, *supra*, 124 Cal.App.3d at p. 318.) She testified she was willing to take her current medication because it did not have a side effect. She testified she would take the medication as long as her doctor believed it was necessary. (*Id.* at p. 319.)

The respondent in *Davis* proposed two jury instructions based on the evidence at trial. (*Davis*, *supra*, 124 Cal.App.3d at p. 319.)

> "Respondent's 2a read as follows: "You are instructed that if you find that Mary Davis is capable of surviving safely in freedom by herself or with the help of willing and responsible family members or friends you shall find that she is not gravely disabled."
>
> Respondent's 2 reads as follows: "You are instructed that before you may consider whether Mary Davis is gravely disabled you might first find that she is, as a result of a mental illness, unwilling or unable to accept treatment for that mental disorder on a voluntary basis. If you find that Mary Davis is capable of understanding that her need for treatment for any mental disorder she may have and capable of making a meaningful commitment to a plan of treatment of that disorder she is entitled to a verdict of 'not gravely disabled.'"

(*Davis*, *supra*, 124 Cal.App.3d at p. 319.)

The Public Guardian in *Davis* cited *Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281 (Buchanan), disapproved in

Conservatorship of Early (1983) 35 Cal.3d 244, 255, (Davis, supra., 124 Cal. App. 3d at 320.) In *Buchanan* the conservatee argued that the court should have instructed the jury that a person was not gravely disabled where third parties could provide the basic necessities of life. The court in *Buchanan* looked to the plain language of section 5008, subd. (h)(1)(A).

The *Buchanan* Court stated "[t]here is no language in the statute to indicate that where third parties can provide the basic necessities of life that no 'grave disability' exists." (*Buchanan, supra*, 78 Cal.App.3d at p. 289.) It held the trial court did not commit error in refusing to provide the requested jury instruction. (*Id.* at p. 291.)

The *Davis* Court rejected the conclusion and the statutory analysis in *Buchanan*. In *Davis* the Court began its analysis by citing principles of statutory construction as stated in *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230–231 [110 Cal. Rptr. 144].

> "We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[the] court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citation] 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of legislative purpose.' [Citation.] '[A] construction making some words surplusage is to be avoided.' [Citation.] 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] Moreover,

> the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." [Citations omitted]

(*Davis*, *supra*, 124 Cal.App.3d at p. 321.)

The *Davis* court turned to section 5001 as indicia of Legislative intent in the enactment of the LPS Act. (*Davis*, *supra*, 124 Cal.App.3d at p. 321.) The *Davis* court then looked at various parts of the LPS Act to construct a statutory framework for its analysis. (*Id.* at p. 322.)

> "Next, looking to the various parts of the act for the purpose of harmonizing section 5008, subdivision (h)(1) in the context of the statutory framework as a whole, we note that section 5352 provides that a petition to establish a conservatorship shall be filed only after a preliminary determination has been made that the person is gravely disabled as a result of mental disorder *and* is unwilling, or incapable of accepting, treatment voluntarily."

(*Davis*, *supra*, 124 Cal. App. 3d at p. 321,Italics in the original)

The *Davis C*ourt returned to its critique of *Buchanan* while noting that precluding the jury to consider the issue of third party assistance would infringe on the proposed conservatee's due process rights. (*Davis*, *supra.*, 124 Cal. App. 3d at p. 323.) Even so, the *Davis* court acknowledged that it shared *Buchanan's* view that the statutory scheme was important in analyzing the issue.

> "While we agree with the *Buchanan* court that the structure of the LPS Act provides for a purposeful

> separation of the adjudication and placement of the gravely disabled person, we differ from *Buchanan* in that we determine the need for an LPS conservator of nondangerous individual is part of the adjudication process. This determination is to be made by the trial judge or jury on the timely demand of the person for whom the conservatorship is proposed. The placement of the conservatee is made after LPS conservatorship is proposed. The placement of the conservatee is made after the LPS conservatorship is imposed in accordance with section 5358 and its subdivisions and provides (§ 5350 subd. (c)) for the placement in the least restrictive placement. That is a very and distinct matter from the adjudication part of the process, and may not be confused with it, constitutionally or under the terms of the LPS Act.
>
> Sections 5001 et. seq., necessarily require the trier of act (the jury in the case at bench) to determine the question of grave disability, not in a vacuum, but in the context of suitable alternative, upon **a consideration of the willingness and capability of the proposed conservatee to voluntarily accept treatment** and upon consideration of whether the nondangerous person is capable of surviving in freedom by himself or with the help of willing and responsible family members, friends or other third parties. (See, *O'Conner v. Donaldson* (1975) 422 U.S. 563, 573–576 [45 L.Ed. 2d 396, 405–407, 95 S.Ct. 2486].)"

(*Davis*, *supra*, 124 Cal.App.3d at p. 325.)(Emphasis added.)

The United States Supreme Court case of *O'Conner v. Donaldson* (1975) 422 U.S. 563 cited in *Davis* had already supported the principle of third party assistance.

> "In short, a State cannot constitutionally confine with more a nondangerous individual who is capable of

> surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

O'Conner v. Donaldson, *supra*, 422 U.S. at p. 577.

The *Davis* Court's citation to and reliance on United States Supreme Court opinion *O'Conner v. Donaldson* is readily understandable. The United States Supreme Court's decision undoubtedly sanctioned the continued emergence of the third party assistance rule. However, there is no United States Supreme Court decision that has addressed the willingness and capability of a nondangerous individual to voluntarily accept treatment as a requirement to establish a conservatorship.

The *Davis C*ourt acknowledged that a proposed jury instructions should be given where the evidence at trial provided a factual basis for the requested instructions.

> "We accordingly hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third parties.
>
> These questions which the nondangerous person proposed for such conservatorship is entitled to have considered by the jury were included in instructions 2 and 2a which the court gave the jury. We accordingly hold that the trial court committed no prejudicial error in giving those two instructions."

(*Davis*, *supra.*, 124 Cal.App.3d at p. 329.)

The *Davis* decision turned on the ordinary application of principles governing proposed jury instructions. Its reasoning also laid the foundation for other leading cases in this area.

b. *Conservatorship of Early.*

The California Supreme Court case of *Conservatorship of Early*, *supra*, 35 Cal.3d 244 [197 Cal. Rptr. 539] was next in the line of leading cases. *Early,* like *Davis*, also involved an initial petition for appointment. *Early,* unlike *Davis*, involved facts showing a trial court that had refused to admit evidence of the availability of the help of family and friends to assist the proposed conservatee in meeting his basic needs. (*Id.* at p. 248.)

The *Early* opinion cited and discussed *Buchanan*, *supra.*, 78 Cal. App. 3d 281, *Davis*, *supra*, 124 Cal.App.3d 313, and *Conservatorship of Wilson* (1982) 137 Cal.App.3d 132.

> "The conclusion reached in Davis was recently adopted by *Conservatorship of Wilson* (1982) 137 Cal. App. 3d 132 [186 Cal. Rptr. 748]. In *Wilson*, the appellate court cited *Davis* and held it was error to instruct the jury that a person is gravely disabled if he or she is unable, *"unassisted,"* to provide for his or her basic personal needs. (Citation omitted.) The court cited *Davis* and added that in modern society no one lives completely independently of everyone and everything. It was therefore too much to ask a proposed conservatee to do so. (Citation omitted.)
>
> We are in accord with *Davis* and *Wilson.* One of the stated purposes of the LPS Act is "[t]o end the inappropriate indefinite, and involuntary

> commitment of mentally disordered persons. . . and to eliminate legal disabilities." (§5001, subd. (a).) To this end, the law must "strive to make certain . . . only those truly unable to take care of themselves are being assigned conservators under the LPS Act and committed to mental hospitals against their will." (*Roulet, supra.* 23 Cal. 3d at p. 225.) We agree with *Wilson* that it is unreasonable to force the conservatee to prove he or she is capable of an entirely independent existence and suggest there are few members of the general public who are capable of such an existence. (footnote omitted.) We all depend, to varying degrees on the assistance of others (e.g. parents, mechanics, the farmer, the tailor) to make our way in the world. Where willing and responsible others are able to assist a person in providing for his or her basic personal needs the person is not, in our view, "truly unable to take care of [himself or herself]." (*Id* at. P. 225.) Moreover, in such a situation the necessity of state intervention as a provider of these basic needs is reduced, thereby fulfilling another purpose of the LPS Act, "to prevent duplication of services and *unnecessary expenditures."* (§ 5001, subd. (f), Italics added in original)

Conservatorship of Early, *supra*, 35 Cal.3d at pp. 251–252.

The California Supreme Court in *Early* did not have the occasion to address a jury instruction on Element 3. The conservatee in *Early* had consistently refused treatment. (*Early*, *supra*, 35 Cal.3d at pp. 255–256.) However, the California Supreme Court in *Early* anticipated problems of proof in connection with the third party assistance rule that apply equally to Element 3.

> "We conclude [that] the definition of the phrase "gravely disabled" as a condition in which the person

is "unable to provide for his basic personal needs for food, clothing, or shelter…"(§ 5008, subd. (h)(1)) **was intended to encompass a consideration** of whether the person could provide these basic needs with or without the assistance of willing and responsible family members, friends, or other third parties. (*Davis, supra,* [124 Cal. App.3d] at p. 325.)[**We readily acknowledge, however, that the burden of proving grave disability so defined could well become insuperable if those alleging such disability had to negate all reasonable doubts as to the possible existence of third party aid.** (See, *Roulet, supra,* 23 Cal. 3d at pp. 225–226.) It would be particularly ironic to impose the frequently impossible duty of proving a negative (here, the nonexistence of third party aid) where the consequence of a failure of such proof could well deny care to a person whose need therefor may be demonstrated clearly or convincingly, but not beyond a reasonable doubt. In the absence of evidence that third party assistance *might* be available, allowing speculation as to that availability by the trier of fact to defeat a finding of grave disability would contravene the purposes of the LPS Act in this context. Knowledge of the availability of third party assistance normally would be in the possession of the proposed conservatee or those acting on his or her behalf. However, they are not necessarily the exclusive sources of such information, and **we see no need to cast the burden of adducing evidence of third party assistance on any particular party to these proceedings. Rather, we hold only that the trier of fact on the issue of grave disability must consider the availability of third party assistance to meet the basic needs of the proposed conservatee for food, clothing or shelter only if credible evidence of such assistance is adduced from any source at the trial of the issue. If the fact-**

finder is a jury, it must be so instructed under these circumstances if so requested by the proposed conservatee."

(*Early*, *supra*, 35 Cal.3d at p. 254, emphasis added.)

The Supreme Court's *Early* decision was concerned with creating an insuperable burden of proof through redefining "grave disability" in terms of the third party assistance rule. The problem arising from the potential burden "to negate all reasonable doubts as to the possible existence of third party aid." The Supreme Court resolved this threat by holding that the jury instruction must be considered only if credible evidence of third party support is adduced at trial and the appropriate jury instruction is requested by the proposed conservatee. (*Early*, *supra*, 35 Cal.3d 244.) Element 3 presents a similar problem.

c. *Conservatorship of Walker.*

Next in the line of cases was *Conservatorship of Walker* (1987) 95 Cal.App.3d 1082 (*Walker.) Walker* involved the initial petition for appointment. (*Id.* at p. 1088.) The *Walker* case involved an erroneous jury instruction that advised the jury that a conservatorship may not be imposed only if a person can provide for his or her basic needs *and* is willing to accept treatment. (*Id.* at p. 1092.) In *Walker,* the jury instruction was problematic because the jury could have erroneously found the proposed conservatee gravely disabled because he was unwilling to accept treatment even though he could otherwise provide for himself. (*Id.* at p. 1093.)

The *Walker* court identified the discrete stages leading up to the filing of the petition when it wrote:

> The LPS Act permits a conservatorship to be recommended when a professional person determines an individual is both (1) gravely disabled *and* (2) unwilling or incapable of voluntarily accepting treatment. (§5352.) One is gravely disabled when unable to provide for basic personal needs for food, clothing, or shelter. (§ 5008, subd. (h).) It follows that if persons provided for their basic personal needs (i.e. are not gravely disabled) *or* are able to voluntarily accept treatment, there is no need for a conservatorship. (Id. at p. 1092, emphasis in original.)

In reliance on *Davis,* the W*alker* Court reasoned that the LPS conservatorship would not be needed if the evidence demonstrated the person could provide for his or her basic needs or was able to voluntarily accept treatment. Either one of these conditions, if found to be true by the trier of fact, would avoid the establishment of the LPS conservatorship.

> "In *Davis*, the jury was instructed essentially as follows: (1) An individual who could survive safely alone or with help, was not gravely disabled. (2) Before considering whether one is gravely disabled, the person must be found to be unwilling or unable to voluntarily accept treatment. A person capable and willing to make a meaningful commitment to a plan of treatment, is not gravely disabled. (*Id.* at p. 319.) **The instructions in *Davis* properly told the jury that proof of either of the two alternatives was sufficient to avoid a conservatorship.** (See also *Conservatorship of Baber* (1984) 153 Cal. App. 3d 542, 552 [200 Cal. Rptr. 22].)" (Emphasis added.)

(*Walker*, *supra*, 95 Cal.App.3d 1082.)

In *Walker,* the conservatee had admitted he would not take medications, consequently and in light of other evidence, the *Walker* Court found the instructional error harmless beyond a reasonable doubt. (*Walker*, *supra*, 95 Cal.App.3d at p. 1095.)

d. *Conservatorship of Symington.*

Conservatorship of Symington, supra., 209 Cal.App.3d 1464 was the last in the line of leading cases. It reevaluated anew all of the other leadings cases. (*Ibid*.) The *Symington* case involved the initial petition for appointment. In *Symington*, the conservatee waived her right to a jury trial and the matter was tried before the court. (*Id.* at p. 1465.) During the court trial, Symington's counsel and the court had a colloquy whether it was necessary for the court to determine whether the conservatee was unwilling or unable to accept treatment despite the undisputed testimony that she was unable to make a meaningful judgment or give informed consent to treatment. (*Id.* at p. 1466.) On appeal the conservatee sought a reversal on the grounds that the trial court erred because it did not make a finding that the conservatee was unwilling or unable to voluntarily accept treatment for her mental illness. (*Id.* at p. 1467.) The county counsel, the prevailing party below, agreed that the trial court had erred but countered that the error was harmless. (*Ibid.*) The *Symington C*ourt disagreed with both counsel and found that the trial judge was correct. (*Ibid.*)

> "As explained in greater detail below, we doubt a finding that the proposed conservatee is unable or

> unwilling to accept treatment is necessary under the statutory scheme. This language is found only in Welfare and Institutions Code section 5352, a section apparently designed to allow treatment facilities to initiate conservatorship proceedings at the time a patient is accepted where the individual may prove uncooperative. It appears to have been enacted for that limited purpose, not as an additional element to be proved to establish the conservatorship itself. Indeed, many gravely disabled individuals are simply beyond treatment. Under the interpretation of the statutory scheme urged upon us, they presumably could not be the subject of an LPS Act conservatorship at all. We seriously doubt any such intent on the Legislature's part." (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1467.)

This observation is underscored by the fact that Section 5352 describes two separate paths resulting in the filing of a LPS conservatorship. The first paragraph anticipates that the person will be admitted into a facility that is currently evaluating and treating the person. The second paragraph involves a person in an outpatient setting. The assessment of whether a person is unwilling or incapable of accepting treatment is applicable only to the first paragraph as described in the statute.

> "When the professional person in charge of any agency providing comprehensive evaluation or a facility providing intensive treatment determines that a person in his care is gravely disabled as a result of mental disorder or impairment by chronic alcoholism **and is unwilling to accept, or incapable of accepting, treatment voluntarily, he may recommend conservatorship to the**

officer providing conservatorship investigation of the county of residence of the person prior to his admission as a patient in such facility.

The professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment, or the professional person in charge of providing mental health treatment at a county jail, or his or her designee[3], **may recommend conservatorship for a person without the person being an inpatient in such facility, if both of the following conditions are met: (a) the professional person or another professional person has examined and determined the he is gravely disabled; (b) the professional person or another professional person designated by him has determined that further examination on an inpatient basis is not necessary for a determination that the person is gravely disabled.**

If the officer providing conservatorship investigation concurs with the recommendation, he shall petition the superior court in the county of residence of the patient to establish conservatorship.

Where temporary conservatorship is indicated, the fact shall be alternatively pleaded in the petition. The officer providing conservatorship investigation or other county officer or employee designated by the county shall act as the temporary conservator." (§ 5352, emphasis added.)

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[3] The language ", or the professional person in charge of providing mental health treatment at a county jail, or his or her designee," was added in a 2018 Amendment. [need Citation.]

As demonstrated above, consideration of whether a person is unwilling or incapable of voluntary treatment is limited to the first paragraph of Section 5352. Under the second paragraph the recommendation for the LPS conservatorship is based on the concurrence of two separate mental health professionals. At this juncture, it can be interjected that reliance on two mental health professionals mirrors the requirements for a petition for reappointment of a conservator for a succeeding one-year period under section 5361. (See, § 5361 discussed above at IV(2).)

Under the analysis in *Symington* the court focused on the statutory definition of "grave disability" and reasoned that the statutory definition did not admit consideration of a conservatee's unwillingness or ability to voluntarily accept treatment.

> "The pertinent statutory definition of "grave disability" is found in Welfare and Institutions Code section 5008, subdivision (h)(1): "A condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter . . ." The statutory definition does not refer to the conservatee's refusal or inability to consent to mental health treatment. Although the term "gravely disabled" appears in a myriad of sections, as noted above, the language referring to a conservatee's unwillingness or inability to voluntarily accept treatment is contained only in Welfare and Institutions section 5352. And there appears to be a logical explanation for it: The phrase is not intended to be a legal term, but is a standard by which mental health professionals determine whether a conservatorship is necessary in order that a gravely disabled individual may receive appropriate treatment. A person who, as a result of a mental disorder, is unable to care for her food, clothing, and shelter need is more likely than not unable to

> appreciate the need for mental health treatment. If a mental health professional determines this to be so, the person may appropriately be recommended for a conservatorship. Put another way, mental health facilities may initiate conservatorship before they accept a gravely disabled patient. But the terms are simply not interchangeable, and an individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Symington*, *supra*, 209 Cal. App. 3d at p. 1468.)

The *Symington C*ourt considered in turn *Walker, Early and Davis*. It commented that in *Walker* the erroneous jury instruction permitted the establishment of the conservatorship merely because a person refused treatment. (*Symington*, *supra*, 209 Cal.App.3d at p. 1468.) The *Early* decision was highlighted because it specifically refused to address the question of an instruction whether a person is not gravely disabled if he voluntarily accepts treatment. (*Ibid.*.) And, with respect to *Davis,* the *Symington* Court observed that the opinion did not analyze the propriety of the jury instruction and none was offered. (*Id.* at p. 1469.)

In *Symington* the court indicated that the language of "unwilling and incapable" appeared only in section 5352. Although the court was mistaken in this respect, it does not detract from the court's analysis. The statutory design of the Welfare and Institutions Code is complex with similar language serving similar purposes throughout. In this context the language of "unwilling and incapable" also appears in Section 5250 governing the 14 day hold for intensive treatment immediately following an initial detention under section 5150. The language also appears in section 5270.15 which provides for an additional

30-day period of continued intensive treatment. The language is these contexts clinical significance in determining whether a person should remain subject to the involuntary holds and intensive treatment authorized under Section 5250, 5260 and 5270.15 – which is precisely how the *Symington* Court understood the language. Throughout the period governed by these sections, the due process rights of individuals during these emergency holds are protected section 5275. Under section 5275 every person receiving involuntary intensive treatment has a right to a hearing by writ of habeas corpus for his release for treatment.

The renewed analysis under *Symington* was concise and cogent. Implicitly, it recognized that the previous line of cases were all focused on the treatment of jury instructions and not the creation of a new element to be proven at trial to establish a LPS conservatorship. In its review, it did not find any justification for elevating a jury instruction to the same level as an element to be proven beyond a reasonable doubt in the statutory definition of "grave disability." Thus, *Symington* concluded that the statutory definition of "gravely disabled" did not require a court finding on the issue of whether a person was unwilling or incapable of voluntary treatment in the establishment of an LPS conservatorship.

3. The Symington analysis places Element 3 in the appropriate jurisprudential context and demonstrates that the establishment of a LPS conservatorship does not require proof beyond a reasonable doubt that a person is "unwilling or unable voluntarily to accept meaningful treatment" to establish a LPS conservatorship.

The *Symington* decision concludes the line of leading cases and reevaluated the emergence of Element 3. The *Symington* decision is a well-reasoned analysis. The Court's discussion has the added benefit of hindsight with respect to the earlier cases in reevaluating the origins of Element 3 and the emerging trend to incorporate its a finding to be proven in granting an LPS petition.

The Court's mistaken comment below that Element 3 language is limited to one section is excusable and understandable. The Welfare and Institutions Code is an arcane statutory scheme, the subject matter is not commonly known, and the practice of law under the LPS Act is extremely narrow. The nature of the error also does not detract from the core analysis.

The characterization of the *Symington* analysis as mere dicta to be ignored is incorrect. The *Symington* court squarely addressed the issue of whether the trial court must make a finding that the person is "unwilling or unable voluntarily to accept meaningful treatment." In *Symington* the application of Element 3 was presented, argued or expressly ruled upon.

> "*Dictum* is a shortened form of *obiter dictum* (= a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered

> in a supporting judgment). . . . Judge Posner has aptly defined *dictum* as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – That, being peripheral may not have received the full and careful consideration of the court that uttered it." *Sannoff v. American Home Prods. Corp.* 798 F.2d 1075, 1084 (7th Cir. 1986)."

(Garner, Dict. Of Modern American Usage (Third Edition 2009) p. 252.)

See, also State Lands Comm'n of Cal. v. Superior Court of Cal in & for (1955) 281 P.2d 59. ("Judicial dictum" is distinguished from obiter dictum where the record of the case shows that the point was presented, argued and expressly passed upon.)

The characterization as dicta can be set aside. Moreover, a reasoned and principled analysis is no less persuasive even though it can be classified as dicta.

The analysis in *Symington* of Element 3 as well as its discussion of the other leading cases is the very *sine qua non* of the opinion. The *Symington* opinion offers a principled analysis and, for that reason, should be accepted as persuasive authority by this court.

4. Element 3 is inapplicable to reappointment of a LPS conservatorship.

Element 3 emerged because, beginning with *Davis*, the Courts took interest in "unwilling, incapable of accepting, treatment voluntarily" language in Section 5352. The Courts reasoned that since this language was a factor in the recommendation to file the

initial petition it should be the basis for a jury instruction. However, the requirements for the petition for reappointment are materially different.

The statutory language for the reappointment of a LPS conservator, relevant in this context, is found in Section 5361.

> "The petition must include the opinion of two physicians or licensed psychologist who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism."(Section 5361.)

See also, California Conservatorship Practice (Cal. CEB 2020) Section 23.136. ("The petition must include the opinion of two physicians or qualified licensed psychologists that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism.")

The original reason for introducing Element 3, as illustrated above, is not applicable to a petition for reappointment. Consequently applying Element 3 to a petition for reappointment is not supported by the same, albeit mistaken, basis used to apply Element 3 to the initial petition to establish a LPS conservatorship.

It is also observed that K.P. did not address whether Element 3 should apply to a petition for reappointment and has sidestepped that issue.

5. The Due Process interests in Element 3 are protected by the writ of habeas corpus in Section 5275.

The California Supreme Court in *Early* observed that a proposed conservatee, before the commencement of a trial, could challenge the matter by way of writ of habeas corpus.

> "If appellant objected to the procedure or the adequacy of the conservatorship investigation he could have challenged the court's actions by writ of habeas corpus prior to trial. (§5275.)

(*Early*, *supra.*, 35 Cal.3d at p. 255.)

As previously discussed, the language of Element 3 appears as a clinical factor in Section 5250 (a 14-day hold), Section 5260 (a 14-day hold in cases of suicidal ideation) and Section 5270.15 (the 30-day hold).

Section 5275, in pertinent part, states:

> "Every person detained by certification of intensive treatment shall have right to a hearing by writ of habeas corpus for his or her release after he or she or any person acting on his or her behalf has made a request for release to either (a) the person delivering the copy of the notice of certification to the person certified at the time of delivery, or (b) to any member of the treatment staff of the facility providing intensive treatment, at any time during the period of intensive treatment pursuant to Section 5250, 5260, or 5270.1"

As a result, a person who is receiving intensive treatment has a statutory right to seek his release, which encompasses the right to dispute Element 3 as it applies to those specific sections.

By the time the petition for appointment is recommended, the person has demonstrated that they are not responsive to intensive treatment which leads to the recommendation for the LPS conservatorship based on the clinical factors in Section 5352. The subsequent proceedings necessarily changes the focus to grave disability.

6. The Legislature's treatment of the Third Party Assistance Rule supports the view that the Element 3 should not be incorporated into the definition of grave disability.

The leading cases illustrated the concurrent evolution of Element 3 alongside the third party assistance rule. The subsequent treatment by the legislature also supports the Public Guardian's position that Element 3 should not be incorporated as an element of grave disability.

The Legislature codified the third party assistance rule in 1989 by amending section 5350 which added subdivision (e). (See Notes on amendments on Welf. & Inst. Code section 5350 in Deering's Ann. Code (2020).) The statutory amendment was followed by the introduction of jury instructions. In 2005, the Judicial Council of California issued 2 CACI 4007 and 4008, Third Party Assistance and Third Party Assistance to Minor, respectively.

The Legislature did not extend similar treatment to Element 3 despite the fact that both concepts emerge from the same line of cases.

V. CONCLUSION

Element 3 should not be incorporated into the definition of grave disability because it is not necessary to protect a person's Due Process right in the establishment of an LPS conservatorship and is not supported by any persuasive authority.

Element 3 was not a well-conceived jury instruction. A person with the mental disorder may accept voluntarily treatment and yet remain unable to secure the basic needs of food, clothing or shelter. The implicit assumption that voluntary acceptance of treatment means that the person can also obtain food, clothing and shelter is speculative. The assumption that a person who is able and willing voluntarily to receive treatment is not gravely disabled is not well reasoned.

In contrast, the third party assistance rule is directly linked to the practical observation of the United States Supreme Court in *O'Conner v. Donaldson*, *supra*, 422 U.S. 563, that a mentally ill person can and should be permitted to benefit from outside assistance in securing food, clothing and shelter. The third party assistance rule has a one-to-one correspondence to those personal needs.

Element 3 is not similarly based on a one-to-one correspondence between a person's ability to voluntarily accept treatment and satisfaction of the needs for food, clothing or

shelter. Element 3 is not supported by similar persuasive authority directly holding that Element 3, as a matter of constitutional law or decisional law, must become an element to be proven to establish grave disability.

Element 3 rests would require that the Public Guardian disprove the negative that the person is not willing or not able voluntarily to accept treatment. As such it introduces the problems of proof and confusion for a jury, in particular, in deciding whether a person is gravely disabled.

In closing, there is no authority requiring the trier of fact to find, beyond a reasonable doubt, that a person is unwilling or unable voluntarily to accept meaningful treatment before a conservator may be appointed under the LPS Act. Likewise there is no authority requiring Element 3 to be proven beyond a reasonable doubt in an LPS reappointment proceeding. In short, the discussion above has demonstrated that Element 3 has no logical connection to the statutes applicable to a petition for appointment or reappointment.

Office of County Counsel

Respectfully submitted,

Dated: July 31, 2020

By: /s/ William Sias

Attorney for Petitioner and
Respondent Public Guardian
of the County of Los Angeles

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This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **13,700** words, excluding the cover, tables, signature block, and this certificate.

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Dated: August 3, 2020 By: /s/ William Sias

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Office of the Public Defender
6464 Sunset Boulevard, Suite 810
Los Angeles, California 90028
(for K.P.)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Office of County Counsel

Dated: August 3, 2020 By: /s/ Sanaz Ossanloo

Sanaz Ossanloo
Office of County Counsel

STATE OF CALIFORNIA
Supreme Court of California

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