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
Hon. Robert Harrison

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Appellant will not endeavor to reply to every point in Respondent's Answer Brief on the Merits (hereafter ABM). Any failure to address an issue in the ABM should not be deemed to be a concession as to its merit, rather appellant has fully and adequately addressed many of these issues in his Opening Brief on the Merits (hereafter OBM), and does not wish to engage in undue repetition.

This Court has asked the parties to brief and argue whether the trier of fact must find beyond a reasonable doubt that a proposed conservatee is unwilling or unable voluntarily to accept meaningful treatment before the conservator may be appointed or reappointed under the Lanterman-Petris-Short Act. (Welf. and Inst. Code[1], § 5000, et seq., hereafter LPSA.) Respondent has answered this in the negative.

Appellant will first address issues raised in the *Introduction* to the ABM. Respondent has characterized the issue before this Court as having first emerged from a jury instruction of "dubious provenance". (ABM, p. 6.) The provenance, however, is clear. The Judicial Council added this element to California Civil Jury Instruction 4000 (hereafter CACI) based on *Conservatorship of Davis* (1981) 124 Cal.App.3d 313 *(Davis)*, which was later approved by this Court on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244 *(Early)*.

[1] Hereafter all statutory references will be to the California Welfare and Institutions Code unless otherwise indicated.

The jury instruction in *Davis*, which formed the basis of Element 3 of CACI 4000, read:

> "You are instructed that before you may consider whether Mary Davis is gravely disabled you *must*[2] 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 Judicial Council saw fit to include this as an element in CACI 4000 in cases where willingness and ability voluntary to accept treatment was an issue raised by the evidence at trial.

It is unfair to characterize the emergence of this concept in the Use Notes in CACI 4000 in 2016, as though it was Athena springing fully formed from the head of Zeus. Although the instruction was validated in *Davis*, the concept has been part of the LPSA since its inception in 1967. Under the LPSA, a nondangerous mentally ill person cannot be subjected to involuntary evaluation, treatment, or commitment at any stage of the Act if the person is willing and able voluntarily to accept such evaluation, services and/or treatment, even if they are gravely

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[2] In quoting this passage from *Davis*, respondent swapped in the word "might" for "must". (ABM, p. 37.)

disabled. The concept literally permeates the entire LPSA and safeguards the rights of persons for whom involuntary treatment is sought. (OBM, I, A.)

Respondent also characterizes the cases which hold that the trier of fact must find the person unwilling or unable voluntarily to seek meaningful treatment before a conservatorship may be established, as being about "jury instructions" and not the elements of proof to establish a conservatorship in an attempt to distinguish them. (ABM, pp. 7, 35, 52.) This is a false distinction that makes no sense.

While not all jury instructions spell out the elements to be proven and the burden of proving them, the jury instructions at issue in *Davis*, *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082 *(Walker)*, and *Conservatorship of Baber* (1984) 153 Cal.App.3d 542 (see OBM, pp. 30–34) all set forth the elements that the jury must find beyond a reasonable doubt before the conservatorship can be established. These elements include proof that the proposed conservatee is unwilling or incapable of voluntarily accepting meaningful treatment, before reaching the question of grave disability. Appellant requests that this Court disregard this false dichotomy between *jury instructions* and the *elements of proof* posited by respondent. They are one and the same in these cases.

Respondent also points out in the *Introduction* that a person who is willing and able voluntarily to accept treatment for mental health may also be gravely disabled – unable to provide for basic needs for food, clothing, or shelter. Respondent reasons that willingness and ability voluntarily to accept treatment is not a proxy for grave disability. (ABM, p 7.)

Respondent misperceives appellant's position and misunderstands the law. When it comes to involuntary evaluation and treatment under every provision of the LPSA relating to nondangerous individuals there are two *separate* requirements of proof: that the person be gravely disabled due to mental disorder, *and that the person be unwilling or unable to voluntarily accept evaluation or treatment*. If either requirement is not met, then the involuntary evaluation or treatment must stop, and the person must be evaluated and/or treated on a voluntary basis. This is the plain meaning of the LPSA, including the requirements for conservatorship. (§ 5352.)

A person for whom conservatorship is sought must be gravely disabled *due to his or her mental disorder*. If the person can voluntarily accept meaningful individualized treatment for that mental disorder, then no conservatorship is necessary, as he or she will be receiving treatment and services on a voluntary basis. The purpose of conservatorship is to provide individualized treatment, supervision, and placement. (§ 5350.1.) These goals will be met without a conservatorship if the mentally ill person can voluntarily accept meaningful treatment.

Requiring those seeking to impose a conservatorship to prove that the person is unwilling or unable voluntarily to accept meaningful treatment is in keeping with the intent of the LPSA, to end the inappropriate, indefinite, and involuntary commitment of persons with mental health disorders; to eliminate legal disabilities; to safeguard individual rights through judicial review; to prevent duplication of services and unnecessary expenditures; and to provide services in the least restrictive setting appropriate to the needs of each person receiving services

under this part. Restricting the elements of conservatorship solely to the issue of grave disability (§ 5008, subd. (h)), would be contrary to the legislative intent of the LPSA.

ARGUMENT

I. Standard of Review

Respondent suggests that appellant must establish that the truncated CACI 4000 jury instruction in this case was prejudicial and resulted in a miscarriage of justice under a civil standard. (*Adams v. MHC Colony Park Ltd. P'ship* (2014) 224 Cal.App.4th 601, 603.) (ABM, p. 31.) Respondent is incorrect.

Respondent is wrong. Error in omitting an element required for civil commitment is reviewed under the "harmless beyond a reasonable doubt" standard, as set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Early*, *supra*, 35 Cal.3d at p. 255.) Respondent agrees that a reviewing court engages in de novo review for instructional error. (*Walker*, *supra*, 196 Cal.App.3d at pp. 1091–1092.) (ABM, p 31.)

Conservatorship of George H. (2008) 169 Cal.App.4th 157 *(George H)*, which is discussed at length by respondent (ABM, pp. 30–31) is irrelevant to this case. *George H.* stands for the proposition that a trial court in an LPSA conservatorship trial has no *sua sponte* duty to instruct the jury on issues raised in the trial. (*Id.* at pp. 164–165.) In this case, appellant requested the full version of CACI 4000 be given and it was denied. The jury was instructed that the only elements of proof to establish the conservatorship were that (1) that K.P. had a mental disorder

and (2) that K.P was gravely disabled as a result of that mental disorder. (CT 247) The *sua sponte* duty of the court to instruct is not presented by the facts of K.P.'s case.

II. Respondent's view of the elements of a conservatorship trial ignores the intent of clear purpose LPSA.

Respondent argues that the answer to whether the trier of fact must find beyond a reasonable doubt that the person for whom a conservatorship sought is unwilling or unable voluntarily to accept meaningful treatment before a conservator may be appointed or reappointed lies in the statutory construction of the LPSA, which it asserts is unambiguous. (ABM, IV. 1, 3, 4.) To remove any ambiguity, however, respondent has selected only a few statutes that support its position at the expense of the clear meaning of the statutory scheme as a whole. Respondent also fails to consider case law which explains that federal and state due process requires the trier of fact to consider factors beyond the issue of *grave disability*.

Respondent would have this Court narrow its focus to Section 5350, subdivision (d)(1), which grants the person for whom a conservatorship is sought the right to a trial on the issue of *grave disability* as defined in Section 5008, subdivision (h)(1). Respondent points out that no mention is made of the requirement that the person be unwilling or unable voluntarily to accept meaningful treatment in these sections relating to conservatorship trials. This myopic view, however, disregards Section 5352 which states that no recommendation for a petition for conservatorship may be made unless the evaluating

professional finds that the person is unwilling or incapable of accepting treatment voluntarily. The conservatorship investigator must concur in the professional's assessment and cannot file the petition for conservatorship in the superior court if there are any suitable alternatives. (§§ 5352; 5354, subd. (a).)

Respondent relies exclusively on *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464 *(Symington)* for its conclusion that § 5352 does not set forth an element of proof in conservatorship trials and is limited to setting a medical standard for health care professionals to treat proposed conservatees inpatient prior to a conservatorship being established.

Appellant has already analyzed *Symington* for this Court (OBM, pp. 35–42) and will not rehash it now. However, it is important to note that respondent now agrees with appellant, that *Symington* was wrong in stating that the only place in the LPSA referring to unwillingness or inability to voluntarily accept treatment is in Section 5352. (*Symington*, *supra*, 209 Cal.App.3d at pp. 1467, 1468.) Respondent breezes over this concession, however, arguing that it does not affect the viability of *Symington's* analysis of the issue. (ABM, pp. 51, 53.)

Nothing could be further from the truth. The error goes to the heart of *Symington's* analysis. In finding that "unwilling and incapable" need not be proven at trial, and that only *grave disability* has to be proven (§ 5008, subd. (h)(1)), the *Symington* reasoned:

> "Although the term 'gravely disabled' appears in myriad of sections [of the LPSA], as noted above, the

> language referring to a conservatee's willingness or inability to voluntarily accept treatment is contained only in Welfare and Institutions section 5352."

(*Symington*, *supra*, 209 Cal.App.3d at p. 1468.) Because the court incorrectly believed it was a term only used in the context of a mental health professional recommending conservatorship and providing treatment before conservatorship (which it does not), it failed to see that the provision was actually a safeguard built into every stage of involuntary action taken against a gravely disabled person.

In fact, except for section 5008, subdivision (h)(1), which defines grave disability, every time the term grave disability or gravely disabled is mentioned in the LPSA in the context of involuntary detention, intervention. evaluation, treatment, or commitment, the statute also has the due process safety requirement that the person must be unwilling or unable or incapable of voluntarily accepting evaluation, services, or treatment.

- § 5150, subd. (c) – person assessing 72-hour hold must determine whether gravely disabled person can be properly served without being detained and if so, must offer services on a voluntary basis.
- § 5200, § 5202, § 5213 – additional 72-hour evaluation requires court order but only if gravely disabled person will not agree to accept services, including evaluation and crisis intervention voluntarily.
- § 5250, subds. (a), (c), § 5252 – gravely disabled person may receive involuntary treatment for additional 14-days if unwilling or unable to accept treatment voluntarily.

- § 5252 – requirement to advise person being treated of option for voluntary treatment.
- § 5270, subds. (a)(2), (b)(2) – additional 30-days of intensive treatment after 14-days of intensive treatment if person remains unwilling or unable to receive treatment voluntarily, and staff must reassess every 10-days.
- § 5276 – superior court judge required to release gravely disabled person on writ of habeas corpus if person had not been advised of, or had accepted, voluntary treatment.
- § 5352 – Professional person may only recommend conservatorship to conservatorship investigator if gravely disabled person is unwilling or incapable of seeking treatment voluntarily.

Symington clearly fumbled its review of the LPSA in determining the intent of the statute. If the court had properly analyzed the LPSA it may well have reached a different conclusion.

Having conceded that *Symington* erred in this respect, respondent clings to the case's reasoning that "unwilling or incapable" is a "medical standard" by which mental health professionals determine whether a conservatorship is necessary in order that a gravely disabled individual may receive appropriate treatment and is not a "legal term". *Symington* supposed that this provision allowed a person to receive intensive treatment at a facility prior to a conservatorship being established. (*Symington*, *supra*, 209 Cal.App.3d at p. 1468.) (ABM, pp. 50, 52, 53; *cf.* OBM, pp. 40-41.)

The respondent's and *Symington's* reasoning again collapses under examination. Mental health professionals who make the recommendation to the conservatorship investigator under

Section 5352 are already providing comprehensive evaluation or intensive treatment to the proposed conservatee under a previous LPSA provision (e.g., § 5250, subd. (a) [14-day intensive treatment] or § 5270.15 [30-day intensive treatment].) That the mentally ill person is already being subjected to intensive treatment at the time of the recommendation for conservatorship is made clear in Section 5270.55, which sets forth when the mental health professionals should make a recommendation under Section 5352:

> (a) Whenever it is contemplated that a gravely disabled person may need to be detained beyond the end of the 14-day period of intensive treatment and prior to proceeding with an additional 30-day certification, the professional person in charge of the facility shall cause an evaluation to be made, based on the patient's current condition and past history, as to whether it appears that the person, even after up to 30 days of additional treatment, is likely to qualify for appointment of a conservator. If the appointment of a conservator appears likely, the conservatorship referral shall be made during the 14-day period of intensive treatment.
>
> (b) If it appears that with up to 30 days additional treatment a person is likely to reconstitute sufficiently to obviate the need for appointment of a conservator, then the person may be certified for the additional 30 days.
>
> (c) Where no conservatorship referral has been made during the 14-day period and where during the 30-day certification it appears that the person is likely to require the appointment of a conservator, then the conservatorship referral shall be made to allow sufficient time for conservatorship

> investigation and other related procedures. If a temporary conservatorship is obtained, it shall run concurrently with and not consecutively to the 30-day certification period. The conservatorship hearing shall be held by the 30th day of the certification period. The maximum involuntary detention period for gravely disabled persons pursuant to Sections 5150, 5250 and 5270.15 shall be limited to 47 days. Nothing in this section shall prevent a person from exercising his or her right to a hearing as stated in Sections 5275 and 5353.

(§ 5270.55. See also, § 5257 [at end of § 5250 commitment the person must be released, unless person voluntarily agrees to treatment, or a further commitment is sought under § 5260 [additional 14-days], § 5270.10 [additional 30-days], or § 5350 **[conservatorship]**.)

Symington is also wrong in its supposition that the terms "unwilling or incapable" are not *legal terms* but are merely a *medical standard*. A person cannot be held for a 72-hour evaluation after an emergency 72-hour detention without a court order (§ 5200), the petition for which requires that the person be unwilling or unable to voluntarily accept evaluation. (§ 5202.) Likewise, a person who is held for intensive treatment for 14-days or 30-days is entitled to seek a writ of habeas corpus from the superior court (§ 5275) and must be released immediately if he or she had not been advised of, or had accepted, voluntary treatment. (§ 5276.)

"Although the LPS is more medically oriented than the former commitment statute, the California Legislature enacted procedural safeguards to protect an individual against erroneous commitment (*Thorn* v. *Superior Court*, 1 Cal.3d 666, 674 [jump

cite omitted])." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 282.) These are clearly "legal terms" and set forth a requirement that must be met for involuntary evaluation and treatment. There is no basis for denying this right and safeguard to those facing a year-long renewable conservatorship.

Section 5352 sets forth the requirements which must be met before a mental health professional can recommend conservatorship to the conservatorship investigator. Respondent argues that because the statute describes the two separate procedures and only one mentions the "unwilling or incapable" language, that this is proof that the language is a "medical standard" (*Symington*, *supra*, 209 Cal.App.3d at p. 1467) and that the legislature did not intend the term to be included as an element of proof in a conservatorship trial. (ABM, p. 49–50.) Once again, the reasoning is faulty.

The first paragraph of Section 5352 requires that when the mental health professional providing comprehensive evaluation or intensive treatment to a person in his care determines that the patient is gravely disabled as a result of mental disorder and is unwilling to accept, or incapable of accepting, treatment voluntarily, he may recommend conservatorship. This paragraph was in the original version of the LPSA when it was passed by the Legislature in 1967.

The second paragraph sets forth a procedure for recommending conservatorship to the investigator when the person is an outpatient. This was added by amendment in 1968. Respondent is correct that this paragraph does not mention the unwilling/incapable requirement which is set forth in paragraph one. Appellant believes that this is because the legislature

intended to incorporate the provisions of the first paragraph into the second, which adds the requirement that the outpatient be examined by two professionals to certify them for grave disability in lieu of the person being in a facility where he is already receiving evaluation or treatment.

We can assume this conclusion is correct because paragraph one sets forth other elements of a conservatorship (besides "unwilling/unable") and paragraph two does not. For instance, paragraph one correctly sets forth the requirement that for a conservatorship to be established the patient must be "gravely disabled *as a result of mental disorder*". Paragraph two only mentions grave disability and fails to state that the grave disability is the result of a mental disorder. Under respondent's reasoning, if each paragraph sets forth unique requirements for recommending a conservatorship, the person receiving outpatient evaluation or treatment would not need to be gravely disabled as the result of a mental disorder, as that element is lacking from the paragraph two requirements.

Appellant has the better argument based upon the rules of statutory construction and it is the conclusion that is consistent with the intent of the LPSA. Paragraph one sets forth the requirements for seeking a conservatorship and paragraph two merely modifies the way the professional arrives at her or his conclusion in the case of an outpatient (two outpatient examinations vs. inpatient evaluation or treatment). It is still a requirement that the person be unwilling or incapable of accepting treatment voluntarily and that grave disability be due to a mental disorder before the conservatorship may issue.

Appellant has shown that respondent's narrow and selective view of the LPSA subverts the Act's intent and purpose.

III. The requirement that the person be unwilling or incapable of voluntarily accepting meaningful treatment before a conservatorship can be established cannot be challenged through writ of habeas corpus (§ 5375).

Even if a recommendation and petition for conservatorship require that the person for whom conservatorship is sought be unwilling or incapable of voluntarily accepting meaningful treatment (

§ 5352

), is that an element to be proven at trial (

§ 5350, subd. (d)

) or must it be raised through a petition for habeas corpus?

Despite the extensive wrangling over *Symington* and the meaning of Section 5352, respondent has apparently retreated to the position that "unwillingness or incapability to accept meaningful treatment" may be a required before a petition may be filed but that it must be challenged by habeas corpus, not as an element of proof at trial. (ABM, IV, 5, *Due Process interests in Element 3 are protected by writ of habeas corpus in Section 5275*, pp. 56–57.)

Respondent bases its claim that habeas relief is the correct method of review on a passage in *Early*.

> "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.)

What respondent fails to appreciate is that in *Early*, the conservatee was challenging the appointment of a conservator prior to the conservatorship trial and unnamed deficiencies in the conservatorship investigation report, presumably related to the pretrial conditions of the conservatorship. (*Early*, *supra*, 35 Cal.3d at p. 248.) *Early* held that the trial court did not appoint a "permanent conservator" but rather a "temporary conservator", which was well within the authority of the trial to do pending the conservatorship trial. (*Id.* at p. 255.) (See, § 5352.1 [Temporary conservatorship].)

This section of *Early* has nothing to do with the issue of whether the conservatee could have challenged that he was willing and able voluntarily to accept treatment. In fact, whether Early was entitled to an instruction that he had to be found unwilling or unable voluntarily to accept meaningful treatment was raised as a separate issue, and the Court decided not to weigh in on it, as there was no evidence to support the instruction. (*Early*, *supra*, 35 Cal.3d at pp. 255–256.)

It is worth noting that the Court did *not* hold that this issue of "unwilling/incapable" should or could have been raised by way of writ of habeas corpus (§ 5275) as it did with the temporary conservatorship issue, in the immediately preceding paragraph of the decision.

Early was decided in 1983, prior to the amended version of Section 5275, which changed the availability of the writ to those receiving intensive involuntary treatment under Sections 5250, 5260, or 5270.10. (§ 5275, Notes, 1988 Amendment.) On its face Section 5275 does not permit this procedure to be used to challenge a recommendation or a petition for conservatorship. (§§ 5352, 5354.)

Section 5352.1 permits a proposed conservatee to challenge the conditions of confinement and placement while awaiting trial through the statutory writ in Section 5275, however. (§ 5353 [Temporary conservator powers and duties].) However, the statutory writ is limited in its scope and would not reach the issue of a person's willingness or ability voluntarily to accept treatment.

It is true that under the statutory writ a superior court judge must release a person being treated involuntarily if they are not gravely disabled *or* if they had not been advised of, or had accepted, voluntary treatment. (§ 5276), under this procedure the government has the burden of proving the elements by a preponderance of the evidence. This lower burden of proof comports with due process because it is for a relatively short period of time. (*In re Azzarella* (1989) 207 Cal.App.3d 1240, 1247; *In re Lois M.* (1989) 214 Cal.App.3d 1036, 1040–1041.) Therefore, if the writ procedure were to be used as respondent envisions, the government would still be required to prove that the proposed conservatee was unwilling or incapable of voluntarily accepting meaningful treatment, and at a higher standard of proof to

satisfy due process. Appellant believes that would be proof beyond a reasonable doubt. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235.)

Since there is a trial to establish the conservatorship (§ 5350, subd. (d)), there is a readily available remedy at law and extraordinary writ relief should not be available. The trial must take place within a short period of time. (§ 5350, subd. (d)(2) [10 days from demand for trial; additional 15 days at the request of counsel for proposed conservatee].)

It would also be a waste of resources to conduct an evidentiary hearing in a habeas proceeding and to then conduct a trial on overlapping issues, assuming that both hearings could be conducted within the time limits required. One of the purposes of the LPSA is to prevent duplication of services and unnecessary expenditures (§ 5001, subd. (f)), which would be subverted by these dueling remedies.

Forcing a proposed conservatee to proceed by habeas corpus before a judge would also result in denying her or him a jury trial on all relevant facts to the establishment of the conservatorship. (§ 5350, subd. (d); *Davis*, *supra*, 124 Cal.App.3d at p. 323.)

Neither does respondent provide any argument as to why the issue of a person's willingness should be decided by a judge on habeas review as opposed to a jury deciding the whether the conservatorship is warranted.

In short, *Early* does not require a proposed conservatee to challenge the issue of her or his unwillingness or inability voluntarily to accept treatment through a Section 5275 writ of habeas corpus. The statutes limit the use of the writ to shorter durations of treatment, including the terms of temporary

conservatorship while awaiting a conservatorship trial. If the issue could or should be raised through the writ, the government would still have the burden of proof beyond a reasonable doubt to comport with due process, and the use of the writ procedure for this purpose would be contrary to the legislative intent of the LPSA.

IV. The elements of proof at trial for reappointment of a conservator are the same as for the initial appointment.

Respondent argues that even if proof of a person's unwillingness and inability voluntarily to accept meaningful treatment is an element of proof in a trial to establish a conservatorship (§ 5352), it is not required in a trial to reappoint a conservator. (ABM, pp. 54–55.)

Respondent relies on the language of Section 5361.

> "The petition [for reappointment] must include the opinion of two physicians or licensed psychologists 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 …."

(§ 5361.) Respondent reasons that because the professional's opinions in support of the petition only address grave disability with no mention of the conservatee's willingness or ability to accept treatment voluntarily, then this is not an element of proof to reestablish the conservatorship. (ABM, p. 55)

The hearing or trial to reestablish a conservatorship is conducted according to the same rules that govern the initial establishment of a conservatorship. (§§ 5350, subd. (d), 5362, subds. (a), (b); rule 8.2.34; *Conservatorship of Kevin M.* (1996) 49 Cal.App.4th 79, 84; *Conservatorship of Deidre B.* (2010) 180 Cal.App.4th 1306, 1312.) The government's burden of proof is beyond a reasonable doubt to establish and reestablish conservatorship. (*Conservatorship of Roulet, supra,* 23 Cal.3d at p. 235; *Conservatorship of Deidre B.*, *supra*, at p. 1312.)

All Section 5361 does is establish the threshold requirements for presenting to the court the petition to reappoint the conservator. A hearing (and/or court or jury trial upon request) must be held on all petitions (§§ 5350, 5362, 5365), where the conservatee may challenge the validity of the physicians' opinions in support of the petition by calling them as witnesses. Satisfaction of the requirements for presenting the petition does not satisfy the requirements for establishing the reappointment if it is challenged by the conservatee at the initial hearing or trial. (*Conservatorship of Delay* (1988) 199 Cal.App.3d 1031, 1036 (*Delay*).)

Section 5362 concerning the required notice to be given by the clerk of the superior court to the interested parties prior to the termination of an existing one-year LPSA conservatorship states:

> "If any of them request it, there shall be a court hearing or a jury trial, whichever is requested, on the issue of whether the conservatee is still gravely disabled *and in need of conservatorship*."

(§ 5362, emphasis added.) The Notice correctly points out that the issues at the trial for reappointment of conservator are broader than the question of grave disability and go to the need for the conservatorship itself, which would include whether the person is able and willing voluntarily to accept meaningful treatment. As *Delay* teaches us, it is anticipated that a conservatee may challenge the basis for the petition and the professional opinions that support it at the hearing or trial. (*Delay, supra*, at p. 1036.)

Respondent offers no rationale as to why the elements of proof would be different in a reappointment trial. If the conservatorship should not be established if the person is willing and able to voluntary accept treatment, why would it be any different for the reappointment of the conservator?

Conservatorships are regularly reviewed, in part, because the conservatees condition can improve, and he or she may no longer be gravely disabled or because he or she can and will now accept treatment voluntarily.

V. The Legislature's codification of *Early's* third-party assistance rule does not support the idea that the Legislature did not intend that a proposed conservatee's unwillingness or inability voluntarily to accept meaningful treatment not be an element of proof in a conservatorship trial.

Respondent points out that the legislature codified the third-party assistance rule, modifying the elements of a conservatorship trial (§ 5350, subd. (e)) and later added Jury Instructions on third-party assistance. (ABM, p. 57.) Respondent then suggests that because the legislature did not codify as an

element of proof that a proposed conservatee must be by found to unwilling or unable voluntarily to accept meaningful treatment before a conservatorship can be established or reestablished, that this shows the legislature's intent that this was not intended to be an element. (ABM, p. 58.) This makes no sense.

Subdivision (e) was added to Section 5350 in response to this Court's holding in in *Early*, that third-party assistance must be considered by the trier of fact in determining grave disability and the legislature's response was in direct response to that case. Adding that to the "grave disability" determination at trial makes sense, as third-party assistance is directly related to the question of whether the person can provide for the necessities of life – food, clothing and shelter – with or without the assistance.

As has been extensively briefed and argued, the requirement that involuntary treatment of a gravely disabled person is predicated on their ability and willingness to accept treatment voluntarily, is a safeguard and protection which runs throughout the LPSA and is separate from the concept of grave disability.

The legislature long ago added statute after statute to the LPSA that required the government detain, evaluate and treat the gravely disabled due to mental illness, only if they were unwilling or unable to accept treatment voluntarily. There was no need to add further statutes.

As far as the addition of jury instructions, the Judicial Council did act, adding the requirement to the Use Notes of CACI 4000 based on *Davis*, *supra*. The trial court improperly rejected K.P.'s request for the *Davis* instruction, despite evidence in the record on the issue.

VI. Respondent has failed to address appellant's argument that Due Process in a conservatorship trial requires the government must prove and the trier of fact must find beyond a reasonable doubt that a mentally ill person is "unwilling or unable voluntarily to accept meaningful treatment" before a conservator may be appointed.

Appellant set forth a separate argument that appellant was denied Due Process under the State and Federal Constitutions when the trial court failed to instruct the jury upon request that the respondent must prove beyond a reasonable doubt that he was unwilling or unable voluntarily to accept meaningful treatment. (OBM, pp. 47–51.) Respondent has not answered this argument, except to posit that appellant's due process rights were protected by the writ of habeas corpus procedures set forth in Section 5275 (ABM, pp. 56–57) or to summarily conclude without analysis or support (ABM, p. 35, 58) that there was no due process violation.

Appellant requests this Court consider this failure of respondent to a be a concession as to the merit of appellant's argument. Even if the LPSA does not require a trier of fact to find beyond a reasonable doubt that a person is unwilling or unable voluntarily to accept meaningful treatment prior to the appointment or reappoint of a conservator, the Due Process clauses of the State and Federal Constitution do.

CONCLUSION

The briefs in this case have necessarily focused on the complex interplay of the statutes in the LPSA. However, we should not lose sight of the forest for the trees.

Prior to the enactment of the LPSA in 1967, mentally ill persons were involuntarily committed to state hospitals trough court-ordered commitment and confined far away from their homes and families. There was with little respect for their rights. The LPSA set in place a modern system of community-based treatment designed to ensure that people who were gravely disabled due to mental disorders were treated in their communities on a voluntary basis, if at all possible, and that if commitment was required it be in the least restrictive environment possible. The system was designed to protect these people's rights at every stage of the process through consistent and regular administrative and judicial review.

Appellant asks that this Court keep in mind the overarching purpose and intent of the LPSA in considering the question of the proper safeguards for the establishment or reestablishment of a conservatorship. Appellant believes the inescapable conclusion is that proof of a proposed conservatee's inability or unwillingness voluntarily to accept meaningful treatment is a requirement to establish this longest variation of involuntary commitment and treatment.

For one or more of the above stated reasons the ruling of the Court of Appeal review should be reversed, and the Conservatorship should be dissolved.

Respectfully submitted,

Dated: August 24, 2020

By: /s/ Christopher L. Haberman
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Attorneys for Objector and Appellant
K. P.

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Dated: August 24, 2020 By: /s/ Christopher L. Haberman

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(for K.P.)

Attorney General
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **P. (K.), CONSERVATORSHIP OF**
Case Number: **S258212**
Lower Court Case Number: **B291510**

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/s/Christopher Haberman
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Haberman, Christopher L. (132604)

Last Name, First Name (PNum)

Christopher L. Haberman

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