S261812

IN THE SUPREME COURT OF CALIFORNIA

PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,
Petitioner-Respondent,

v.

Eric B.,
Objector-Appellant.

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, CASE NO. A157280
CONTRA COSTA SUPERIOR COURT, CASE NO. P18-01826
HONORABLE SUSANNE M. FENSTERMACHER, JUDGE • PHONE: (925) 608-1115

ANSWER TO BRIEF OF AMICUS CURIAE DISABILITY RIGHTS CALIFORNIA, CALIFORNIA ASSOCIATION OF MENTAL HEALTH PATIENTS' RIGHTS ADVOCATES, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, LAW FOUNDATION OF SILICON VALLEY, AND MENTAL HEALTH ADVOCACY SERVICES

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PETITIONER-RESPONDENT PUBLIC GUARDIAN OF CONTRA COSTA COUNTY'S ANSWER TO BRIEF OF AMICUS CURIAE DISABILITY RIGHTS CALIFORNIA, CALIFORNIA ASSOCIATION OF MENTAL HEALTH PATIENTS' RIGHTS ADVOCATES, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, LAW FOUNDATION OF SILICON VALLEY, AND MENTAL HEALTH ADVOCACY SERVICES

INTRODUCTION

Amicus Curiae Disability Rights California, California Association of Mental Health Patients' Rights Advocates, California Public Defenders Association, American Civil Liberties Union, American Civil Liberties Union of Northern California, Disability Rights Education and Defense Fund, Law Foundation of Silicon Valley, and Mental Health Advocacy Services ("*Amici*") create a straw man argument and then attack that argument to attempt to show that Petitioner-Respondent Public Guardian of Contra Costa County ("Public Guardian") is elevating theory over substance in its argument to this Court by ignoring the "practical effects of civil commitment." (Amicus Brief ["AB"] 19.) To the contrary, the Public Guardian did not argue that Lanterman-Petris-Short ("LPS") Act conservatorships are likely or unlikely to result in restrictive housing placements or that they are likely or unlikely to last for longer than one year. Instead, the Public Guardian argued that the fact that potential LPS Act conservatees and Not Guilty by Reason of Insanity acquitees ("NGIs") can both be subjected to involuntary civil commitment is not sufficient to support a conclusion that they are similarly situated with respect to the right to refuse to testify in light of the differences between LPS Act conservatorships and NGI re-commitment proceedings. Nothing in the Amicus Brief addresses that argument.

In the brief and in the documents attached to the request for judicial notice of *Amici*, they suggest that the implementation of LPS Act conservatorships by certain counties does not comply

with the letter or spirit of the LPS Act in terms of providing less restrictive placement options for conservatees. Even if true, the solution to that problem is a legislative change to the Act itself or an investment in improvements in the outpatient services offered by counties. Problems with the implementation of LPS Act conservatorships in the "real world" cannot be solved by a ruling from this Court that would make it more difficult for triers of fact to make accurate assessments of whether a person is gravely disabled and in need of help to address the potentially devastating effects of that disability.

LEGAL ARGUMENT

I. The Public Guardian's Arguments Are Not "Theoretical" and Do Not Depend on the Implementation of Any Particular LPS Act Conservatorship

The Amicus Brief is based on an unsupported contention that the arguments advanced by the Public Guardian are "theoretical" and do not take into consideration the "practical" effects of LPS Act conservatorships. (AB 21.) That contention is without merit. At no point did the Public Guardian deny or even minimize the possibility that a person who is found to be gravely disabled pursuant to Welfare and Institutions Code section 5008, subdivision (h)(1)(a) could be involuntarily committed, including in a state hospital, for a significant period of time. (See Opening Brief on the Merits ["OBM"] 21-24.)

Amici's argument that, in practice, LPS conservatees are often placed in locked facilities, at least initially, is also not surprising in light of the fact that, to be subject to an LPS Act conservatorship, a person must be unable to provide for his food, clothing, or shelter due to a mental health disorder. LPS Act conservatorships pursuant to section 5008, subdivision (h)(1)(A) are designed to only apply to those individuals who are unable to care for themselves. That reality does not detract from the arguments made by the Public Guardian in its merits briefs.

As set forth in that briefing, many courts have noted that the liberty interests in LPS Act conservatorship proceedings, including the possibility of involuntary commitment, are significant. (*See Conservatorship of Roulet* (1979) 23 Cal.3d 219, 224 [152 Cal.Rptr. 425, 590 P.2d 1].) The potential imposition on a person's liberty interests is one of the reasons for the numerous procedural protections already in place in LPS Act conservatorship proceedings. (*See* OBM 21-23.) *Amici* break no new ground by suggesting that an LPS Act conservatee may be involuntarily committed in a locked facility, including in a state hospital. The Amicus Brief does not meaningfully add to the analysis of this issue because Eric B. made similar arguments in the Answer Brief on the Merits. (Answer Brief on the Merits ["ABM"] 38-40.)

The Public Guardian did not represent that LPS Act conservatorships actually last less or more than one year. Instead, on the issue of duration, the Public Guardian pointed out that one of the differences between NGI commitments and LPS

Act conservatorships is that an NGI commitment pursuant to Penal Code section 1026.5 is for a period of two years beyond the initial confinement period while an LPS Act conservatorship automatically terminates after one year. (OBM 22.) *Amici* do not dispute that fact. The actual length of individual conservatorships does not impact the arguments made by the Public Guardian because those arguments were made in recognition of the fact that both NGI commitments and LPS Act conservatorships are subject to possible extension and that the "theoretical maximum period of detention is life. . . ." (*Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, 994 [259 Cal.Rptr.3d 281], *quoting Roulet*, supra, 23 Cal.3d at 223–224.)

The fact that both LPS Act conservatees and NGIs face possible involuntary civil commitment and that both LPS Act conservatorships and commitments under Penal Code section 1026.5 can be renewed under certain circumstances is not sufficient to conclude that LPS Act conservatees and NGIs are similarly situated for the purposes of the right against compelled testimony. The Public Guardian set forth its arguments on that issue in the merits briefs and will not repeat those arguments here. *Amici*'s unsupported anecdotal arguments to refute a claim -- that LPS Act conservatorships last for short durations -- the Public Guardian did not make is not persuasive on the issue of whether LPS Act conservatees and NGIs are similarly situated for the purposes of equal protection.

Amici urge this Court to make a ruling that will apply state-wide based on statistics obtained from two reports that

include information about the length of LPS Act conservatorships in only three of 58 California counties. The information relied on by *Amici* presents too narrow a picture to be helpful. *Amici* also fail to illuminate how a rule prohibiting a potential LPS Act conservatee from being called as witnesses at trial will (a) make it more likely that the conservatee will be housed in a less restrictive setting or (b) shorten the length of LPS Act conservatorships.

Amici argue that it is significant that a very small percentage of LPS Act conservatees are placed in their own homes or with family members. (AB 27-28.) However, *Amici*'s argument ignores the fact that, if it is determined that a person can obtain food, clothing or shelter with the help of friends or family, that person is not considered to be gravely disabled and, therefore, not subject to a conservatorship at all. (Welf. & Inst. Code, § 5350(e)(1).) As such, the ability for a potential LPS Act conservatee to articulate a plan and present ability to provide food, clothing and shelter at trial may be crucial to avoiding an unnecessary conservatorship. Nothing in the documents submitted by *Amici* provides statistics for the number of people who avoid conservatorships (and any involuntary commitment) altogether because of section 5350, subdivision (e)(1) -- a provision with no counterpart in the statutory scheme for NGI re-commitments.

However, a case relied on by *Amici* -- *Conservatorship of David L.* (2008) 164 Cal.App.4th 701 [79 Cal.Rptr.3d 530] -- illustrates why it is important for potential LPS Act conservatees

to testify at conservatorship trials. (AB 22-23.) In that case, two doctors testified at trial that David L. was gravely disabled but disagreed about the least restrictive appropriate placement.

David L. was called as a witness and testified as to his preferences for placement. He later sought to obtain new counsel, in part, because he claimed he was not able to sufficiently explain his views about the proposed conservatorship and potential placement during his testimony. (*Id.* at p. 707.) While the trial court ultimately determined that placement in a state hospital was appropriate, the case demonstrates the potential for conflicts in expert testimony, illustrates how a potential LPS Act conservatee's testimony could influence the trial court's decisions relating to the conservatorship, and belies the argument that a potential conservatee's testimony could only be used to negatively impact his liberty interests. The California State Auditor's report recognized this point as well, noting that superior courts "considered the level of insight these individuals had into their illnesses . . . when determining whether conservatorships were necessary." (Ex. A to Request for Judicial Notice ["RJN"] at p. 20.) It would be difficult for trial courts to make those determinations without hearing from the conservatees themselves.

In sum, *Amici*'s reliance on a snapshot of how some LPS Act conservatorships are handled in some counties does not change the fact that LPS Act conservatorships are not similarly situated with NGI re-commitment proceedings in terms of the right against compelled testimony.

II. The Documents Relied on By *Amici* are Too Narrow to be Helpful and Support the Public Guardian's Arguments

Even if the Court found evidence of "real world" implementation of LPS Act conservatorships to be helpful in analyzing the equal protection issue before it, the documents submitted in support of the Amicus Brief are too narrow to be helpful in determining the "practical effects" of LPS Act conservatorships pursuant to section 5008, subdivision (h)(1)(a).

For instance, Exhibit A to the request for judicial notice is a report from the California State Auditor about its investigation of the implementation of LPS Act conservatorships in only three counties. (Ex. A to RJN at p. 1.) Contra Costa County is not one of the three counties included in the report.

Exhibit B is a Policy Analysis Report from one of those three counties, the City and County of San Francisco, analyzing and identifying ways to improve that county's mental health system. It provides little insight into the practical effects of LPS Act conservatorships in the other 57 counties in California.

Exhibit C is a civil grand jury report from Santa Clara County that is focused on recommendations to improve the efficiency and office morale of the Public Guardian office in that county. *Amici* cite to only one sentence of that report and actually misinterpret that sentence. According to *Amici*, the Santa Clara civil grand jury found that the Public Guardian in that county "typically placed people conserved under the LPS Act in locked psychiatric hospitals." (AB 34, citing Ex. C to RJN at p.

7.) That is not what the grand jury report said. Instead, on page 7 of its report, the grand jury concluded (with no citation to authority) that potential conservatees "are typically referred to [the Public Guardian] by locked psychiatric hospitals." (Ex. C to RJN at p. 7.) Exhibit C provides no help to the Court in determining what happens to potential LPS Act conservatees in Santa Clara County after they are found to be gravely disabled.

As to the report of the Contra Costa grand jury, by its own express terms, that report is focused on "probate conservatorships," not LPS Act conservatorships. (Ex. D to RJN at p. 1.) As such, it seems to have no value to the Court or parties in the analysis of the issue presented. In fact, it appears to have been included in the request for judicial notice because it reaches the conclusion that the Public Guardian was not in compliance with a 2006 law that amended portions of the Probate Code. The sole purpose of including the Contra Costa grand jury report in the request for judicial notice appears to be to inappropriately put the grand jury's criticism of the Public Guardian in front of this Court regardless of its relevance.

Moreover, to the extent the Court relies on those documents, they provide support for the Public Guardian's arguments. For instance, according to the California State Auditor, two thirds of persons referred for LPS Act conservatorships in San Francisco County in one year spent less than a year in the LPS conservatorship program. (Ex. B to RJN at A-9) In addition, at least one third of persons in LPS Act

conservatorships in San Francisco were housed in unlocked facilities. (Id. at A-10.)

The California State Auditor found that, even where LPS Act conservatees were initially housed in restrictive settings, "counties had stepped individuals down to lower levels of care by the time their conservatorships ended." (Ex. A to RJN at p. 22.) The report also suggested that this number could be increased if outpatient treatment options were increased. (Id.) San Francisco and Alameda counties already have programs in place to try to minimize the time that LPS Act conservatees spend in locked facilities. (Ex. B to RJN at p. A-20.) This suggests that *Amici*'s concerns over lengthy or inappropriate involuntary commitments in locked facilities can be addressed by means other than preventing people who need help from getting it by allowing them to refuse to testify at LPS Act conservatorship trials.

Exhibit A to the request for judicial notice also recognized an important difference between LPS Act conservatees and other civil committees. For instance, the California State Auditor noted that parolees with mental illnesses must be housed in state hospitals while the "LPS Act does not similarly and explicitly require [conservatees] to be placed in state hospital facilities." (Ex. A to RJN at p. 25-26.)

Finally, the California State Auditor found that, in Los Angeles County, conservatorships were being terminated inappropriately when doctors failed to appear and testify at re-commitment hearings. (Ex. A to RJN at p. 30.) The report noted that the effect of a premature termination of a conservatorship

can be "devastating" for the person who is gravely disabled. If the potential conservatee can refuse to testify and a doctor called by the Public Guardian fails to appear, it is unclear how else a Public Guardian could be expected to meet its burden to show that a potential LPS conservatee needs assistance which, as noted, can have devastating results. The California State Auditor also recognized another difference between NGIs and LPS Act conservatees -- that "individuals with mental illness are disproportionally victims of violence." (Id. at p. 106.)

Ultimately, even if the Court decided to consider the evidence submitted by *Amici*, it is impossible to assess the relevance and effect of that evidence without a more complete record about LPS Act conservatorships in other counties and without considering similar information about the length and circumstances of civil commitments of NGI acquitees, about which no information was provided by *Amici*. As such, the thumbnail sketch of the details of LPS Act conservatorships in a select number of counties over a small window of time does little to guide the Court's analysis of the issue before it.

III. The Court should Exclude *Murphy* Conservatorships From Its Analysis

Amici finally argue that the Court should consider *Murphy* conservatorships in determining whether LPS Act conservatees and NGIs are similarly situated for the purposes of the right against compelled testimony at commitment trials. *Amici's* argument is based on the claim that, in *Roulet*, the Court held

that "equal protection must be applied when looking at rights conferred to individuals committed for treatment under different sections of the LPS Act." (AB 37, citing *Roulet*, 23 Cal.3d at p. 231.)

The Court in *Roulet* did not make the broad statement asserted by *Amici*. The Court held that LPS Act conservatees have a due process right to a unanimous jury on the issue of whether they are gravely disabled and that the Public Guardian had to prove grave disability beyond a reasonable doubt. (*Id.* at p. 235.) As part of its analysis, the Court suggested that a failure to rule that section 5350, subdivision (d) required a unanimous jury verdict would raise equal protection issues because a unanimous jury was already required in commitment proceedings for "imminently dangerous persons" pursuant to section 5303. (*Id.* at p. 231.) The Court did not make the broad statement that persons committed under any section of the LPS Act had to be treated the same in all circumstances.

Moreover, the conclusion that Murphy conservatorships are different from regular LPS Act conservatorships is further demonstrated by the documents submitted by *Amici* in support of the request for judicial notice. In several of those documents, the authors note the existence of Murphy conservatorships but the reports generally exclude those conservatorships from their discussion of LPS conservatorships generally. (Ex. A to RJN at p. 1; Ex. B to RJN at p. 6.)

The relatively small number of Murphy conservatorships is also reflected in documents submitted in support of the amicus

brief. For instance, in San Francisco, Murphy conservatorships make up around 2% of the total LPS Act conservatorships handled by that county's Public Conservator. (See Ex. B to RJN at A-11.)

The Amicus Brief confirms the fact that Murphy conservatorship are unique and rare and should not decide the issue of whether LPS Act conservatorships under section 5008, subdivision (h)(1)(A) are similarly situated to NGI re-commitment proceedings.

IV. Court Should Deny, In Part, Amici's Request for Judicial Notice

The Public Guardian does not oppose *Amici*'s request for judicial notice as to exhibits A through D.

As to the declarations attached as Exhibit E, the request should be denied. In the request for judicial notice, *Amici* cite to *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 n.14 [11 Cal.Rptr.2d 51, 834 P.2d 745] to support the request for the Court to take judicial notice of the declarations of a select group of attorneys who are advocates for potential LPS Act conservatees. However, in that case, while it denied a motion to strike declarations submitted by an amicus curiae, the Court expressly noted that the declarations were not subject to judicial notice because they were "not part of the record, were not subjected to the testing mechanisms of the adversary process or independent professional review, and do not qualify for judicial notice pursuant to Evidence Code section 450 et seq." (*Id.*)

The other case cited by *Amici*, *Pang v. Beverly Hosp., Inc.* (2009) 79 Cal.App.4th 986 [94 Cal.Rptr.2d 643], also does not support the request to take judicial notice of declarations. In that case, the court of appeal took judicial notice of declarations that had been filed in the trial court in support of a motion for summary adjudication. Those declarations were considered by the appellate court at the request of both parties because they were part of the record on appeal and constituted "judicial admissions and concessions" which are subject to judicial notice. (*Id.* at p. 990.)

The declarations attached as Exhibit E were not part of the record on appeal, were not subject to the testing mechanisms of the adversary process and do not qualify for judicial notice pursuant to the Evidence Code. The Court should deny the request to take judicial notice of those declarations and refuse to consider them.

CONCLUSION

Nothing in the Amicus Brief is sufficient for the Court to find that NGIs and LPS Act conservatees under section 5008, subdivision (h)(1)(A0 are similarly situated for the purposes of the testimonial privilege.

May 10, 2021

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

The text of this brief consists of 3,179 words as counted by the Microsoft Word word processing program used to generate the brief.

May 10, 2021

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CERTIFICATE OF SERVICE

(Code Civ. Proc. §§ **1012, 1013a, 2015.5;** F R Civ P **5(b))**

Re: Public Guardian of Contra Costa County, Petitioner, v. E.B.., Respondent; No. S261812 Case No. P18-01826

I declare that my business address is the County Counsel's Office of Contra Costa County, Administration Building, P.O. Box 69, Martinez, CA 94553-0116; that I am a citizen of the United States, over 18 years of age, employed by the County of Contra Costa and not a party to the within action; and, that I am readily familiar with the County Counsel's office business practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of the County Counsel's office business practice the document described below will be deposited with the United States Postal Service on the same date that it is sealed and placed at the County Counsel's office with fully prepaid postage thereon.

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PUBLIC GUARDIAN OF CONTRA COSTA COUNTY'S ANSWER TO BRIEF OF AMICUS CURIAE on each of the following by the method indicated:

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

Executed at Martinez, California on **May 10, 2021.**

/s/

Erik Schlenker

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S261812**
Lower Court Case Number: **A157280**

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