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

Opening Brief on the Merits

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ISSUE PRESENTED FOR REVIEW

Must the trier of fact find, beyond a reasonable doubt, that the objector is unwilling or unable voluntarily to accept meaningful treatment before a conservator may be appointed, or reappointed, under the Lanterman-Petris-Short Act (LPSA)?

INTRODUCTION

It has long been held that under the rules of statutory construction and to meet the federal and state constitutional requirements for due process, LPSA conservatorship trials (Welf. & Inst. Code[1], § 5350) should not be limited to the narrow issue of "grave disability" – whether the person is unable due to his mental illness to provide for his basic needs of food, shelter and clothing, as defined by statute. (§ 5008, subd. (h)(1).) Rather, the intent of the LPSA is to allow the jury to determine whether a conservatorship is necessary in light of all the relevant facts. (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 325 *(Davis)*; *Conservatorship of Early* (1983) 35 Cal.3d 244, 250 *(Early)*. These relevant facts include whether the person is unwilling or unable voluntarily to accept meaningful treatment. This requirement is separate and distinct from the issue of grave disability.

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

The LPSA requires that before a nondangerous mentally ill person may be involuntarily committed for evaluation or treatment for any period of time, the person must be found to suffer from a mental disorder, be gravely disabled or impaired by chronic alcoholism[2] *and be unwilling or unable to accept services, evaluation or treatment on a voluntary basis*. (§ 5150, subd. (c) [no 72-hour detention if person can be evaluated and treated without detention]; § 5152, subd. (b) [must release after 72-hours if willing and able to accept voluntary treatment]; § 5202 [requirement for court-ordered evaluation and further 72-hour hold]; § 5250, subd. (c) [requirement for 14-days after 72-hour hold]; § 5257, subd. (b)(1) [must release after 14-days if willing and able to accept voluntary treatment]; § 5270.15, subd. (a)(2) [requirement for 30-day extension after 14-day commitment]; § 5270.35, (a), (b)(1) [must release after 30-day extension if willing and able to accept voluntary treatment]; § 5352 [requirement for establishing temporary conservatorship of 30 days to 6 months prior to establishment of conservatorship]; § 5352 [requirement for seeking petition for conservatorship under § 5350].)

The person for whom involuntary commitment is sought may challenge initial commitments and extension periods of 14 days and 30 days, through administrative (§§ 5254, 5256) and/or judicial review by petition for habeas corpus (§§ 5275–5276). In those review hearings the government must justify by a preponderance of the evidence the necessity of the commitment, including that the person suffers from a grave disability and is unable or unwilling to accept treatment on a voluntary basis. The

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[2] Chronic alcoholism is not at issue in this case.

lower standard of proof is constitutionally permissible because of the shorter period of involuntary detention and treatment. (*In re Azzarella* (1989) 207 Cal.App.3d 1240, 1247; *In re Lois M.* (1989) 214 Cal.App.3d 1036, 1040–1041.)

The rules of statutory construction and constitutional due process require that the government prove and the trier of fact find that the proposed conservatee is unwilling or unable voluntarily to accept treatment and not merely that he or she is gravely disabled to mental illness before a conservator may be appointed. (*Davis*, *supra*, 124 Cal.App.3d at p. 325; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 *(Walker)*.)

While the need for shorter periods of commitment (e.g. 14 days, 30 days) may be proven by only a preponderance of the evidence (*In re Azzarella*, *supra*, 207 Cal.App.3d at p. 1247; *In re Lois M.*, *supra*, 214 Cal.App.3d at pp. 1040–1041), constitutional due process requires the government to prove and the trier of fact find all elements beyond a reasonable doubt before a one-year conservatorship can be established or renewed. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235.) This includes the statutory requirement that the proposed conservatee is unwilling or unable to voluntarily accept meaningful treatment before a conservator may be appointed. The elements of proof are not limited to the issue of "grave disability". (*Walker*, *supra*, 196 Cal.App.3d at pp. 1092–1093; *Davis*, *supra*, 124 Cal.App.3d at pp. 319–323, 325.)

The only case standing for the proposition that the government is not required to prove that a proposed conservatee is unwilling or unable voluntarily to accept meaningful treatment

is *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464. This case was wrongly decided, and its analysis of the issues is dicta. Therefore, it may not be relied upon as precedent.

STATEMENT OF THE CASE

On April 19, 2018, the Public Guardian of Los Angeles County petitioned for re-appointment as conservator of K.P. (appellant) under sections 5350 through 5368. (CT 205–206.) On May 5, 2018, appellant requested jury trial. (CT 217.) A three-day jury trial commenced on June 20, 2018, and on June 22, 2018, the jury found that appellant was gravely disabled. (CT 220, 230, 261; RT 1187.) The public guardian was reappointed as conservator with a termination date of June 3, 2019. (CT 231; RT 1188.) Notice of appeal was filed on July 5, 2018. (CT 262.)

Prior to the start of appellant's trial counsel filed a written motion and made a series of arguments regarding the required elements for establishing a conservatorship under section 5352. (CT 222–225; RT 1106–1109.) Counsel for K.P. noted that CACI[3] Form Instruction 4000 required that the person seeking the conservatorship prove three elements beyond a reasonable doubt

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[3] Appellant requests that this court take judicial notice of California Civil Jury Instructions (CACI) at issue in this case. (Evid. Code, § 451.) Appellant is aware that "[j]ury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles." (*People v. Morales* (2001) 25 Cal.4th 34, 48 fn. 7.) Appellant presents the information on the CACI instructions for factual background and context for examination of the instructional issue.

before a conservator can be appointed.[4] The third of those elements requires a finding that the defendant is unwilling or unable to voluntarily accept meaningful treatment. Counsel indicated that up until about a year before this trial that element was consistently given in LPS trials in Los Angeles. (RT 1106–1107.)

Defense counsel then noted that element three had been removed from the draft instructions for this case and objected, arguing that under the authority detailed in his written motion, the third element was required because he would be presenting evidence that appellant was willing to voluntarily accept treatment and his mother was willing to aid appellant. (RT 1106–1107.) Counsel further asserted that the ongoing local practice of removing element three and adding the following paragraph to CACI 4002 was not sufficient to remedy the error:

> In determining whether [KP] is presently gravely disabled, you may consider whether he is unable or unwilling voluntarily to accept meaningful treatment. (CT 249.)

Counsel asserted that moving the above language from an element under CACI 4000 to an optional consideration under

[4] The three elements in CACI 4000 are: "1. That [*name of respondent*] [has a mental disorder/is impaired by chronic alcoholism]; [and] 2.That [*name of respondent*] is gravely disabled as a result of the [mental disorder/chronic alcoholism][; and/.] [3. That [*name of respondent*] is unwilling or unable voluntarily to accept meaningful treatment.]"

CACI 4002 was insufficient because the jury was no longer required to make a finding beyond a reasonable doubt on the issue. (RT 1106–1107.)

The trial court indicated that the changes had been made in the instructions because that is what was requested by the public guardian. (RT 1108.) The court noted that published cases had discussed the issues and stated that the "public guardian is asking for the different instruction" version. (RT 1108.) Counsel for the county made no comment and the court declined to modify the instructions as drafted by the county.

STATEMENT OF FACTS

Psychologist Dr. Sara Mehraban was appellant's treating psychologist at his residential care facility. (RT 1130–1131.) She met with him daily, including on the morning of her testimony, and had reviewed his background files and records. (RT 1140.) Dr. Mehraban diagnosed appellant with schizophrenia and testified that he experienced auditory hallucinations and paranoid delusions. (RT 1141–1142.) As an example, Dr. Mehraban testified that earlier that morning appellant had indicated to her that he needed to be placed in a witness protection program because he believed a patient at the facility was going to attack him. (RT 1142.) On prior occasions appellant had responded violently to perceived threats from other patients. (RT 1145.) Appellant also exhibited a variety of other symptoms of schizophrenia including disorganized behavior, lack of motivation, difficulty speaking, and lack of social interaction. (RT 1144.)

Appellant was prescribed a variety of medications for his mental illness and gave inconsistent statements to Dr. Mehraban about whether he would continue taking them if he was released from the treatment facility. (RT 1146–1147.) Dr. Mehraban opined that she did not believe appellant had sufficient insight into his condition to continue treatment if released and would not be able to provide for his food, shelter, clothing, and care without supervision. (RT 1147.) During their discussions, appellant had acknowledged to her that he had a mental illness and could identify his symptoms but did not clearly understand what was required to effectively manage his condition including the need for medication. (RT 1147–1148, 1160.)

In Dr. Mehraban's opinion appellant was unwilling or unable voluntarily to accept meaningful treatment because he had not shown initiative in his treatment and frequently changed between stating that he wanted to continue his medication and wanted to stop taking it. (RT 1152.)

Appellant's mother testified that she believed appellant had a mental illness and was willing to help him in his care and treatment if he was not subject to a conservatorship. (RT 1120–1122.) She was previously appellant's conservator before the public guardian took over the responsibility (RT 1123) and was willing to make sure he was treated if needed at a hospital and could arrange for medical care and housing if needed. (RT 1121–1122.)

Appellant testified on his own behalf. (RT 1165.) He indicated that if his conservatorship were terminated, he was willing to stay at the facility until he could find a place to live and would continue to see a therapist or psychologist. (RT 1165–1166.)

Appellant indicated that he did not believe he had schizophrenia but rather brain trauma of some form and would not continue taking medication because he believed he was better off without it. (RT 1165–1166, 1169.) Appellant indicated that he had been hospitalized since 2013 and described an incident where he believed he was attacked by a patient. (RT 1167–1169.) Appellant planned to find an apartment and support himself through social security and being an entrepreneur. (RT 1169–1171.)

ARGUMENTS

I. The LPSA requires that the government prove a person is gravely disabled due to a mental disorder and is unwilling or unable voluntarily to accept meaningful treatment before the person can be involuntarily committed for evaluation or treatment for any period.

The LPSA provides for the involuntary detention and treatment of nondangerous mentally ill persons. This case requires harmonization of apparently conflicting statutes within the LPSA. On the one hand, prior to the establishment of a one-year conservatorship, section 5350 explicitly grants the proposed conservatee a jury or court trial on the issue of "grave disability" as defined in section 5008, subdivision (h)(1)(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."

However, section 5350 contains no requirement that the government prove that the person for whom the conservatorship is sought is unwilling or unable voluntarily to accept meaningful treatment.

On the other hand, multiple sections of the LPSA explicitly require that a person must be found unwilling or unable voluntarily to accept meaningful treatment and gravely disabled due to a mental illness before the person can be involuntarily committed to any period of treatment or evaluation.

The LPSA also requires that if a person requests administrative or judicial review of the involuntary detention, evaluation or treatment, the government must affirmatively prove that a proposed conservatee is unwilling and unable voluntarily to accept meaningful treatment before an involuntary commitment may be ordered beyond a 72-hour detention for initial assessment, evaluation, and/or treatment. Proof that the person is unwilling or unable to voluntarily accept treatment is an element that must be proven by the person seeking to impose the commitment and treatment at any stage, including a one-year conservatorship.

A. LPSA requirements for involuntary commitments

The LPSA permits involuntary commitment for evaluation and treatment of nondangerous people with mental health disorders for increasingly greater periods of time, if necessary, beginning with a 72-hour period of crisis intervention, assessment, evaluation, and treatment (§ 5150) and ending with

a renewable one-year conservatorship (§ 5350). Here are the LPSA requirements for each step in this gradual process. Consideration of these statutes are necessary to ascertain the scope and purpose of the LPSA and for this Court to analyze and harmonize the conflicting statutes.

1. 72-hour detention

When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, they may, upon probable cause, be taken into custody for a period up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a designated facility. (§ 5150, subd. (a).) Even in this relatively short period of detention, the person responsible for evaluation and treatment must assess the person to determine whether they can be properly served *without being detained*. If the person can be served without detention, then services must be offered on a voluntary basis. (§ 5150, subd. (c).)

2. Additional 72-hour court-ordered evaluation

A person may not be evaluated beyond this initial 72-hour period without an order from the superior court. (§ 5200.) Prior to filing a petition for this evaluation, the person seeking the petition must determine whether the gravely disabled person *will agree to accept services voluntarily*. The petition should only be filed if the person to be evaluated is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely

disabled, *and that the person will not voluntarily receive evaluation or crisis intervention*. (§ 5202, emphasis added.) The superior court judge shall order the evaluation when it appears that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled, and *the person has refused or failed to accept evaluation voluntarily*. (§ 5206.) If, after evaluation, the person has been deemed to be, as a result of a mental disorder, a danger to others, or to himself or herself, or gravely disabled, they may be detained and treated in an appropriate facility for another 72-hours. (§ 5213, subd. (a).)

3. 14-day evaluation and treatment

If a person who has been detained for crisis intervention for 72-hours under section 5150, or an additional 72-hours for court-ordered evaluation under section 5200, the person may be held for treatment for an additional 14-days, if after evaluation the person has been found to be, as a result of a mental health disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled (§ 5250, subd. (a)) and the person has been advised of the need for, *but has not been willing or able to accept, treatment on a voluntary basis*. (§ 5250, subd. (c).) The professionals seeking to extend the person's commitment are required to certify, in part, that the person has been informed of this evaluation, and has been advised of the need for, *but has not been able or willing to accept treatment on a voluntary basis, or to accept referral to, certain specified services*. (§ 5252.)

4. Administrative or judicial review

The person who is involuntarily committed for an additional 14 days, is entitled to an administrative review hearing (§§ 5254, 5256–5256.5), on whether he or she meets the criteria for extended treatment. In the alternative, the person for whom further evaluation is sought may request judicial review in the superior court via a petition of habeas corpus under section 5275, et seq., either before (§§ 5254.1, 5256) or after the administrative review hearing (§ 5256.7).

If the court finds, that the person requesting release is not, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled, *that he or she had not been advised of, or had accepted, voluntary treatment*, or that the facility providing intensive treatment is not equipped and staffed to provide treatment or is not designated by the county to provide intensive treatment, he or she shall be released immediately. (§ 5276.) This is an element to be proven by the government by a preponderance of the evidence. The preponderance of the evidence standard of proof satisfies constitutional due process, in part, because it is for a relatively short period of time. (*In re Azzarella*, *supra*, 207 Cal.App.3d at p. 1247.)

A person certified for a period of intensive treatment under section 5250 shall be released at the end of 14 days *if the patient agrees to further treatment on a voluntary basis*. (§ 5257, subd. (b)(1).)

5. 30-day Extension of Extensive Involuntary Treatment

Should the government seek to extend involuntary treatment beyond the 14-day evaluation period (§ 5250, subd. (a)), the person may be certified for an additional period of not more than 30 days of intensive treatment if the professional staff of the agency or facility treating the person has found that the person remains gravely disabled as a result of a mental disorder or impairment by chronic alcoholism *and that the person remains unwilling or unable to accept treatment voluntarily*. (§ 5270.15, subd. (a).) The person must be released from the treatment facility before the 30-days if the treating professional believes the *person is prepared to voluntarily accept treatment on a referral basis or to remain in the facility for intensive treatment on a voluntary basis*. (§ 5270.35, subds. (a), (b)(1).)

The person again is permitted to challenge this 30-day extension through administrative review (§ 5256) or petition of habeas corpus in the superior court (§ 5275, et seq.) The government carries the burden of proof by a preponderance of the evidence. (*In re Azzarella*, *supra*, 207 Cal.App.3d at p. 1247.)

The legislature explained its intent in revising the chapter on extended treatment beyond the periods of initial evaluation in section 5270.10.

> "It is the intent of the Legislature to reduce the number of gravely disabled persons for whom conservatorship petitions are filed and who are placed under the extensive powers and authority of a temporary conservator simply to obtain an additional period of treatment without the belief that a

> conservator is actually needed and without the intention of proceeding to trial on the conservatorship petition. This change will substantially reduce the number of conservatorship petitions filed and temporary conservatorships granted under this part which do not result in either a trial or a conservatorship."

6. One-Year Conservatorship

A person who, because of a mental health disorder, is gravely disabled, may be appointed a conservator of his or her person and estate for renewable one-year periods. (§§ 5350, 5361.) The proposed conservatee is entitled to a jury or court trial on the issue of grave disability. (§ 5350, subd. (d)(1). The term "gravely disabled" is defined as "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." (§§ 5350, subd. (b)(1); 5008, (h)(1)(A).) However, a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter. (§ 5350, subd. (e)(1).)

The government may not petition for a conservatorship under section 5350, however, unless the proposed conservatee is unwilling or unable to accept treatment voluntarily. When the professional person in charge of an agency providing evaluation or facility providing intensive treatment determines that a person in their 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, the professional person may recommend conservatorship to the officer providing conservatorship investigation for the county where the proposed conservatee resided prior to his or her admission as a patient in such facility. (§ 5352.) This officer is responsible for initiating the conservatorship after a comprehensive investigation is made. (§§ 5352, 5354.)

The investigator shall not petition for the conservatorship unless there are no suitable alternatives. (§ 5354.) If, after investigation, the investigator concurs with the recommendation of the professional the investigator shall petition the superior court to appoint a conservator. (§ 5352.)[5]

7. Temporary Conservatorship

The petition for conservatorship may also request a temporary conservator be appointed prior to trial on the petition. (§ 5352.) The court may appoint a temporary conservator based on the comprehensive report filed by the investigator (§ 5354) or affidavit of the professional who recommended the conservatorship. (§ 5352.1, subd. (a).) The temporary conservatorship shall expire after 30 days. (§ 5352.1, subd. (b).) If the proposed conservatee demands a trial on the petition,

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[5] It is instructive to note that when an LPS conservatorship is sought for someone who already has a conservator appointed under the Probate Code, the court must determine whether the person is gravely disabled *and unwilling or unable to accept treatment voluntarily*, before it may refer the person for a mental health examination to determine if an LPS conservator should also be appointed. (§ 5350.5.)

however, the court may extend the period of the temporary conservatorship for a period not to exceed 6 months. (§ 5352.1, subd. (c).)

A temporary conservator shall determine what arrangements are necessary to provide the person with food, shelter, and care pending the determination of conservatorship, giving preference to arrangements which allow the person to return to his home, family, or friends. The person must be placed in the least restrictive most appropriate environment. (§§ 5353, 5358.)

The person for whom the conservatorship is sought is permitted to seek review of the conditions of confinement and placement while awaiting trial through petition of habeas corpus in the superior court (§ 5275, et seq.). (§§ 5353, 5358.)

B. Statutory Construction and Interpretation of the LPSA and § 5008, subd. (h)(1)(A)

The scope the conservatorship trial must be considered in the context of the entire statutory scheme, not merely on the question of grave disability as set forth in sections 5008, subdivision (h)(1)(A) and 5350, subdivisions (b)(1) and (e)(1). Interpretation of section 5008, subdivision (h)(1) in the context of the LPSA was tackled back in 1981 in *Davis*, *supra*, 124 Cal.App.3d 313.

> Because our analysis of this issue involves the proper interpretation of section 5008, subdivision (h)(1), we are guided by the general principles of statutory construction aptly summarized by our Supreme Court in *Moyer* v. *Workmen's Compensation Appeals Bd.* (1973) 10 Cal.3d 222, 230–231 [jump cite omitted]: "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.' [Citations.] 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the 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." (See also *Tripp* v. *Swoap* (1976) 17 Cal.3d 671, 679 [jump cite omitted] and *People* v. *Untiedt* (1974) 42 Cal.App.3d 550, 554 [jump cite omitted].)"

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

Davis then ascertained the intent with which the Legislature enacted the LPSA:

> "(a) *To end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons*, developmentally disabled persons, and persons impaired by chronic alcoholism, *and to eliminate legal disabilities*;
>
> "(b) To provide prompt evaluation and treatment of persons with serious mental disorders or impaired by chronic alcoholism;
>
> "(c) To guarantee and protect public safety;

"(d) To safeguard individual rights through judicial review;

"(e) To provide individualized treatment, supervision, and placement services by a conservatorship program for gravely disabled persons;

"(f) To encourage the full use of all existing agencies, professional personnel and public funds to accomplish these objectives and *to prevent* duplication of services and *unnecessary expenditures*;

"(g) To protect mentally disordered persons and developmentally disabled persons from criminal acts. [Italics added.]"

(§ 5001, subds. (a)–(g)[6].) (*Davis*, *supra*, 124 Cal.App.3d at pp. 321–322.) *Davis* identified the italicized sections as being relevant to issues presented.

Next, *Davis* looked to 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. The court noted 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

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[6] Legislature had since revised some of the language of Section 5001 and has added two new factors:

(h) To provide consistent standards for protection of the personal rights of persons receiving services under this part and under Part 1.5 (citation omitted).

(i) *To provide services in the least restrictive setting appropriate to the needs of each person receiving services* under this part and under Part 1.5 (citation omitted). Subdivision (i) is also relevant to the issues under consideration in this case.

and is unwilling, or incapable of accepting, treatment voluntarily (*Davis*, *supra*, 124 Cal.App.3d at p. 322), and that section 5354 provides that conservatorship shall be recommended to the court *only* if no suitable alternatives are available, and requires that the report recommending conservatorship include all relevant aspects of the person's family, vocational and social condition. (*Davis*, *supra*, at p. 323.)

Davis concluded that based on the principles of statutory construction, although section 5350 states that the issue at trial is "whether [the person] is gravely disabled," it appears from a reading of the entire act that this phrase must be broadly construed to include the determination of whether the establishment of a conservatorship is necessary in light of all the relevant facts. (*Ibid.*)

In *Davis*, the court was faced with the question of whether a conservator can be appointed if there are responsible third parties who will assist a proposed conservatee who is gravely disabled by providing for their basic needs. The *Davis* Court held:

> "Sections 5001 et seq., necessarily require the trier of fact (the jury in the case at bench) to determine the question of grave disability, not in a vacuum, but in the context of suitable alternatives, upon a consideration of the *willingness and capability of the proposed conservatee to voluntarily accept treatment* and upon consideration of whether the nondangerous individual is capable of surviving safely in freedom by himself or with the help of willing and responsible family members, friends or other third parties. (See *O'Connor* 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.)

Davis was later affirmed by this Court in *Early*, *supra*, 35 Cal.3d at page 254.

> "We are in accord with *Davis*.... One of the stated purposes of the LPS Act is "[to] 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.' [Citation.].)"

(*Early*, *supra*, 35 Cal.3d at pp. 250–251.) *Early* and *Davis* concluded that a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter. The statute concerning conservatorship trials was later amended to reflect these holdings regarding responsible third-party assistance on grave disability. (§ 5350, subd. (e)(1).)[7]

The issue presented in this case is more straightforward than the third-party assistance issue in *Davis* and *Early*. The LPSA requires that a person who the government is seeking to involuntarily detain, evaluate, and/or treat, must be found to be

[7] The issue of whether the government must prove that a person for whom conservatorship is sought is unwilling or unable voluntarily to accept meaningful treatment before a conservator can be appointed, was before the *Early* Court, but no decision was reached on that question. (*Early*, *supra*, 35 Cal.3d at pp. 255–256.)

unwilling or unable voluntarily to accept treatment, separate and apart from the question of grave disability due to mental disorder and the existence of third-party assistance.

Every single stage of involuntary detention, evaluation and treatment – from the 72-hour crisis intervention, to the court-ordered 72-hour evaluation, to the 14-day further evaluation and intensive treatment, to the filing of the petition for one-year conservatorship, to the temporary conservatorship – requires that the mentally ill person be unwilling or unable voluntarily to accept treatment before any involuntary commitment may occur.

Under the LPSA, in habeas corpus proceedings reviewing the propriety of lesser periods of involuntary treatment under section 5375, et seq., the government has the burden of proving that involuntary detention, evaluation and treatment is appropriate, including that the person is unwilling or unable voluntarily to accept treatment.[8]

Giving effect to the statutes, according to the usual and ordinary meaning of their language, giving significance to every word, phrase and sentence pursuant to the legislative purpose, and harmonizing section 5350 and 5008, subdivision (h)(1)(A) in the context of the statutory framework as a whole, the inescapable conclusion is that the government must prove, and the trier of fact must find, that a person for whom a conservatorship is sought is unwilling or unable voluntarily to accept meaningful treatment prior to the appointment of a conservator. (*Davis*, *supra*, 124 Cal.App.3d at p. 325.)

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[8] The issue of the proper standard of proof in conservatorship trials will be addressed in another section.

It is difficult to believe that the legislature intended that every stage of involuntary evaluation, treatment and placement under the act would require a finding that the person is unwilling or unable voluntarily to accept meaningful treatment, except for the longest period of confinement: a conservatorship, which lasts a year and can be renewed for a lifetime.

With a conservatorship, unlike the shorter periods of commitment, the issue of the person's lack of willingness and ability to voluntarily accept treatment, can only be challenged through at trial (§ 5350). Habeas corpus review (§ 5375) after the petition has been filed and a temporary conservatorship been established, is limited to a review the conditions of confinement and placement of the individual before trial. (§§ 5353, 5358.) This means that the proposed conservatee can remain committed without legal review until trial which could be six month under the statute but effectively could even be longer.

Since the proposed conservatee cannot seek review on the issue of the question of his amenability to treatment through habeas corpus and it it is not an element at trial, he has been completely denied the right to review this element. He has been completely denied one of the basic protection in the LPSA. The only interpretation of the statutes that makes sense, is if the proposed conservatee's lack of willingness or inability voluntarily to accept meaningful treatment is an element to be proven at trial.

Based on the rules of statutory construction, this Court should find that conservatorship trials under section 5350 require the government to prove that the mentally ill person is unwilling or

unable voluntarily to accept meaningful treatment, as is required in every other period of involuntary intrusion under the LPSA.

II. Case law supports the Objector's position that that the LPSA requires that before a conservator may be appointed for a person with a mental health disorder, the person seeking to impose the conservatorship must prove both grave disability and that the person is unwilling and unable voluntarily to accept meaningful treatment.

A. Cases in support of the requirement that a person must be found unwilling or unable voluntarily to accept treatment before a conservator can be appointed.

Davis concluded that the LPSA (§ 5001, et seq.) requires that the trier of fact determine the question of grave disability, not in a vacuum, but upon consideration of all the relevant facts, including the willingness and capability of the proposed conservatee to voluntarily to accept treatment. (*Davis*, *supra*, 124 Cal.App.3d at p. 325.)

In *Walker*, *supra*, 196 Cal.App.3d 1082, the proposed conservatee had refused treatment. The jury instructions at issue told the jury that a conservatorship may be imposed only if a person can provide for his needs *and* is willing to accept treatment. *Walker* explained:

> "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must

> determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified."

(*Walker*, *supra*, 196 Cal.App.3d at pp. 1092–1093.) Because the LPS Act permits a conservatorship to be recommended only when a qualified professional person determines an individual is both (1) gravely disabled (§ 5008, subd. (h)) *and* (2) unwilling or incapable of voluntarily accepting treatment (§ 5352), it follows that if persons provide 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. (*Walker*, *supra*, 196 Cal.App.3d at p. 1092.)

Under the LPS Act, if a treatment professional observes a person cannot meet his basic needs, the professional will seek to place the person under the care of an appropriate treatment program. If the person voluntarily accepts treatment, the treatment program will presumably ensure the person's basic needs are met, and conservatorship will not be recommended. However, if the person will not voluntarily accept treatment, the professional will then recommend a conservatorship. (*Ibid*; § 5352.) This requirement to find the person in unwilling or unable is consistent with the entire LPSA, not just section 5352. (See Brief on the Merits, Section I, *supra*.)

Walker relied on *Davis*, which held that a proposed conservatee has the right to have a jury determine all issues relevant to the establishment of the conservatorship, not merely the narrow issue of "grave disability". (*Davis*, *supra*, 124 Cal.App.3d at p. 324.)

This interpretation of the LPSA is not only supported by the language of the statutory scheme but is consistent with the recognition that a conservator has power over a conservatee's fundamental liberty rights and thus a conservatorship should only be established after all suitable alternatives have been considered. (*Davis*, *supra*, 124 Cal.App.3d at pp. 324–325.) These alternatives include the willingness and capability of the proposed conservatee to voluntarily accept treatment and whether the individual is capable of surviving safely in freedom by himself or with the help of family, friends, or other third parties. (*Id.* at p. 325.)

In *Davis*, the Public Guardian (appellant) argued in part that the following jury instruction was improperly given that stated:

> "You are instructed that before you may consider whether Mary Davis is gravely disabled you must first find that she is, as a result of a mental disorder, unwilling or unable to accept treatment for that mental disorder on a voluntary basis. If you find that Mary Davis is capable of understanding 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.) *Davis* found that the trial court committed no prejudicial error in giving this instruction. (*Id.* at p. 329; *Walker*, *supra*, 196 Cal.App.3d at p. 1093.)

Davis was also cited with approval by this Court in *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 928, where the Court was considering the proper criteria for Sexually Violent Predator evaluations. There the court stated:

> Decisions addressing similar schemes for the civil commitment of mentally disordered and dangerous persons have held that the person's amenability to voluntary treatment is a factor in determining whether commitment is necessary. ([Citations omitted]… *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 319–321…*[in conservatorship proceeding under Lanterman-Petris-Short Act, jury may be instructed that person is not gravely disabled if he or she understands the need for treatment and has made a meaningful commitment to pursue it]*.) (*Ibid.,* emphasis added.)

Davis' holding stood in opposition to *Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281 *(Buchanan)*, which held that a trial court did not err in refusing to give a jury instruction that "One is not gravely disabled either if he/she is capable of surviving on his/her own or with the help of willing and responsible third parties. Such third parties include relatives, friends, community agencies, and board and care facilities." *Davis* differed from *Buchanan* in that *Davis* determined the need for an LPS conservator of a 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. (*Davis*, *supra*, 124 Cal.App.3d at p. 325.)

In *Early*, *supra*, 35 Cal.3d at page 255, this Court agreed with *Davis* and disapproved of *Buchanan* on whether the scope of an LPS conservatorship trial was limited to "grave disability", as defined in section 5008, subdivision (h)(1)(A), or should include the availability of responsible third-party assistance. In addition to the third-party assistance issue, the conservatee in *Early* also contended on appeal that the trial court erred in refusing his instruction that he was not gravely disabled if he voluntarily accepted treatment. The Court, however, found no basis for this instruction in the trial record, as Early consistently refused treatment and that allowing hospital staff to bathe him did not mean he voluntarily accepted treatment in the sense intended under section 5352. Therefore, this Court had no occasion to ultimately decide the issue. (*Early*, *supra*, at pp. 255–256) However, in declining to reach the issue, *Early* implicitly acknowledged that section 5352 requires that proposed conservatee be unwilling or unable voluntarily to accept treatment before a conservatorship can be established.

In *Conservatorship of Baber* (1984) 153 Cal.App.3d 542 *(Baber)*, the court also noted that the *Davis* instruction reflects the language of section 5352, which provides that a person must be both "gravely disabled" and unwilling or *incapable* of accepting treatment voluntarily before a petition for conservatorship may be filed against him. In *Baber*, the jury instruction omitted the word "incapable" from this preliminary instruction. The court held that it was error to leave out "incapable" from the instruction. (*Early*, *supra*, 35 Cal.3d at p. 252.)

B. *Symington* misunderstands section 5352, ignores the LPSA, and its analysis of 5352 is dicta with no precedential effect, and should be disapproved.

The Court of Appeal and the trial court rejected the above line of cases in favor of *Conservatorship of Symington*, *supra*, 209 Cal.App.3d at (Symington). CACI 4000 Use Notes identified a split of authorities between *Davis,* requiring the element (jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness and ability to accept treatment as an element) and *Symington,* which would not require the element (many gravely disabled individuals are simply beyond treatment) some persons are beyond treatment). While it is true that courts of appeal have offered varying statements on the requirements for LPSA commitment, as demonstrated below, there is no "split of authority" in California on the elements that should be given under the instruction.[9]

Symington involved a bench trial and a claim, raised for the first time on appeal, that the trial court should have been

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[9] The importance of a "split" is that in California, vertical stare decisis is statewide and inter-jurisdictional. A decision of a Court of Appeal is binding on every lower court in the state, not just those in its own appellate district, until another Court of Appeal or the Supreme Court contradicts it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].) Only where there are actual conflicting appellate decisions is the trial court free to choose between them regardless of its supervising appellate district. (*Id.* at p. 456; See *In re Alicia T.* (1990) 222 Cal.App.3d 869, 880.)

required to make an express finding that the defendant was unwilling or unable to voluntarily accept treatment for her mental illness. (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1467.)

The proposed conservatee was an octogenarian with primary cognitive dementia, who was delusional, intellectually impaired, unable to care for her health, nutritional needs, hygiene, and finances. She did not have the ability to take prescribed medication on her own and was unable to cooperate with treatment. In the trial court, Symington's attorney had essentially conceded the need for the conservatorship and offered no evidence to contradict the overwhelming evidence produced by the county. (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at pp. 1465–1466.)

After the court determined Symington was gravely disabled beyond a reasonable doubt, Symington's counsel advised the court that it was necessary to additionally determine whether Symington was unwilling or unable to accept treatment on her own. The trial court disagreed but noted that there was undisputed evidence that she was unwilling to accept treatment. The court then stated based on that evidence, "I would therefore make all of the necessary LPS findings that might be required in addition to what I've stated." (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1466.)

On appeal the conservatee argued that reversal was required because the court did not make a finding that Symington was unwilling or unable to voluntarily accept treatment for her mental illness. Counsel for the conservatee claimed, "Grave disability, *by definition,* includes an unwillingness and/or

inability on the part of the proposed conservatee to voluntarily accept treatment for the mental disorder making the conservatee unable to provide for the necessities of life." (*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1467.)

Symington "doubted" a finding that the proposed conservatee is unable or unwilling to accept treatment is necessary under the statutory scheme. *Symington* believed that the only issue that must be proved at a conservatorship trial is that the person is "gravely disabled" as defined in section 5008, subdivision (h)(1)(A). (*Ibid.*)

> "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."

(*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1468.) Of course, section 5352 is not the only place this language, or the requirement for finding of unwillingness or inability, appears in the LPSA. (*Conservatorship of Symington*, *supra*, at pp. 1467–1468). The LPSA requires that before a mentally ill person can be involuntarily detained, evaluated, treated or placed for any period of time under the act, they must be found to be

unwilling or unable to accept treatment voluntarily. This is a requirement from the 72-hour crisis intervention hold all the way to the renewable one-year conservatorship. This requirement of proof that the person is willing or incapable of voluntarily accepting treatment is one of the primary protections provided to nondangerous persons who the government seeks to involuntary commit and treat. This failure to note the pervasive scope of this concept throughout the LPSA is fatal to *Symington's* reasoning. (See, Brief on the Merits, Section I, A.)

Section 5352 is one of two statutes[10] in the LPSA that sets forth the procedure to initiate a petition for conservatorship of a nondangerous person.[11] Given its importance in the dispute between the parties is worth examining.

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[10] Section 5350.5 sets forth the procedure for establishing an LPS Conservatorship when conservatorship already exists under the Probate Code. That statute authorizes, after evidentiary hearing, a mental health evaluation to determine if the conservatee has a treatable mental illness, including whether the conservatee is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism, *and is unwilling to accept, or is incapable of accepting, treatment voluntarily*. This phrasing is identical to that in section 5352. This supports appellant's position that the person's unwillingness and inability to accept treatment voluntarily is an element of proof for the establishment of a conservatorship under the LPSA.

[11] Section 5352.5 sets forth different procedures for referring a person for conservatorship who has been committed as mentally incompetent (Pen. Code, § 1370), Not Guilty by Reason of Insanity (Pen. Code, § 1026), a metnally ill prisoner (Pen. Code, § 4011.6), or parolee (Pen. Code, § 2684). No mention of unwillingness and inability appears in these procedures. That is not a consideration for the incarcerated individual. This further highlights the importance of amenability to treatment for involuntary treatment of the nondangerous person.

> "When the professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment determines that a person in his or her 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 or she may recommend conservatorship to the officer providing conservatorship investigation of the county of residence of the person prior to his or her admission as a patient in such facility."

Symington offered an explanation for why the terms appear in section 5352 and why they were not intended to be an element of proof in a conservatorship trial.

> "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 needs 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 proceedings 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."

(*Conservatorship of Symington*, *supra*, 209 Cal.App.3d at p. 1468.) The court's reasoning was faulty.

First the phrase "unwilling or unable" is a "legal term". It is part of the legal standard for involuntary commitment for nondangerous people. The LPSA permits persons subjected to terms of involuntary commitment and treatment to seek legal review in superior court. For instance, a person may challenge a 14-day commitment (§ 5250, subd. (c)) or a 30-day commitment (§ 5270.15), through a petition for writ of habeas corpus (§ 5275, et. seq.). These petitions require the person seeking to detain and treat the individual involuntarily to prove that the mentally ill person is unwilling or unable voluntarily to accept treatment or involuntary treatment and detention cannot continue. (§§ 5257, 5270.35.) A superior court judge must make the legal decision as to whether the person is unwilling or unable to accept treatment voluntarily.

Additionally, a person cannot be held beyond the initial 72-hour period for further evaluation and treatment, without an order from the superior court. The petition for that order must allege and the person seeking involuntary evaluation must prove that the person for whom the evaluation is sought is unwilling or unable to voluntarily submit the evaluation. (§§ 5200, 5202).

Second, *Symington* has incorrectly concluded that section 5352 creates a medical standard by which mental health facilities may initiate conservatorship proceedings before they accept a gravely disabled patient into their facility. This was most likely drawn from the passage in section 5352 which reads:

> "[the professional person] may recommend conservatorship to the officer providing

> conservatorship investigation of the county of residence of the person *prior to his or her admission as a patient in such facility*." (Emphasis added.)

This clause does not refer to making the recommendation prior to admission to the facility. That would make no sense, as the person is already under the case of the recommending professional. Rather, the clause modifies "the county of residence of the person". Simply put, the statute is explaining that professional person must make the recommendation for conservatorship to the investigating officer for county where the proposed conservatee resided before he or she was admitted as a patient. For instance, if the proposed conservatee lived in the City and County of San Francisco, but was hospitalized for treatment or evaluation in San Mateo County, the professional person in San Mateo County would make the recommendation to the officer responsible for conservatorship investigations in San Francisco.

Once the statute is read with this understanding, the statute is clear: a recommendation for conservatorship cannot be made by the professional person unless the person for whom the conservatorship is sought is gravely disabled due to a mental disorder and is unwilling or unable voluntarily to accept treatment and the investigating officer to whom the recommendation is made must be from the county where the person resided before they were hospitalized for evaluation or intensive treatment. With this understanding, *Symington's* entire reasoning collapses.

Symington failed to conduct the necessary statutory analysis. *Davis*, *supra*, 124 Cal.App.3d at p. 321, held that a

conservatorship trial in must be reviewed in the context of the entire LPSA statutory scheme and not merely section 5008, subdivision (h)(1)(A). If the court had engaged in a proper analysis, it would have realized that the phrases "gravely disabled" and "unwilling or unable", or variations thereof, often appear together throughout the LPSA and apply to almost every level of involuntary action upon the mentally ill person. The court should have realized that this was one of the basic protections given to nondangerous mentally ill persons. If it had done so, the case would have been decided on different grounds that were proper. For instance, there was ample evidence that the trial court had made a finding beyond a reasonable doubt that the conservatee was unwilling and unable voluntarily to accept meaningful treatment. This proposition is what *Symington* is cited for in the CACI 4000 footnote, that many individuals are beyond treatment (unwilling or unable), so no instruction is required.

The entire analysis of 5352 was dicta with no precedential value. *Symington* was reviewing a bench trial where the trial court indicated it had made all of the necessary findings, including the one debated on appeal, therefore, the court's analysis of section 5352 should not be considered a holding related to jury instructions or one that stands in definitive opposition to *Davis* and *Walker*.

Observations unnecessary to the holding of a case are, by definition, dictum. (*Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 339–340.) "Only statements necessary to the decision are binding precedents…." (*Western Landscape Constr. v. Bank of Am.* (1997) 58 Cal.App.4th 57, 61.) "The doctrine of

precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised." (*Ibid.*)

The other case cited by respondent below was *Conservatorship of George H.* (2008) 169 Cal.App.4th 157, in which Division Five of this Second District concluded that there was no sua sponte duty to give a *Walker/Davis* instruction. (*Id.* at pp. 161–165.) The *George H.* court did not consider the legal merits of the instruction if requested because it concluded that any error was forfeited. (*Ibid.*) Only in that context did the court, at Footnote 3 of the opinion, note without analysis that *Walker* had been criticized by *Symington*. (*Id.* at p. 162, fn. 3.) In appellant's view, *George H.* is incorrect. If substantial evidence has been presented on the issue of willingness and ability, the the court should have a sua sponte duty to instruct.

Thus, the intermediate published appellate authority in California in which a jury instruction was actually at issue unanimously concludes that where there is evidence deserving of consideration and requested by a party, the jury in an LPSA trial must be instructed that in order to find that a conservator is required, the person seeking the conservatorship must prove that proposed conservatee in unwilling or unable voluntarily to accept meaningful treatment.

C. *Early* does not prevent the government from being assigned the burden of producing evidence and proving beyond a reasonable doubt that the proposed conservatee is unwilling and unable to accept treatment voluntarily before a conservator may be appointed.

After the *Early* Court determined that a finding of "grave disability" must take into account the availability of responsible third-party assistance, the Court addressed the question burden adducing evidence and the burden of proof.

> "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 of 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.)

Since *Early* refused to assign the burden of presenting evidence on the issue of third-party assistance and made it only a factor to be considered on the issue of grave disability by the trier of fact, what effect, if any, does that holding have on the question of assigning the burden of presenting evidence of a proposed conservatee's willingness and ability voluntarily to accept treatment?

This holding in *Early* does not and should not apply to assigning the burden of presenting evidence of a person's willingness and ability voluntarily to accept treatment. Whether the person is unwilling or unable voluntarily to accept treatment and the role third-party assistance plays in determining grave disability are separate issues.

These two elements are always presented as separate considerations throughout the LPSA, which has made clear that the burden of proving lack of willingness and ability to accept treatment voluntarily is on the person seeking involuntary evaluation, treatment and commitment. (See Brief on the Merits, Section I, A.)

The LPSA already has assigned the duty of adducing evidence of a person's willingness and ability voluntarily to accept treatment in judicial proceedings. In habeas corpus review of 14-day and 30-day commitments in the superior court under section 5375, et seq., the person seeking to extend commitment and treatment has the burden of presenting evidence on this issue and the court must find that person is unwilling or unable voluntarily to accept evaluation and/or treatment to uphold the commitment. (*Ibid.*; *In re Azzarella, supra,* 207 Cal.App.3d 1240, 1247; *In re Lois M., supra*, 214 Cal.App.3d at pp. 1040–1041.) Neither will it be difficult for the trier of fact in a conservatorship trial.

As was noted in *Davis* and *Walker*, one can be gravely disabled but a conservatorship cannot be established if the person can and will accept meaningful treatment on a voluntary basis. (*Walker, supra*, 196 Cal.App.3d at pp. 1092–1093; *Davis, supra*, 124 Cal.App.3d at p. 319.) These decisions reflect an accurate interpretation of the requirements of the LPSA, specifically, section 5352.

Early was loathe to assign to the government the burden of negating all reasonable doubts as to the existence of third-party aid that might be available to assist the proposed conservatee with food, clothing and shelter, so *Early* made third-party assistance a factor to be considered and if credible evidence is presented by any party on the issue, the jury must be instructed to take into consideration. (*Early, supra*, 35 Cal.3d at p. 254.) However, the question of the proposed conservatee's willingness and ability is a mental state which is knowable and can be proven through direct and/or indirect evidence. Courts and juries

in all manner of cases routinely deal with determining a party's state of mind; especially in cases where mental health and amenability of treatment can be an issue; e.g. Mentally Disordered Offenders (Pen. Code, § 2960, et. seq.), Sexually Violent Predators (§ 6600, et seq.), Persons Not Guilty By Reason of Insanity (Pen. Code, § 1026, et seq.)

The issue in this case just does not raise the same concerns noted in *Early*. *Early* presents no impediment to assigning the burden of adducing evidence on unwillingness and inability to the person seeking to impose the conservatorship. It is not merely a factor to be considered it is an element of proof.

III. To comport with Due Process in a conservatorship trial, 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.

A. Due Process in conservatorship trials

In reviewing error from a conservatorship trial, the court firsts reviews for statutory violation, and if none appears, the court must determine if the conservatee was deprived due process in establishing the conservatorship as it did. These are legal issues subject to de novo review. (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 142.)

Here, appellant has established in the previous sections (Brief on the Merits, Sections I, II) that a statutory violation occurred upon which this Court can base its decision; however, appellant was also denied federal and state constitutional due process when

the trial court failed to instruct the jury that the government must prove beyond a reasonable doubt that he was unwilling or unable voluntarily to accept meaningful treatment.

> "[A]lthough section 5350 states that the issue at trial is 'whether (the person) is gravely disabled', it appears from a reading of the entire act that this phrase must be broadly construed to include the determination of whether the establishment of a conservatorship is necessary in light of all the relevant facts. *This conclusion is required not only by the principles of statutory construction which we have previously reviewed, but is compelled by the constitutional due process clause of the Fourteenth Amendment to the federal Constitution, and by article I, sections 7, subdivision (a) and 16 of the California Constitution*."

(*Davis, supra*, 124 Cal.App.3d at p. 323.)

The intent of the LPSA is to allow a jury in a conservatorship trial to determine whether a conservatorship is necessary in light of all the relevant facts, including consideration of the willingness and capability of the proposed conservatee to voluntarily accept treatment, and therefore, limiting the jury's consideration to the sole issue of grave disability as defined by the statute would seriously infringe on the conservatee's due process rights. (*Davis, supra*, 124 Cal.App.3d at pp. 323-324, 325; *Early, supra*, 35 Cal.3d at pp. 250-251; *Walker, supra*, 196 Cal.App.3d at pp. 1092-1093.)

The right to a jury trial in mental health conservatorship cases is extremely important. Under the federal and state constitutions, no person may be deprived of 'life, liberty, or

property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. XIV, Cal. Const., art. I, §§ 7, 15) The United States Supreme Court and California Courts have repeatedly recognized that civil commitment constitutes a significant deprivation of liberty that requires due process protections. (*Addington v. Texas* (1979) 441 U.S. 418, 425 (*Addington*); *In re Gault* (1967) 387 U.S. 1, 50, *Roulet, supra*, 23 Cal.3d 219, 225.) The destruction of an individual's personal freedoms effected by civil commitment is "scarcely less total than that effected by confinement in a penitentiary," and entails a "massive curtailment of liberty" in the constitutional sense.'" (Ibid.) It is "incarceration against one's will, whether it is called 'criminal' or 'civil.'" (*In re Gault, supra*, 387 U.S. at p. 50.) Civil Commitment "entails a 'massive curtailment of liberty' in the constitutional sense." (*Humphrey v. Cady* (1972) 405 U.S. 504, 509; see also *Roulet, supra*, 23 Cal.3d at p. 235.)

In effect, the LPSA assures in many cases an unbroken and indefinite period of state-sanctioned confinement. (*Id.* at 224.) "The theoretical maximum period of detention is *life* as successive petitions may be filed . . . ." (*In re Gary W.* (1971) 5 Cal.3d 296, 300, italics added.) "The destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary." (*People v. Burnick* (1975) 14 Cal.3d 306, 323.)

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a

> particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
>
> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
>
> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.

(*Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424.)

In *Addington*, the U.S. Supreme Court ultimately decided that the intermediate standard of clear and convincing evidence was the correct burden of proof to satisfy federal due process, California, however, opted for greater protections for the nondangerous mentally ill person facing loss of liberty at the hands of the state - the Beyond a Reasonable Doubt Standard

used in criminal cases. This was based in the state's due process requirements. The party seeking imposition of the conservatorship must establish the elements of the conservatorship beyond a reasonable doubt, and a jury verdict finding such disability must be unanimous. (*Roulet, supra*, 23 Cal.3d at p. 235.)

Therefore, assuming appellant is correct, and proof that he was unwilling and unable voluntarily to accept meaningful treatment was an element of proof to establish the conservatorship, the government needed to prove that fact to the jury beyond a reasonable doubt and failure to give the instruction of the element, impermissibly reduced the government's burden of proof and requires reversal unless the government can prove beyond a reasonable doubt that the instructional error did not result in the jury finding appellant gravely disabled.

B. Standard of review for instructional error

Consistent with the requirements of federal due process a trial court must instruct accurately on general principles of law and all legal theories and issues raised by the evidence. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199; *People v. Kondor* (1988) 200 Cal.App.3d 52, 56; *Wardius v. Oregon* (1973) 412 U.S. 470, 473–474, fn. 6; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

The trial court must instruct the jury on every material question upon which there is any evidence deserving of any consideration. (*People v. Breverman* (1998) 19 Cal.4th 142, 154–158; *People v. Burns* (1948) 88 Cal.App.2d 867, 871; *People v. Carmen* (1951) 36 Cal.2d 768, 773.)

This Court reviews on a de novo basis a contention of civil commitment instructional error. (*Walker, supra*, 196 Cal.App.3d at pp. 1091–1092.)

Error in omitting an element required for involuntary civil commitment is reviewed under the "harmless beyond a reasonable doubt" standard. (*Early, supra,* 35 Cal.3d at p. 255.) This *Chapman* standard requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required if there is a "'reasonable possibility that the [error] complained of might have contributed" to the verdict.'" (*Chapman*, at p. 23; *Yates v. Evatt* (1991) 500 U.S. 391, 402–403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.)

"To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates, supra*, 500 U.S. at p. 403.) Rather, it is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that [the error] … did not contribute to the verdict is to make a judgment about the significance of the [error] to reasonable jurors, when measured against the other evidence considered by those jurors independently of the [error]." (*Id.* at pp. 403–404.)

Under *Chapman*, "the appropriate inquiry is 'not whether, in a trial that occurred without the error, a [specific] verdict would surely have been rendered, but whether the [specific] verdict

actually rendered in this trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621.)

Davis and *Walker* require that this court reverse the order establishing the conservatorship. The error of failing to properly instruct the jury as to the element that K.P was unwilling or unable voluntarily to accept meaningful treatment was not harmless beyond a reasonable doubt. (*Early*, *supra*, 35 Cal.3d at p. 255.)

The entire thrust of the appellant's case was that he had a willingness to continue some form of treatment and his mother, who had been his prior conservator, was willing to facilitate and aid that ongoing treatment. (RT 1118, 1182-1183.) While appellant testified that he did not believe he required ongoing medication or suffered from schizophrenia, he did indicate he had some "brain condition" and had a need to seek mental health care. His mother indicated that she was prepared to aid his efforts. Thus, this is not a case where there was no evidence supporting the requested instruction.

Because it was error to withhold the third element of CACI 4000, under *Chapman*, the appropriate inquiry is whether the jury's grave disability finding was "surely unattributable" to the court's refusal to give the element central to the defense. (*People v. Quartermain, supra*, 16 Cal.4th at p. 621.) The People cannot carry this burden because appellant's entire defense was based on his testimony and the testimony of his mother that they would continue some form of treatment on a voluntary basis if the conservatorship was terminated.

Therefore, order of conservatorship should be dissolved.

CONCLUSION

Appellant has demonstrated that under the LPSA a conservatorship cannot be sought unless the proposed conservatee is proven to be unwilling or unable voluntarily to accept meaningful treatment. (§ 5352.) This requirement is a basic protection which runs through every aspect of the LPSA. No involuntary evaluation, treatment or placement may occur without first ensuring that the person cannot be treated or evaluated voluntarily.

A review of the LPSA reveals that at every level the persons seeking to evaluate, treat or confine a nondangerous person who is gravely disabled due to a mental health disorder, are charged with the burden of proving that the person lacks willingness or is unable to accept treatment voluntarily. Administrative and judicial reviews have been created by the LPSA to examine this issue and ensure no one is involuntarily treated if they are otherwise able to do so voluntarily.

While shorter periods of commitment must be proven by a preponderance of the evidence, the elements of a renewable, one-year conservatorship must be proven by the government beyond a reasonable doubt, as a proposed conservatee's liberty interests are implicated.

Appellant has shown why section 5352 requires no recommendation or petition for conservatorship under 5350 can occur unless the proposed conservatee is unwilling or unable voluntarily to accept treatment. We have also explained how the conservatorship trial is the only venue available for the proposed conservatee to challenge the issue, unlike all the shorter periods

of commitment, which can be challenged through habeas corpus, and how due process is denied if the government is not required to prove the element at trial.

The instruction advising the jury that the Public Guardian had the burden to prove beyond a reasonable doubt that K.P. was unwilling or unable voluntarily to accept meaningful treatment was correct, and the trial court's refusal to give it lightened the government's burden of proof and stripped appellant of one of the basic rights and protections afforded him by the constitution.

Appellant respectfully requests that this Court find in his favor and reverse the order of the trial court establishing his conservatorship.

Respectfully submitted,

Dated: May 13, 2020

By: /s/ Christopher L. Haberman

Attorney for Objector and Appellant K. P.

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **11,188** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: May 13, 2020 By: /s/ Christopher L. Haberman

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is P.O. Box 521, Visalia, CA 93279. I served document(s) described as Opening Brief on the Merits as follows:

By U.S. Mail

On May 13, 2020, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Los Angeles County County Superior Court
Attn: Hon. Robert Harrison
c/o LA County Superior Court Clerk
Metropolitan Courthouse
1945 S. Hill Street
Los Angeles, CA, 90007

K. P.
Address on file

I am a resident of or employed in the county where the mailing occurred (Visalia, CA).

By email

On May 13, 2020, I served by email (from habermanlaw@gmail.com), and no error was reported, a copy of the document(s) identified above as follows:

Michael Salmaggi, Deputy Public Defender
msalmaggi@pubdef.lacounty.gov

Attorney General of the State of California
docketinglaawt@doj.ca.gov

By TrueFiling

On May 13, 2020, I served via TrueFiling, and no error was reported, a copy of the document(s) identified above on:

William Carl Sias
(for Public Guardian of the County of Los Angeles)

California Appellate Project Los Angeles

Court of Appeal - Second Appellate District

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

Dated: May 13, 2020 By: /s/ Christopher L. Haberman

Attachment A

Filed 9/18/19 (unmodified opn. attached); THE SUPREME COURT OF CALIFORNIA HAS GRANTED REVIEW

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Conservatorship of the Person and Estate of K.P. PUBLIC GUARDIAN OF THE COUNTY OF LOS ANGELES, Petitioner and Respondent, v. K.P., Objector and Appellant.	B291510 (Los Angeles County Super. Ct. No. ZE032603) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed August 28, 2019, be modified as follows:

1. On page 17, in the first sentence of the first full paragraph, the word "analyzed" is changed to "discussed" so the sentence reads:

> In so finding, the *Davis* court discussed section 5352, which provides that when a professional "determines that a person in his or her care is gravely disabled . . . and is unwilling to accept, or incapable of accepting, treatment voluntarily, he or she may recommend conservatorship to the officer providing conservatorship investigation . . . prior to his or her admission as a patient in such facility."

2. On page 19, in the second sentence of the last full paragraph, the words "or reestablish" are inserted between the words "establish" and "a" so that the sentence reads:

> Section 5352, which allows a professional to initiate conservatorship proceedings for a patient that is unwilling to accept treatment, does not add an additional requirement, to be proved beyond a reasonable doubt, to establish or reestablish a conservatorship.

3. On page 20, the first full paragraph is deleted and the following paragraph is inserted in its place:

> Thus, we find that the trial court did not err in declining to include the element of unwillingness or inability to accept treatment as part of the definition of "gravely disabled" in CACI No. 4000.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

LUI, P. J. ASHMANN-GERST, J. CHAVEZ, J.

Filed 8/28/19 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Conservatorship of the Person and Estate of K.P. PUBLIC GUARDIAN OF THE COUNTY OF LOS ANGELES, Petitioner and Respondent, v. K.P., Objector and Appellant.	B291510 (Los Angeles County Super. Ct. No. ZE032603)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Harrison, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Objector and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Rosanne Wong, Assistant County Counsel, and William C. Sias, Deputy County Counsel, for Petitioner and Respondent.

Conservatee K.P. (K.P.) appeals from a judgment entered following a jury trial on the petition by the Public Guardian of the County of Los Angeles (public guardian) for reappointment as K.P.'s conservator under the Lanterman-Petris-Short Act (LPSA) (Welf. & Inst. Code § 5000 et seq.).[1] After a three-day trial, the jury found that K.P. was gravely disabled pursuant to the LPSA, and the trial court granted the public guardian's petition for reappointment. K.P. argues that the court erred in instructing the jury pursuant to California Civil Jury Instruction (CACI) No. 4000, which sets forth the elements of a claim that an individual is gravely disabled. Specifically, K.P. contends that the trial court erred in omitting a third element from CACI No. 4000, which required a finding that the individual "is unwilling or unable voluntarily to accept meaningful treatment." We find no reversible error and affirm the judgment.

BACKGROUND

The LPSA

"The [LPSA] governs the involuntary detention, evaluation, and treatment of persons who, as a result of mental disorder, are dangerous or gravely disabled. (§ 5150 et seq.)" (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 142 (*John L.*).) Under the LPSA, the court may "appoint a conservator of the person for one who is determined to be gravely disabled (§ 5350 et seq.), so that he or she may receive individualized treatment, supervision, and placement (§ 5350.1)." (*John L.*, at p. 142.) The LPSA defines a person who is "gravely disabled" as one who is "unable to provide for his or her basic personal needs for food, clothing, or shelter." (§ 5008, subd. (h)(1)(A).)

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[1] All further statutory references are to the Welfare & Institutions Code unless otherwise noted.

"An LPSA conservatorship automatically terminates after one year, and reappointment of the conservator must be sought by petition. (§ 5361.)" (*John L., supra*, 48 Cal.4th at p. 143.)[2]

Conservatorship reappointment pretrial proceedings

On April 19, 2018, the public guardian filed a petition for reappointment as conservator of K.P. under sections 5350 through 5368. On May 5, 2018, K.P. filed a demand for jury trial.

At the trial readiness conference on June 14, 2018, the public guardian filed a memorandum dated June 12, 2018, containing information from Dr. Sara Mehraban, Program Coordinator at Gateways Satellite, where K.P. was being treated. Dr. Mehraban observed that recently K.P. had become paranoid. In May 2018, he was sitting outside and was accidentally "grazed" by a basketball. He then charged a fellow resident who he attempted to stab with a pen because K.P. believed the other individual had intended to hit him with the basketball. K.P. continued to try to attack the other resident even with staff intervention, and had to be hospitalized because he would not let go of the situation and still wanted to attack the other resident later in the day.

Dr. Mehraban reported that K.P.'s mother was of the view that K.P. does not have a mental illness. K.P.'s mother also

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[2] We note that the reappointment at issue terminated on June 3, 2019. Because the conservatorship from which K.P. appeals has terminated, this appeal is technically moot. (*Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 709.) However, because a conservatorship is brief in comparison with the appellate process, this issue is one that is "'capable of recurring, yet of evading review because of mootness.'" (*Ibid.*) We therefore conclude it is appropriate to address the issue in this case.

believed that K.P.'s medications were making him act as he did, and she did not believe that the recent reported incident of aggression took place. Dr. Mehraban thought mother's visits were negatively affecting K.P. and intended to revoke them until K.P. improved. Dr. Mehraban was aware of the upcoming trial and wanted the court to be aware of this information.

Trial

A three-day jury trial commenced on June 20, 2018. K.P. appeared with his counsel.

Preliminary matters

Prior to trial the court addressed the ground rules for trial, emphasizing the need to focus the jurors on the question of whether K.P. was gravely disabled. The court asked counsel not to talk about the length of, or results of, a conservatorship. K.P.'s counsel argued that the jury should be made aware of the length of the conservatorship and that forced medication could be administered against a person's will. The court said counsel should remain within the framework of CACI No. 4000. K.P.'s counsel objected to the instruction. The court ordered K.P.'s counsel not to refer to the time limits of a conservatorship.

K.P.'s counsel then addressed CACI No. 4000, by arguing, "there was a time where for decades we would have that element three." K.P.'s counsel conceded that the third element had dropped out of consistent use in CACI No. 4000. However, he advocated for its inclusion here because he intended to show that K.P. was "willing to voluntarily accept treatment." K.P.'s counsel acknowledged that there had been a "so-called 'Missouri Compromise'" where the element of willingness and ability to voluntarily accept meaningful treatment had been added to CACI No. 4002, in the very last sentence. K.P.'s counsel argued that

this was insufficient because it was "thrown in at the bottom of some other less consequential later jury instruction."

The court observed that case law indicated that the version of CACI No. 4000 the court would provide, properly laid out the elements that the public guardian needed to prove in order to show that an individual was gravely disabled. However, the jury should be able to consider willing, voluntary acceptance of treatment, therefore it was included in CACI No. 4002.

Opening arguments

The parties provided their respective opening statements to the jury. The public guardian said it would prove, beyond a reasonable doubt, that K.P. had a mental disorder, and that as a result of that disorder, K.P. was gravely disabled.

K.P.'s counsel outlined the evidence that he would provide to show that K.P. was not gravely disabled. Counsel argued, "If anything, the evidence will show that he has a plan to take care of himself." Counsel stated:

> "So just keep in mind when you're hearing all this evidence, and then, ultimately, you deliberate, it's the county that's got to convince you beyond a reasonable doubt that he's gravely disabled which means, look, if he's off conservatorship, he won't have a stable place to stay; that he can't take care of his basic food, clothing, or shelter and because it's going to be an issue here, there is no viable alternative. By 'alternative' meaning, look, what his family is able to do to help him out, it's not enough. He's still gravely disabled. So they have that extra burden here of showing there is no third-party assistance to help him out and that, ultimately, he's unwilling to seek treatment."

K.P.'s counsel finished with "If anything, the evidence shows he's willing to continue with his treatment."

Trial testimony

K.P.'s mother

K.P.'s counsel called Karen Celestine (mother), K.P.'s mother.[3] On direct examination, mother testified that she believed her son had a mental illness; that she was willing to help him see a psychiatrist and help him fill prescriptions; that she believed he needed to continue taking his medications; and that she would insist that he take his medications if he resisted taking them.

Mother could not provide housing for K.P. However, she would help him find an apartment or board and care. She agreed to take him to a mental hospital if his symptoms returned or he was resisting taking his medications.

On cross-examination, mother was asked about her immediate plan for finding K.P. housing if he were to win his jury trial. Mother indicated that she "would find housing," by "looking for him and going to talk to the people and . . . getting quotes and stuff." When asked where K.P. would be staying during the "interim" period while she looked for housing, she responded, "Well, he's at the facility right now. So I don't know how that works." K.P.'s medical doctor was still in place, and for his psychiatric and mental health issues, she testified "They refer him. He has referrals." On redirect, mother indicated that she would work with K.P.'s current social worker on discharge

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[3] The court had been advised, outside of the presence of the jury, that mother was starting a new job the following day and would not be available to return to court and testify. The court agreed that the witnesses would be called out of order.

planning. She typically worked during the week and visited K.P. on the weekends.

Dr. Sara Mehraban

Dr. Mehraban, the licensed clinical psychologist employed by the residential agency where K.P. was residing, was called by the public guardian to offer her expert opinion. She normally saw K.P. five days a week for nearly eight hours a day. She met with him individually and in groups.

Dr. Mehraban's most recent examination of K.P. had been earlier that morning at the facility. Dr. Mehraban testified that K.P. had been diagnosed with schizophrenia. As a result of this disorder, K.P. experienced auditory hallucinations. During auditory hallucinations, he believes he is hearing voices, and responds to them. In addition, K.P. suffered from delusions, which are false beliefs that are in contradiction to reality. The false beliefs are considered bizarre. Dr. Mehraban testified that K.P.'s delusions tended to be paranoid, where he believed people were out to get him and people were out to hurt him. K.P. was often scared of people hurting him.

K.P. had experienced some delusions that morning. He requested to be in the witness protection program because he believed that a peer who had been standing near him was trying to attack him. K.P. expressed a desire to enter the witness protection program because he was afraid of that peer.

In addition to the above described symptoms of auditory hallucinations and delusions, K.P. also experienced symptoms of schizophrenia, such as not being motivated, not being able to socialize with other people, difficulty speaking, and poverty of speech.

Dr. Mehraban described the recent incident which resulted in K.P.'s hospitalization. She explained that K.P. believed he had been intentionally hit with a basketball, pursued an individual with a pen and was unable to be redirected. Dr. Mehraban explained that K.P.'s paranoia and fear could be so extreme that it caused him to act in ways that K.P. believes are self-defense, but which are not appropriate.

Dr. Mehraban informed the jury of the medications that K.P. takes for schizophrenia and heightened anxiety. She also explained her conversation about the medications with K.P., in which he had been inconsistent about his willingness to continue if he were to be released from the conservatorship. Dr. Mehraban was of the opinion that K.P. was not capable of providing for his basic food, shelter, and clothing without taking the medication. Nor did she expect he would continue taking the medication without the supervision of a conservator.

Dr. Mehraban explained "insight" as it relates to a mentally ill person. K.P. had the basic level of insight, meaning that he had some understanding that he had symptoms, however, he "minimizes them and doesn't really understand where they come from." K.P. had suggested at times the symptoms came from his medications, and that the medications were causing the symptoms.[4] The highest level of insight would be the ability of an individual to effectively manage his or her symptoms, and K.P. did not meet that level. K.P. had declined to take his medications when he was not feeling well, even though he had

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[4] K.P.'s mother had also expressed to Dr. Mehraban that she believed K.P.'s medications were causing his hallucinations.

been told that taking his medication was "the most important thing" even when he did not feel well.

Dr. Mehraban had discussed with K.P. his plans if he were to be released from his conservatorship. He told her that he wanted to live in an apartment, and that his mother would help him. To Dr. Mehraban's knowledge, K.P. had not been to look at any apartments. Dr. Mehraban did not believe that K.P. had a viable plan for self-care. In the year and a half that he resided at the facility, he had never gone into the community without his mother or his therapist, despite having the opportunity. Dr. Mehraban was concerned that K.P. would not have anyone for support, and in her opinion, at this time, he needed constant supervision. K.P.'s mother had not spoken to Dr. Mehraban about K.P.'s plans if he were to be released from conservatorship.

Dr. Mehraban was of the opinion that K.P. did not have sufficient insight to be a voluntary patient, which would involve making appointments, getting to appointments, and calling the pharmacy. K.P. had not demonstrated a capacity to manage these tasks. He had expressed to Dr. Mehraban that he wanted to get off his medications, and then tended to waffle between wanting to be on the medications and not wanting to take them. Dr. Mehraban found this concerning given the importance of the medications.

On cross-examination Dr. Mehraban agreed that it is important for a patient to acquire insight regarding medication. There is no cure for schizophrenia, but the symptoms can be controlled through treatment. Dr. Mehraban believed that K.P. was presently telling her he would take his medications because he would have a secondary gain. She did not believe that he had insight into his medications. About a month earlier Dr.

Mehraban asked K.P. whether he would follow up with treatment if released. K.P. responded that he would think about it.

On re-direct examination, Dr. Mehraban related an incident with K.P.'s medication from the previous day. Dr. Mehraban gave K.P. his medication before he went to court. The patients are handed their pack of medications, and they are supposed to know what day it is and how to administer the medication. Dr. Mehraban was monitoring K.P., and he almost gave himself a double dose of one of his medications that can cause toxicity. When Dr. Mehraban stopped him and told him that he had already taken it, K.P. disagreed.

K.P.

K.P. was asked whether he was willing to stay at his current placement until he and his mother could find a place for him. He responded, "no." When asked the same question a second time, he responded, "yes."

K.P.'s counsel asked him, "If you get out of the hospital, are you willing to continue to take psychiatric medications?" K.P. responded, "No." K.P.'s counsel again asked him, "You don't want to take medications?" K.P. responded, "No." K.P. acknowledged that he needed a psychiatrist. When asked if he thought he had a mental illness, he responded, "No." When asked if he had schizophrenia, K.P. responded, "No." When asked if he wanted to continue taking "psych medications," K.P. responded, "I feel like I'm doing better without them." When asked a second time, K.P. provided the same answer.

On cross-examination, K.P. was asked about the incident involving the basketball. He described it as an "attack." He admitted that he became "outraged." K.P. repeated that he did not believe he should take medication anymore. "I'm at a point

where I've taken them enough -- where I feel like I've taken them enough that I need to stop." K.P. did not believe that he had schizophrenia, but that he experienced brain trauma as a child. K.P. received $800 every month in social security benefits but nothing else. He indicated that upon his release he intended to become a businessman. When asked about his previous experience, K.P. stated that he sold candy in 1995.

When K.P. was asked about his mother, he indicated that she was previously his conservator. When asked why that ended, K.P. stated, "I think it's because she moved away, and she was homeless."

Jury instructions/closing arguments

The jury instructions were read but not recorded. The court gave the following relevant instructions:

"**CACI No. 4000. Conservatorship--Essential Factual Elements**

"The Office of the Public Guardian claims that [K.P.] is gravely disabled due to a mental disorder and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder. To succeed on this claim, the Office of the Public Guardian must prove beyond a reasonable doubt all of the following:

"1. That [K.P.] has a mental disorder; and

"2. That [K.P.] is gravely disabled as a result of the mental disorder."

"**CACI No. 4002. 'Gravely Disabled' Explained**

"The term 'gravely disabled' means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of a mental disorder.

"Psychosis, bizarre or eccentric behavior, delusions or hallucination are not enough, by themselves, to find that [K.P.] is gravely disabled. He must be unable to provide for the basic needs of food, clothing, or shelter because of a mental disorder.

"If you find [K.P.] will not take his prescribed medication without supervision and that a mental disorder makes him unable to provide for his basic needs for food, clothing, or shelter without such medication, then you may conclude [K.P.] is presently gravely disabled.

"In determining whether [K.P.] is presently gravely disabled, you may consider evidence that he did not take prescribed medication in the past. You may also consider evidence of his lack of insight into his mental condition.

"In determining whether [K.P.] is presently gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

"In determining whether [K.P.] is presently gravely disabled, you may consider whether he is unable or unwilling voluntarily to accept meaningful treatment."

"**CACI No. 4007. Third Party Assistance**

"A person is not 'gravely disabled' if he can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs for food, clothing, or shelter.

"You must not consider offers by family, friends, or others unless they have testified to or stated specifically in writing their willingness and ability to help provide [K.P.] with food, clothing, or shelter. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely."

In closing argument, counsel for the public guardian reminded the jurors that he had identified three factors that he would prove beyond a reasonable doubt: first, that K.P. suffers from a mental disorder; second, that as a result of the mental disorder, K.P. cannot provide for his basic needs of food, shelter, and clothing; and finally, that there were no reasonable viable alternatives to conservatorship for K.P. He added that the public guardian had shown that K.P. lacked sufficient insight into his mental disorder, and would not continue to take his prescribed medications unless he was under a conservatorship. Counsel then discussed the relevant evidence supporting the position that these factors had been proven beyond a reasonable doubt.

In his closing argument, K.P.'s counsel argued that the "third-party assistance" instruction was an important one. He asked that the jury consider whether K.P. is gravely disabled given that he could survive with the help of a third party. K.P.'s counsel also pointed out instruction CACI No. 4002, specifically

the language indicating that the jury may consider whether he is unable or unwilling voluntarily to accept meaningful treatment. Counsel stated, "currently, he is taking his medication. He is in his treatment. He does have his mother to assist him if he gets out so that he can take his medications, follow up with the doctors." Counsel argued that K.P. was able to accept meaningful treatment.

Verdict

On June 22, 2018, the jury found that K.P. was gravely disabled. The court reappointed the public guardian as conservator of K.P.'s person and estate.

Appeal

On July 5, 2018, K.P. filed his notice of appeal.

DISCUSSION

K.P. contends that the trial court erred by omitting a third element from the CACI No. 4000 instruction provided to the jury. We find no error. We further find that even if instructional error had occurred, any such error would be harmless under the circumstances of this case.

I. Standard of review

LPSA proceedings are civil in nature, but individuals subject to conservatorship proceedings are entitled to certain due process protections similar to a criminal defendant because significant liberty interests are at stake. (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1166-1167 (*P.D.*).)

We review the propriety of the jury instructions de novo. (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 44-45; *P.D., supra*, 21 Cal.App.5th at p. 1167.) "In considering the accuracy or completeness of a jury

instruction, we evaluate it in the context of all of the court's instructions. [Citation.]" (*Caldera*, at p. 45.)

II. The instruction was not error

K.P. contends that the trial court failed to properly instruct the jury with a third element in CACI No. 4000, which would have required the jury to find, beyond a reasonable doubt, that K.P. was "unwilling or unable voluntarily to accept meaningful treatment."[5] The parties have cited and discussed the relevant case law. Our review of the relevant cases leads us to the conclusion that the trial court's instruction was not erroneous.

> K.P. points out that the use note to CACI No. 4000 states:
>
> "There is a split of authority as to whether element 3 is required. (Compare *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 ['[Many gravely disabled individuals are simply beyond treatment'] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)"

(Use Note to CACI No. 4000 (Rev. 2006) (2019) p. 964.)

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[5] The two elements that the trial court included in the instruction were "1. That [K.P.] [has a mental disorder/is impaired by chronic alcoholism]; [and] [¶] 2. That [K.P.] is gravely disabled as a result of the [mental disorder/chronic alcoholism]." (CACI No. 4000.) The third element, which K.P. argues should have been included, is: "[3. That [K.P.] is unwilling or unable voluntarily to accept meaningful treatment.]" (*Ibid*.)

K.P. argues that this statement is incorrect, and there is no split of authority. On the contrary, K.P. argues, the law supports his position that, where there is evidence that the conservatee is willing and able to voluntarily accept meaningful treatment, the court must give the third element of CACI No. 4000. In making this argument, K.P. relies primarily on *Conservatorship of Davis* (1981) 124 Cal.App.3d 313 (*Davis*).

First, we note that *Davis* is distinguishable in that it involved a petition to establish a conservatorship, not a petition for reappointment. (*Davis, supra*, 124 Cal.App.3d at p. 317.) The petition had been filed as to a 39-year-old woman, who had been married for 18 years. Her husband testified at the trial that he was willing to have respondent live at his home and she would be welcome at their family home if she returned to it. (*Ibid.*) The woman testified to the jury that she would continue taking her medication as long as the doctor felt it was necessary. She also testified to her personal habits of self-care, cooking, and grocery shopping. (*Id.* at p. 319.)

The jury was instructed, over the public guardian's objection, that "'[B]efore you may consider whether Mary Davis is gravely disabled you must first find that she is, as a result of a mental disorder, unwilling or unable to accept treatment for that mental disorder on a voluntary basis. If you find that Mary Davis is capable of understanding 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 jury found her not gravely disabled. (*Id.* at p. 317.) The public guardian appealed, arguing that the trial court erred in delivering this instruction. The

Court of Appeal disagreed, finding no prejudicial error. (*Id.* at pp. 329, 331.)

In so finding, the *Davis* court analyzed section 5352, which provides that when a professional "determines that a person in his or her care is gravely disabled . . . and is unwilling to accept, or incapable of accepting, treatment voluntarily, he or she may recommend conservatorship to the officer providing conservatorship investigation . . . prior to his or her admission as a patient in such facility." Section 5352 is not at issue in the present appeal, as the petition here is not a petition to establish a conservatorship. Nor is a conservatorship investigation at issue. Instead, this was a petition for reappointment.[6] Thus, we find *Davis* unpersuasive here.

Conservatorship of Early (*Early*) (1983) 35 Cal.3d 244, is also distinguishable. *Early,* like *Davis,* involved an initial conservatorship proceeding, not a reappointment. The primary issue was whether the conservatee should have been permitted to introduce evidence that he could meet his needs for food, clothing,

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[6] K.P. was subject to a reappointment petition pursuant to section 5361, which provides that "[i]f 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." Section 5361 requires an opinion by two licensed professionals that "the conservatee is still gravely disabled as a result of a mental disorder." (§ 5361; see also *Conservatorship of Dierdre B.* (2010) 180 Cal.App.4th 1306, 1312 [reestablishment of conservatorship requires state "to prove beyond a reasonable doubt that the conservatee *remains* gravely disabled" (italics added)].) Thus, section 5352 would not apply in this context.

and shelter with the assistance of family and friends. (*Early*, at p. 249.) No particular jury instructions were analyzed, although the conservatee also appealed the "failure to instruct that a person is not gravely disabled if he can meet his basic needs with the assistance of others." (*Id.* at p. 248.) The *Early* court did not weigh in on the necessity of including such language in the instruction setting out the essential factual elements of a conservatorship. It merely held, in general, that "a jury is entitled to consider the availability of third party assistance to meet a proposed conservatee's basic needs for food, clothing and shelter." (*Id.* at p. 247.) Such consideration was appropriately made here, with the court permitting evidence, and providing instruction, on third party assistance. In addition, the court explicitly instructed the jury, in CACI No. 4002, that in contemplating the term "gravely disabled," the jury could consider the element of willingness and ability to voluntarily accept meaningful treatment. Thus, *Early* does not support the claim of instructional error in this case.

Conservatorship of Walker (1987) 196 Cal.App.3d 1082 (*Walker*), involved an erroneous instruction that advised a jury that conservatorship was inappropriate only if the potential conservatee "can provide for his needs *and* is willing to accept treatment." (*Id.* at p. 1092, fn. omitted.) This instruction was error because "if persons provide 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." (*Ibid.*) The *Walker* court found the instructional error harmless beyond a reasonable doubt because the conservatee "admitted he would not take medication on his own." Thus, "as a matter of law no jury could find [the conservatee], on his own or with family help,

capable of meeting his basic needs for food, clothing or shelter." (*Id.* at p. 1094.)

We find the analysis in *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464 (*Symington*), relied upon by the public guardian, to be persuasive. In *Symington,* the conservatee argued that reversal of the finding of grave disability was required due to the trial court's failure to make a finding that the conservatee was unwilling or unable to voluntarily accept treatment for her mental illness. (*Id.* at p. 1467.) The *Symington* court held that "gravely disabled," as defined in section 5008, subdivision (h)(1) is 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[.]'" (*Symington*, at p. 1468.) The court noted that this definition makes no mention of a conservatee's refusal or inability to consent to treatment, and that the language concerning a proposed conservatee's refusal or inability to consent to treatment appeared only in section 5352. (*Symington*, at pp. 1467-1468.) The court determined that section 5352 was enacted to allow treatment facilities to initiate conservatorship proceedings at the time of admitting a patient when the patient may be uncooperative. (*Symington*, at p. 1467.) The section was not enacted "as an additional element to be proved to establish the conservatorship itself." (*Ibid.*)

We agree with *Symington*. Section 5352, which allows a professional to initiate conservatorship proceedings for a patient that is unwilling to accept treatment, does not add an additional requirement, to be proved beyond a reasonable doubt, to establish a conservatorship.

Thus, we find that the trial court did not err in instructing the jury as to the definition of "gravely disabled" in CACI No. 4000.

III. Any error would be harmless

We further find that, even if the trial court had committed error in its instructions to the jury, any error would be harmless as a matter of law in this case because the evidence was overwhelming that K.P. was unwilling or unable to accept treatment. Specifically, K.P. testified that he did not have a diagnosed mental disability and did not intend to continue taking his medications if he were released because he believed he was better off without them. Thus, K.P. admitted that he was unwilling or unable to accept appropriate treatment.

The parties point to differing authorities regarding the standard of prejudice applicable to the instructional error at issue. The public guardian advocates for the civil standard, which requires that, to be reversible, any error must result in a miscarriage of justice. (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 613.)[7] In support of the use of this standard, the public guardian cites *Conservatorship of George H.*

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[7] Article VI, section 13 of the California Constitution provides that "[n]o judgment shall be set aside, or a new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." This prohibits reversal unless there is "a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

(2008) 169 Cal.App.4th 157, 164-165 ["given that LPS conservatorship proceedings are not criminal proceedings, the sua sponte duty to instruct . . . does not apply to jury trials under section 5350"].) K.P., on the other hand, advocates for the criminal standard of constitutional error, citing *Early, supra*, 35 Cal.3d 244 at page 255 [holding that error in conservatorship proceeding was "not harmless beyond a reasonable doubt"].[8]

We need not resolve the question of the appropriate standard of prejudice applicable in this matter. Given K.P.'s admission that he was unwilling to accept meaningful treatment, any purported error was harmless under either standard. (*Walker, supra,* 196 Cal.App.3d at p. 1094 [holding that where conservatee admitted he would not take medication, "as a matter of law no jury could find [the conservatee], on his own or with family help, capable of meeting his basic needs for food, clothing or shelter"].)

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[8] The requirement in criminal cases that constitutional error be found harmless beyond a reasonable doubt was set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a . . . constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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