Incompetent to Stand Trial Workshop

December 2, 2015 - 1:30 p.m. – 2:45 p.m.
Monterey Marriott, San Carlos Room 4
Monterey County, California

"Incompetent to Stand Trial" In and Out of Jail: A Complex Issue
As the number of people with mental illness continues to grow in our criminal justice system; counties are struggling with solutions in and outside of the criminal justice system. California's courts, law enforcement and behavioral health providers are working together on strategies that address needs of individuals with mental illness, while preserving public safety. This workshop will look at the complex issues surrounding individuals who are mentally ill and incompetent to stand trial (IST), and limitations around solutions to these complex cases outside of a jail setting.

1:30 p.m. **Welcoming Remarks**
- Darby Kernan, Legislative Representative, CSAC
- Stanicia Boatner, Legislative Analyst, CSAC

1:35 p.m. **Case Study**
- Charles J. McKee, County Counsel, Monterey County

1:50 p.m. **Public Guardian Perspective on Case Study**
- Connie D. Draxler, Deputy Director, Office of the Public Guardian, Los Angeles County

2:00 p.m. **District Attorney's Perspective of Case Study**
- Matt Byrne, Deputy District Attorney, Los Angeles County

2:10 p.m. **County and State Perspective of Case Study**
- Kirsten Barlow, Executive Director of the County Behavioral Health Directors Association (CBHDA)
- Pam Ahlin, Director, California Department of State Hospitals

2:30 p.m. **Questions and Answers**

2:45 p.m. **Adjournment**

ATTACHMENTS

Case Study

Case Study

Attachment One

John Smith Case Study

Case Study: John Smith

Background:

John Smith is a 52-year-old male with significant brain injuries dating back to a 1991 gunshot wound to the head, and a 1997 or 1998 traumatic brain injury, which caused him to manifest aggressive and violent behaviors. Prior to his brain injuries, he was diagnosed with cerebral palsy and mental retardation, complicated by the brain injuries. As a result of the brain injuries, Mr. Smith has a seizure disorder, aphasia, dysarthria, dysphagia, and severe neurocognitive disorder with dementia due to the resultant encephalopathy.

Mr. Smith currently resides in a secured-perimeter neurobehavioral facility in Oakland, California. He requires the use of a wheelchair because of his poor gait and being subject to falls if he walks unassisted. Mr. Smith requires extensive assistance with all activities of daily living, such as grooming, basic hygiene, bathing, medication levels, transfer from his bed, and meal preparation.

Mr. Smith's psychiatrist diagnosed him with psychotic disorder NOS and dementia with behavior disturbance due to head injury. His "behavior remains very problematical" as he becomes "physically aggressive hitting staff" when they try to assist him with his activities of daily living. Similarly, he is "disoriented to time, place and situation" and has been observed "to be responding to internal stimuli, talking and shouting to himself," and injures himself by "using his hands to pound walls, objects and persons within his reach."

Prior to residing at the facility, Mr. Smith was charged with assaulting his 83-year-old mother (a felony) and elder abuse (a misdemeanor). The case was filed March 23, 2012, and Mr. Smith resided in the Monterey County Jail awaiting disposition until December 2014.

Approximately three years before his 2012 incarceration, Mr. Smith lived on the streets of Salinas, California, where extended family members would spot him and drive him back to his elderly mother's home in Watsonville, California, where, due this mental disorders, would eventually act out violently and would assault her. This pattern occurred many times resulting in multiple misdemeanor charges. Eventually, felony charges were filed against him.

Problem:

Mr. Smith is one of the many victims of a gap in California law. Under former California law, he would not be considered capable of committing a crime as he would not have the capacity to form the requisite intent, given his brain injury. Under present law, the courts have declared that he cannot be tried because he lacks capacity. At the same time, the court, his assigned Public Defender, and the District Attorney determined that it would not be safe for him or others to be returned to the street.

Legal History:

On March 23, 2012, Mr. Smith was charged with Penal Code §368(b)(1) (causing injury to an elder adult), §368(c) (physical/emotional elder abuse), and §1170.12(c)(1) (prior felony

conviction). On April 20, 2012, the Mr. Smith was found incompetent to stand trial. On May 9, 2012, he was sent to Atascadero State Hospital for treatment (not to exceed 3 years) to regain competency. Normally, a defendant would have remained at the state hospital for three years, but the state hospital sent him back almost immediately because he did not have a treatable mental disorder, and because there was no likelihood of successful treatment, the state hospital would not keep him. In the past, State hospitals would keep these defendants but, after the State's budgetary problems, they started exercising their right to return them to their county of origin.

On September 14, 2012, the court referred the matter to the Monterey County Public Guardian ("Public Guardian" or "PG") to determine if a conservatorship should be filed. On October 5, 2012, after an investigation, the PG determined that it could not file for a conservatorship because Mr. Smith did not meet the applicable legal criteria—just as the state hospital had concluded, he did not have a mental disorder falling within the Lanterman Petris Short ("LPS") Act. On April 24, 2013, the Court asked the PG to reevaluate Mr. Smith for conservatorship. After an investigation, on May 1, 2013, the Court was informed that the PG could not file for a conservatorship because the Mr. Smith did not meet the legal criteria.

On June 26, 2013, an internal county meeting was convened by the Deputy District Attorney to discuss possible conservatorship and alternatives for placement for Mr. Smith due to his traumatic brain injury – those in attendance included the Monterey County Sheriff; jail staff familiar with Mr. Smith; Mr. Smith's Deputy Public Defender; staff from County of Monterey Behavioral Health; the Chief Deputy Public Guardian; and, Deputy County Counsels. At the meeting, both legal and placement obstacles to an LPS conservatorship were discussed at length. Behavior Health informed the participants that there are no available placements for brain-injured individuals; in fact, brain-injured individuals are not a population served by Behavioral Health, which serves severely mentally ill individuals. County Counsel explained that the LPS Act was created to end inappropriate, indefinite, and involuntary judicial commitment of persons with specified mental health disorders, not as a mechanism for permanent involuntary commitment for individuals with conditions such as dementia or brain injury that could never be improved with treatment, medication or commitment.

The case was continued to August 15, 2013, for a "hearing whether a Murphy conservatorship is appropriate." Neither the County Counsel nor the Public Guardian were ordered to be present at, or even legally noticed of, the August 15, 2013, hearing. The Court conducted a hearing and took testimony on the issue. The Court found "by preponderance of evidence that defendant is gravely disabled due to mental disorder as defined in W&I 5008(h) both (A) and (B)." While the LPS Act requires two physicians or licensed psychologists with Ph.D. degrees to find the proposed conservatee is gravely disabled, for a petition even to be filed, it does not appear that the hearing encompassed any such testimony. The Court went on to find, "beyond a reasonable doubt," that Mr. Smith "is an ongoing danger to himself and others." As such, the Court "orders the County guardian to initiate proceedings to determine if the defendant is a suitable candidate for an LPS conservatorship."

On October 28, 2013, the Public Guardian notified the Court that Mr. Smith did not meet the criteria for a Murphy Conservatorship since he does not have a mental disorder and had not exhibited any violent tendencies (i.e. no present dangerousness). The County of Monterey noted that Mr. Smith, as an individual with an acquired traumatic brain injury, was specifically excluded from the targeted population serviced under the LPS Act and from the provision of services intended by the legislature, by the Bronzan-McCorgudale Act, which states that, to the extent resources are available, funds much be used primarily to serve specified target populations. (*See* W&IC §5600.3(b)(3)(A).)

On January 20, 2014, the District Attorney's Office emailed a subpoena to the County Counsel's Office for County Counsel and the Public Guardian to appear in Court on January 24, 2014. On January 24, 2014, the Court issued an order to the Public Guardian to petition to establish a conservatorship on behalf of Mr. Smith and to act as a conservator on his behalf.

Challenges:

1) **Lack of Placements**

Multiple health facilities turned the County down for placement of Mr. Smith. The facilities argued he did not fit their population and could not be treated because he is not mentally ill; instead, he has an irreversible brain injury.

2) **Mr. Smith's Violent History**

Unfortunately, this was not Mr. Smith's first assault on his mother. It was difficult to guarantee to the facilities that Mr. Smith would not act out against another resident. Further, given his diagnosis, violent lashing out is sometimes common. The local facilities were simply not equipped to handle a patient like Mr. Smith.

3) **Criminal System – Its Philosophy and Purpose**

The District Attorney's Office believed Mr. Smith to be a danger to the public if released. The Public Defender, on the other hand, given the lack of placements, believed that Mr. Smith should not be released to the streets. The Sheriff's Office was claiming that housing Mr. Smith in the infirmary at the County Jail was extremely costly and, given Mr. Smith's condition, not appropriate for him. The judge, a former Deputy District Attorney, was very sympathetic to the safety argument.

Over the past year, the Public Guardian Office has had numerous cases referred by the courts for LPS conservatorship investigation without a mental illness as recognized in Title 9 of the California Code of Regulations regarding medical necessity criteria for reimbursement. Conditions have included dementia, language disorder, and traumatic brain injury. These, unfortunately, are conditions not recognized for treatment using county mental health plan resources.

4) Split in the Courts

There is currently a split in the courts regarding conservatorships, their purpose, and whether the courts can order the counties to file them. *People v. Karriker* (2007) 149 Cal.App.4th 763, allows the public guardians discretion to decide whether they file for a conservatorship. Philosophically, *Karriker* takes the sound position that "[t]he point of a conservatorship is to take care of people who can't take care of themselves…..We just don't believe it's appropriate to place someone in an institute for mental disease perhaps….for their lifetime when they can't be treated there." (*Id.* at 772.) Thus, mental conditions that cannot be treated, such as dementia or traumatic brain injury are not subject to LPS or *Murphy* conservatorships as they would condemn the person to be placed in an instate for mental disease for their lifetime.

Contrasted with *County of Los Angeles v. Superior Court of Los Angeles* (*Kennebrew*) (Dec. 19, 2013) 222 Cal.App.4th 434, where the court asked the public guardian to investigate Kennebrew for a conservatorships but it declined to file one because of his diagnosis of Alzheimer's type dementia, which, by its very nature, is not likely to improve with treatment. (*Id.* at 440.) The criminal court concluded that Kennebrew remained incompetent to stand trial; that he met the requirements for a conservatorship under the LPS Act; that he had been diagnosed by the state hospital as presenting a substantial danger of physical harm to others by reason of his mental disorder; and, that no rational basis or compelling interest outweighed the concerns for public safety and need for conservatorship under the LPS Act or justified the public guardian's refusal to act as conservator for Kennebrew. (*Id.* at 441.) The court then ordered the public guardian to petition for establishment of a conservatorship under § 5008(h)(1)(A) and (B) (both LPS and Murphy), and ordered the public guardian to act as Kennebrew's conservator. (*Id.* at 441.) In *Kennebrew*, the focus shifts away from the patient and treatment, towards the interests of the criminal justice system and incapacitation.

Many courts around the state, including Monterey County, apply the *Kennebrew* decision and have been ordering public guardian offices to file conservatorships where, arguably, they do not meet the requirements of the LPS Act and are condemning people to indefinite institutionalization.

5) County Jail

Placement in the County Jail was clearly inappropriate. Even though Mr. Smith was placed in the infirmary across from the nurses' station, given Mr. Smith's mental condition, lack of mobility, possibility of him being subject to an attack from an inmate, seizure disorder, etc., the jail was not the appropriate placement. The more Mr. Smith remained in legal limbo, the greater the possibility that something catastrophic could happen to him in jail.

6) Lack of Funding – County's Responsibility

Mr. Smith was not eligible to receive public assistance for his placement while the charges were pending. Further, any State or Federal assistance would probably be insufficient to cover the full cost of an adequate non-local facility, leaving the County to pay the difference.

7) Setting Precedent

The County of Monterey was worried that, if it did not oppose taking Mr. Smith as a conservatee, the floodgates would open and the scant County resources would be quickly exhausted. In other words, it was worried about setting dangerous precedent in Monterey County.

8) Lack of Family Cooperation

Mr. Smith was somewhat estranged from his relatives. The only relative that was engaged with the process was his sister. Although she was willing to take care of Mr. Smith, she was not capable because her spouse opposed Mr. Smith moving in with them. Further, dismissing the charges and allowing Mr. Smith to move in with her sister was probably a solution that the District Attorney was not going to entertain.

Approaches Taken:

1) Legal

The County Counsel's Office filed a motion for reconsideration of the Court's order for the Public Guardian to file a conservatorship. The motion was denied. County Counsel filed a writ with the California Court of Appeal; it was denied. County Counsel then petitioned the California Supreme Court for redress; the California Supreme Court refused to entertain the case.

2) Regional Center

Monterey County researched the possibility to have the California Department of Developmental Centers ("the Regional Center") to take over Mr. Smith's care. The regional centers have many resources to help individuals in Mr. Smith's condition, including the ability to file and act as conservators for the person. However, because Mr. Smith's injury occurred after he turned 18, the Regional Center was not required to care for Mr. Smith.

3) State Hospital

The County of Monterey kept requesting that the State hospital take Mr. Smith, as it was the most appropriate placement for him. The State claimed a lack of resources and an inability to treat individuals with traumatic brain injury. However, the State hospital representative acknowledged that, if the County of Monterey was forced to file for a conservatorship, and if the County was willing to pay in excess of $100,000 per year, they would be willing and able to house Mr. Smith. Thus, it was clear that the State might have had the technical capacity to care for Mr. Smith, but they lacked the financial capacity to care for him.

4) Educating the Parties

Throughout the legal case, the County Counsel's Office, the Public Guardian's Office, and Mr. Bullick, the Director of the Department of Health and Public Guardian, attempted to educate the District Attorney, Public Defender, and the Court of a) the lack of legal support for

their position but, most importantly, b) the lack of appropriate placements for Mr. Smith. The results were negligible.

5) Practical Solutions

Throughout the process, the Public Guardian attempted to find a solution that would not require the Count to file a conservatorship. It looked for appropriate placements for Mr. Smith and presented his case throughout the county and neighboring counties.

Possible Solutions:

1) Legislative Fixes (Regional Centers, LPS Act and Bronzan-McCorgudale Act)

When the laws that set up the regional centers were enacted, they contained provisions to care for individuals in Mr. Smith's situation. The requirement that the individual be diagnosed with a qualifying mental condition before the age of eighteen only makes sense when one looks at it from the funding perspective. Changing the law to require regional centers to help individuals in Mr. Smith's situation, regardless of when they were diagnosed, would fill in that gap.

Similarly, amending the LPS Act to specifically state that dementia is an illness covered under the Act would provide clarity and, hopefully, funding to place these individuals. The same is true with an amendment to the Bronzon-McCorgudale Act.

2) California Supreme Court

The counties need to work together to bring a favorable case before the California Supreme Court. In hindsight, a writ might not have been the best vehicle to ask the California Supreme Court for redress as it is not obligated to rule on the merits of the case. We would like to think that counties with a higher volume of cases are already looking that test case that will hopefully resolve this split in the courts in the counties' favor.

3) Availability of Placements

The State of California, especially Monterey County, needs more facilities to accommodate the needs of persons with dementia and traumatic brain injuries. Having more facilities would have many benefits, bringing down costs being the main one. The legislature could enact laws that would provide funding to incentivize the public sector to build these types of facilities, or it could allocate funding to run these facilities itself.

4) State Hospitals

It is evident that the main reason why the State hospitals have begun sending defendants back to their counties of origin is funding. Not only did they begin this practice during the State's budgetary crisis, but the very candid discussion that the County of Monterey had with an attorney for the State hospitals that they would take Mr. Smith if the county paid for his stay, shows that they have the technical capacity, but not the financial capacity. Providing more

funding to State hospitals, with the mandate that they care for these individuals, would go a long way to filing in the gap.

Outcomes:

In the end, the County of Monterey filed a probate conservatorship for Mr. Smith. One reason is that we avoided setting precedent in Monterey County that the courts can order the Public Guardian to file an LPS or a *Murphy* conservatorship. The other reason is that a probate conservatorship gives the Public Guardian much more flexibility than an LPS or *Murphy* conservatorship, where the Public Guardian would be beholden to the District Attorney's or the Public Defender's will.

Mr. Smith is in an appropriate facility in Oakland, California. Even though there are some minor violent incidents due to his condition, Mr. Smith's family has reported that he is thriving in Oakland and that they have never seen him doing so well. Granted, his previous placement was in jail, but Mr. Smith now has dedicated and trained staff that can understand his needs and his condition from a therapeutic perspective.

Case Study

Attachment Two

Los Angeles County Court Case

Filed 1/17/14 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COUNTY OF LOS ANGELES, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; PEOPLE OF THE STATE OF CALIFORNIA, Real Parties in Interest.	B249494 (Los Angeles County Super. Ct. No. BA352179) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 19, 2013, be modified as follows:

1. On page 8, second full paragraph, line 5, delete the word "either".
2. On page 21, footnote 16, line 2, substitute the word "adequate" for the word "inadequate."
3. On page 21, footnote 16, lines 4-5, delete the words:

   ", and does not provide this court with the probate conservatorship order."

   The first sentence of the footnote should then read:

   > We decline to consider further whether the public guardian abused its discretion by determining that Kennebrew's probate conservatorship was an

inadequate alternative to a Murphy conservatorship, as the public guardian advised, because the petition does not contend that the trial court's order lacks supporting evidence on that ground.

There is no change in judgment.

Petitioner's petition for rehearing is denied.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

Filed 12/19/13 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COUNTY OF LOS ANGELES, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	B249494 (Los Angeles County Super. Ct. No. BA352179)

ORIGINAL PROCEEDINGS in mandate. Norman J. Shapiro, Judge. Petition denied.

John F. Krattli, County Counsel, Leah D. Davis, Assistant County Counsel for Petitioner.

Jackie Lacey, District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys for Real Party in Interest.

Petitioner County of Los Angeles seeks review of the May 15, 2013 order of respondent Superior Court of Los Angeles, Honorable Norman J. Shapiro, ordering the public guardian to petition for a conservatorship and to act as conservator for real party in interest Nattie Kennebrew, Jr., under the Lanterman-Petris-Short Act, Welfare and Institutions Code sections 5000 et seq. We deny the writ, but issue this opinion to clarify the law with respect to the requirements for conservatorships under subdivision (h)(1) of Welfare and Institutions Code section 5008, and the authority of the superior court to review recommendations of administrative agencies concerning the imposition of such conservatorships.

Background

The charged felony

While suffering from dementia that caused him to believe that people were stealing his veterans' benefits, defendant Nattie Kennebrew, Jr., shot and killed a handyman who had come to do repairs at his apartment on January 28, 2009.

The evidence at Kennebrew's preliminary hearing was that on January 28, 2009, Kennebrew, then 83 years old and claiming to be legally blind, shot and killed Gerardo Ramos, who had come to his apartment to repair the garbage disposal. After shooting Ramos in the chest and head at close range, he tried to shoot Vyktor Arce, the building's resident manager, also at close range, but failed apparently because his gun was out of bullets. After being admonished and waiving his *Miranda* rights, Kennebrew told the investigating detective that he believed that the victim, the apartment manager, and an employee of the Veterans Administration had conspired to steal his veterans' benefits, in part because he is Black.

At the conclusion of his preliminary hearing on June 17, 2009, Kennebrew was held to answer on charges of murder (Pen. Code, § 187), and assault with a firearm (Pen. Code, § 245, subd. (a)(2)), in *People v. Kennebrew*, Los Angeles Superior Court Case No. BA352179. He was charged by information with one count of murder (Pen. Code, § 187), one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(2)), and one

count of attempted murder (Pen. Code, §§ 664, 187), and was arraigned on July 1, 2009. On November 23, 2009, Kennebrew was found to be incompetent to stand trial and was committed to placement at Patton State Hospital (Patton) pursuant to Penal Code section 1368.[1]

In a February 7, 2012 application for a mental health conservatorship and reexamination of Kennebrew in anticipation of his maximum commitment date,[2] doctors at Patton reported that Kennebrew suffered from "dementia of the Alzheimer's type, with late onset, with behavioral disturbance," ongoing paranoid delusions, worsening dementia, inability to accept voluntary treatment, and inability "to provide for his . . . personal needs for food, clothing, or shelter as a result of a mental disorder." The report identified Kennebrew as "a danger to others because of fixed delusion of persecutory type," noting that although he has not been violent during his hospitalization, he had threatened to kill a fellow patient at Patton, indicating "that the risk of danger to others is high and he needs to be placed in a structured environment."

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[1] Under Penal Code section 1367, subdivision (a), "A person cannot be tried or adjudged to punishment while that person is mentally incompetent." Penal Code section 1370, which governs the procedure following a finding that a defendant is incompetent to stand trial, applies "to a person who is charged with a felony and is incompetent as a result of a mental disorder." (Pen. Code, § 1367, subd. (b).) Patton has been identified as a "prisonlike institution[]" that houses conservatees under the Lanterman-Petris-Short Act. (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 182, fn. 18.)

[2] Penal Code section 1370, subdivision (c)(1) provides for a maximum commitment of three years, after which the defendant must be returned to the committing court.

On August 23, 2012, the trial court referred the matter to the Los Angeles County Office of the Public Guardian for investigation for a possible conservatorship.[3] On August 24, 2012 the public guardian responded by letter that it would not seek a conservatorship for Kennebrew, because Kennebrew's diagnosis of dementia is not a qualifying mental disorder diagnosis under the Lanterman-Petris-Short Act (LPS Act), Welfare and Institutions Code section 5000 et seq.[4] Because the condition of a patient with Alzheimer's type dementia is not likely to improve with treatment, the public guardian explained, county funds cannot be used for that purpose.

The court again referred the matter to the public guardian for investigation on October 25, 2012, based on the Patton physicians' application for conservatorship. A November 7, 2012 neuropsychological evaluation by medical personnel at Patton cited Kennebrew's threat to kill his roommate soon after his arrival at Patton, and based on his lack of remorse or guilt about the victims of his charged offenses ("Kennebrew continues to believe he did nothing wrong"), concluded that "there is a significant likelihood that he may be violent in the absence of supervised treatment."

The public guardian's November 16, 2012 response to the court explained why it would not petition for conservatorship: Dementia is not recognized as a recoverable mental health illness and thus does not meet the criteria for a conservatorship under the LPS Act.

On April 5, 2013, the probate department of the court, acting independent of the criminal department in case no. BA352179, established a conservatorship for Kennebrew.

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[3] The public guardian is mandated county officer. (Gov. Code, § 24000, subd. (w).) In Los Angeles County the Office of the Public Guardian, a division of the Department of Mental Health, acts as conservatorship investigator and conservator for individuals who are seriously and persistently mentally ill and in need of involuntary mental health treatment, and for frail and vulnerable elderly or dependent adults. (Welf. & Inst. Code, §§ 5350, 5351, 5352.)

[4] Further statutory references are to the Welfare and Institutions Code unless otherwise identified.

It appointed Kennebrew's son as conservator, granted him permission to take Kennebrew to live with him in Michigan, anticipating that the California conservatorship would be terminated upon establishment of a Michigan conservatorship.

On April 10, 2013, the criminal department of the court ordered the public guardian to provide it with the available options "to place Mr. Kennebrew in an environment where he will not pose a danger to the public." The public guardian's office responded on May 8, 2013, explaining why it believed conservatorships under the LPS Act would not be appropriate for Kennebrew, and why the conservatorship established by the probate department was appropriate under the circumstances.

Following hearings on May 9 and 15, 2013, and written submissions by the People and the public guardian, the court found that Kennebrew remains incompetent to stand trial; that he meets the requirements for a conservatorship under the LPS Act (§ 5008, subds. (h)(1)(A) & (h)(1)(B)); and that he has been diagnosed by Patton as presenting a substantial danger of physical harm to others by reason of his mental disorder. The court also found that no rational basis nor compelling interest outweighs the concerns for public safety and need for a conservatorship under the LPS Act, or justifies the public guardian's refusal to act as conservator for Kennebrew. And it found that the conservatorship established for Kennebrew by the probate department does not address the court's public safety concerns and does not preclude the criminal court from ordering a conservatorship under the LPS Act.

The challenged orders

Based on these findings and the court's determination that the public guardian's refusal to act as conservator abused its discretion, on May 15, 2013 the court ordered the public guardian to act as conservator for Kennebrew; that Kennebrew remain at Patton; and that the public guardian petition for establishment of a conservatorship pursuant to section 5008, subdivisions (h)(1)(A) and (h)(1)(B), as requested by Patton and the district attorney's office.

The requested relief

Los Angeles County Counsel, representing the public guardian, petitioned this court for writ of mandate on behalf of the County of Los Angeles, on June 20, 2013. The petition asks this court to set aside respondent court's May 15, 2013 orders, on two grounds: (1) that the public guardian's office has sole discretion to petition for conservatorship under the LPS Act, or to decline to file such a petition, and the superior court has no authority to order the public guardian to act as a conservator or to petition for conservatorship; and (2) that the public guardian's office correctly determined that Kennebrew is not eligible for a conservatorship under section 5008, subdivisions (h)(1)(A) or (h)(1)(B), because dementia is not a qualifying diagnosis for a conservatorship under the LPS Act.[5]

On June 26, 2013, this court ordered a temporary stay of the May 15, 2013 orders in *People v. Kennebrew, supra*, LASC Case No. BA352179, pending further order. On October 1, 2013, we entered an order to show cause why the orders of May 15, 2013 in that case should not be vacated and the court should not be ordered to issue a new and different order.

Based on our review of the responses to the order to show cause by the Los Angeles County Counsel on behalf of petitioner, and the Los Angeles District Attorney on behalf of real party in interest People of the State of California, we deny the requested relief for the reasons explained below.

Discussion

A. Conservatorships under the LPS Act

The LPS Act, which governs the involuntary treatment of the mentally ill in California, was enacted in order to end "the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious

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[5] County counsel also requested a stay of proceedings in the superior court with respect to the challenged orders (which were to take effect on July 1, 2013) while its petition is pending in this court.

mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008; § 5001.)

Three types of conservatorships are relevant to this case, the first two of which come under the LPS Act, and require a finding that the prospective conservatee is "gravely disabled." However, for each of these conservatorships the requirements for a determination that a prospective conservatee is gravely disabled is different.

The first of these conservatorships under the LPS Act, referred to as a subdivision (h)(1)(A), or "LPS conservatorship," is one in which the conservatee, is "gravely disabled"—which is defined in this subdivision to mean that "as a result of a mental disorder," the conservatee "is unable to provide for his or her basic personal needs for food, clothing, or shelter." (§ 5008, subd. (h)(1)(A).)

The second category of conservatorships under the LPS Act, known as a subdivision (h)(1)(B), or "Murphy conservatorship," is one in which the conservatee is subject to a pending indictment or information charging him or her with a felony involving death, great bodily harm, or threat to the physical well-being of another; in which "as a result of mental disorder," the conservatee is unable to understand or meaningfully participate in the pending criminal proceedings; and in which the conservatee has been found to be mentally incompetent under the procedures set forth in Penal Code section 1370.[6] (§ 5008, subd. (h)(1)(B).) To these three statutory requirements for the imposition of a Murphy conservatorship our supreme court has added a fourth: the constitutionally required finding that the conservatee is "currently dangerous as the result of a mental disease, defect, or disorder." (*Conservatorship of Hofferber*, *supra*, 28 Cal.3d at p. 178.) Under Penal Code section 1370, subdivision

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[6] Penal Code sections 1370 and 1370.01 provide procedures for commitment and treatment of criminal defendants who are found to be mentally incompetent to stand trial.

(c)(1), a criminal defendant who is found incompetent to stand trial is subject to a commitment for a period not to exceed three years. Any further commitment is permitted only if the requirements for a conservatorship under one of the provisions of the LPS Act are met. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 776 (*Karriker*).)

The third type of conservatorship relevant to this case is a "probate conservatorship," under Probate Code section 1800 et seq. Generally speaking, probate conservatorships are imposed when it is established that the conservatee is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. (Prob. Code, § 1801.) Unlike for conservatorship under the LPS Act, however, probate conservatorships may be ordered upon the application of relatives or friends of the conservatee, rather than only upon the application of the public guardian. (Prob. Code, § 1820, subd. (a); § 5114; *St. Joseph Hospital v. Kuyper* (1983) 146 Cal.App.3d 1086, 1090.) In Los Angeles County, probate conservatorships are handled by the Probate Department, while LPS Act conservatorships are heard in Department 95-A of the superior court. (Super. Ct. L.A. County, Local Rules, rule 2.7(c)(2)(B).)

In ordering the public guardian to establish a conservatorship, the trial court found that Kennebrew comes within the "gravely disabled" definitions that apply to conservatorships under both subdivisions (h)(1)(A) and (h)(1)(B) of section 5008. However, the People have conceded in this proceeding that the record contains inadequate evidence to show either that Kennebrew was unable to care for himself, the requirement for an LPS conservatorship under section 5008, subdivision (h)(1)(A). Based on this concession, we consider only whether the court abused its discretion by ordering the public guardian to establish a conservatorship and to act as conservator under section 5008, subdivision (h)(1)(B)—a Murphy conservatorship—and we do not examine the propriety of these orders under section 5008, subdivision (h)(1)(A).

B. Standards of Review

Petitioner contends that the trial court erred by finding that Kennebrew's dementia qualifies as a "mental disorder" within the meaning of the LPS Act (contrary to the public

guardian's determination that it does not); and that the trial court lacked authority to order the public guardian to establish a conservatorship and act as conservator for Kennebrew.

The issue in the trial court was whether the public guardian had abused its discretion by refusing to establish a conservatorship and to act as Kennebrew's conservator. The effect of the trial court's order was to require the public guardian to establish a conservatorship and to act as Kennebrew's conservator—in effect, a writ of mandate. A traditional writ of mandate is appropriate "to compel a public official to perform an official act required by law." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) Although mandamus cannot be used to compel an official to exercise discretion in a particular manner, it may issue in order to require that discretion is exercised consistent with the law. (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 118; *Common Cause v. Board of Supervisors*, *supra*, 49 Cal.3d at p. 442 [mandate may issue to compel public official to exercise discretion "under a proper interpretation of the applicable law"].)

The trial court in this case reviewed the public guardian's determination that the applicable law does not obligate or empower it to establish a conservatorship for Kennebrew or to act as his conservator under the LPS Act, after affording the public guardian the opportunity to be heard with respect to the facts and the law. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995 [under Code Civ. Proc., § 1085, trial court reviews administrative agency's action to determine whether it is arbitrary, capricious, or entirely without evidentiary support, contrary to public policy, or procedurally unfair or unauthorized by law].) In this court we treat the trial court's factual determinations as conclusive if they are supported by substantial evidence, but we independently review statutory interpretations and other issues of law. (*Ibid.*)

C. The Trial Court Correctly Ordered The Public Guardian To Petition For A Murphy Conservatorship.

Petitioner contends that the public guardian correctly exercised its discretion to refuse to seek a conservatorship under the LPS Act because Kennebrew's dementia does not qualify as a "mental disorder," one of the defining requirements for conservatorships

under that act.[7] As noted above, for an LPS conservatorship, the conservatee must be unable to provide for his or her basic personal needs for food, clothing, or shelter "as a result of a mental disorder"—thereby meeting the definition of "gravely disabled" that applies to that type of conservatorship. (§ 5008, subd. (h)(1)(A).) For a Murphy conservatorship, the definition of "gravely disabled" is different: the conservatee must be "gravely disabled" by virtue of being subject to an information or indictment charging a serious violent felony, must be unable "[a]s a result of mental disorder" to meaningfully participate in his or her defense to the charge, and must also be found to be "currently dangerous as the result of a mental disease, defect, or disorder." (§ 5008, subd. (h)(1)(B); *Conservatorship of Hofferber*, *supra*, 28 Cal.3d at p. 178.) If Kennebrew's dementia is not a "mental disorder" within the meaning of the LPS Act, the LPS Act does not apply to Kennebrew, and the court abused its discretion by ordering the public guardian to seek the Murphy conservatorship.

The provisions for Murphy conservatorships were added to the LPS Act in order to distinguish between persons who do, and do not, present a danger to the public. They are intended to "address the difficult problem of integrating and resolving the conflicting concerns of protecting society from dangerous individuals who are not subject to criminal prosecution," while "preserving a libertarian policy regarding the indefinite commitment of mentally incompetent individuals who have yet to be convicted of criminal conduct, and safeguarding the freedom of incompetent criminal defendants who present no threat to the public." (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 456; *Karriker*, *supra*, 149 Cal.App.4th at p. 775.) For a conservatee under subdivision (h)(1)(A) of section 5008, the court is required to place the conservatee in the least restrictive available placement. (§ 5358, subd. (a)(1)(A).) However, for a conservatee who meets the "gravely disabled" definition of subdivision (h)(1)(B) of section 5008, the priority is public safety, not the

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[7] Petitioner also argues that Kennebrew does not qualify for an LPS Act conservatorship because the earlier-imposed probate code conservatorship provided an available alternative to the Murphy conservatorship ordered in this case.

least restrictive available placement. The placement must be one "that achieves the purposes of treatment of the conservatee and protection of the public." (§ 5358, subd. (a)(1)(B); *Karriker, supra*, 149 Cal.App.4th at p. 778.) As the public guardian put it, "[i]n an LPS conservatorship the primary focus is least restrictive placement and in a Murphy conservatorship it is the protection of the public."

The *Karriker* decision held that the public guardian cannot be ordered to establish a conservatorship under the LPS Act if it determines—in its sole discretion—that the conservatee's dementia does not constitute a "mental disorder" within the meaning of the LPS Act. (*Karriker, supra*, 149 Cal.App.4th at pp. 778-779, 783.) Therefore, petitioner contends, the public guardian was justified in determining that the Murphy conservatorship sought by the district attorney and ordered by the court in this case was not appropriate, because—as the court decided in *Karriker*—dementia is not a "mental disorder" within the meaning of the LPS Act.

Upon independent review, we conclude that the trial court in this case correctly interpreted the LPS Act to provide that dementia is a "mental disorder" within the LPS Act's meaning, contrary to the statutory interpretation urged by the public guardian and set forth in *Karriker*. We also conclude that on this point the *Karriker* decision is factually distinguishable and does not compel a contrary interpretation of the applicable statutes.

1. The Facts Of The *Karriker* Decision Distinguish It From The Case At Hand.

The facts in *Karriker* are somewhat similar to those in the case at hand, but the differences are significant. The defendant in *Karriker* had been charged by complaint with one felony count of making a criminal threat (Pen. Code, § 422), and one misdemeanor count of battery (Pen. Code, § 242). Before his preliminary hearing, a medical officer appointed under Penal Code section 1368 reported that Karriker was not competent to stand trial, and would be unlikely to be restored to competence. On that basis the court ordered Karriker committed to Napa State Hospital for the maximum three-year term under the criminal competency statute. (*Karriker, supra*, 149

Cal.App.4th at p. 770.) A subsequent examination led to a determination by the conservator investigator (analogous to the public guardian in this case) that an LPS conservatorship was not indicated, because Karriker was not "gravely disabled" as the result of a mental disorder within the meaning of section 5008, subdivision (h)(1)(A). Although "Karriker suffers from Amnestic Disorder due to a head injury and chronic alcoholism and alcohol dependence," the investigator concluded, there was no evidence that he is "unable to provide for his basic needs of food, clothing, or shelter as a result of a mental disorder . . . ." (*Id.* at p. 771.) On that basis the investigator recommended that "'establishment of a probate conservatorship would be inappropriate.'" (*Ibid.*)[8]

In order to qualify for a Murphy conservatorship—but not an LPS conservatorship under section 5008, subdivision (h)(1)(A), as in *Karriker*—the defendant must be subject to a pending indictment or information for a serious and violent felony, and must be found to present a substantial danger of physical harm to others by reason of his mental disorder. (§ 5008, subd. (h)(1)(B).) In *Karriker*, there was no pending indictment or information, and the court had before it no indication that Karriker posed a current danger. (*Karriker*, *supra*, 149 Cal.App.4th at pp. 784, fn. 12, 788, fn. 14.)[9] The *Karriker* court's conclusion that a Murphy conservatorship would not be justified in that case therefore resulted not just from the absence of the conditions required for the imposition of such a conservatorship, but also from the fact that the remedy sought in that case was an LPS conservatorship under subdivision (h)(1)(A) of section 5008.

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[8] Despite the diagnosis of chronic alcoholism and alcohol dependence, the *Karriker* decision does not discuss the applicability of the definition of "gravely disabled" in section 5008, subdivision (h)(2), as "a condition in which a person, *as a result of impairment by chronic alcoholism*, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (Italics added.)

[9] In *Karriker*, the trial court "had before it no evidence indicating that defendant currently poses a danger to society," and while an LPS conservatorship was recommended because he was gravely disabled under section (h)(1)(A) of section 5008, "at no time did anyone opine that he is dangerous." (*Karriker*, *supra*, 149 Cal.App.4th at p. 788, fn. 14.)

Here, unlike in *Karriker*, the conditions required for the imposition of a Murphy conservatorship were found by the trial court to be satisfied, and the petition does not challenge the sufficiency of the evidence to support those findings. Unlike in *Karriker*, Kennebrew was subject to a pending information charging him with serious and violent felonies; and he was diagnosed as presenting a continuing danger.[10]

Moreover, in this case, the trial court found that Kennebrew's probate conservatorship (which permitted his removal to his son's home in Michigan, rather than his placement in a secure locked mental health facility under the court's jurisdiction) did not address the court's public safety concerns. That is a statutorily mandated factor, not present in *Karriker*, which controls Kennebrew's placement in this case. (§§ 5350, subd. (a)(2); 5358, subd. (a)(1)(B); *Karriker*, *supra*, 149 Cal.App.4th at p. 778.)

2. Dementia is a "mental disorder" within the meaning of the LPS Act.

In *Karriker*, the appellate court reversed the trial court's decision to impose an LPS conservatorship not only because it concluded that a probate conservatorship would be appropriate under the circumstances, but also because it found that the defendant's dementia was not a qualifying mental disorder within the meaning of section 5008, subdivision (h)(1)(A) of the LPS Act. (*Karriker*, *supra*, 149 Cal.App.4th at p. 787.) A

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[10] The most recent report of Kennebrew's condition under Penal Code section 1370, dated August 23, 2012, reported his diagnosis under DSM-IV as "Dementia of the Alzheimer's Type, with late onset, with behavior disturbance," and "Psychotic Disorder with delusions due to Alzheimer's Disease." Upon his admission to the hospital, "his fund of knowledge, abstract thinking, and general intelligence seemed to be impaired by psychosis." He is unable and incompetent to understand the criminal proceedings against him, to assist counsel in his defense, or to care for himself, by virtue of his "paramount and ongoing" belief that his attorney is part of a government plot to appropriate his veterans' benefits, his worsening dementia, as well as various physical problems. He has no remorse or insight into the consequences of his alleged criminal act, "no insight into his mental illness." He has repeatedly stated that he considers himself a victim, and would repeat his alleged crime. The referring physicians at Patton found "a significant likelihood that [Kennebrew] may be violent in the absence of a supervised treatment," and recommended that the court consider conservatorship under Penal Code section 1370, subdivision (c)(2). While this diagnosis plainly includes dementia, it is not at all clear that it necessarily excludes psychotic mental disorders of other origins.

Probate Code conservatorship, "not an LPS conservatorship . . . , addresses the special needs of a person with dementia," the court held. (*Ibid.*) For that reason, the court held, the public guardian was justified in determining that an LPS conservatorship was unavailable to Karriker. "The ultimate decision to file a petition requesting conservatorship," the court found, "is vested in [the public guardian's] sole discretion." (*Id.* at p. 772.)

Petitioner takes the same position in this case. It argues that in order to qualify for a Murphy conservatorship under the LPS Act, Kennebrew must be found to be suffering from a "mental disorder," and that the trial court exceeded its authority "because the defendant suffers from dementia, which is not a qualifying diagnosis" under the LPS Act.

Petitioner concedes that although *Karriker* found that dementia is not a mental disorder under the LPS Act, an earlier decision held that the term "mental disorder" in the LPS Act refers to "those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders [DSM]." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 283, fn. 5.) The DSM-IV lists dementia as among mental disorders that include cognitive deficits resulting from (among other causes) "the combined effects of cerebrovascular disease and Alzheimer's disease."[11] A 1989 Opinion of the California Attorney General finds, consistent with the appellate court's reference to the DSM definition of mental disorders, that the Legislature intended that the general term "mental disorder" in the LPS Act would "evolve with the times" in order to reflect the term's "current meaning in the medical and psychological community." (72 Ops.Cal.Atty.Gen. 41, 47, 49 (1989).) Significant here, that attorney general opinion

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[11] "The disorders in the 'Dementia' section [of DSM-IV] are characterized by the development of multiple cognitive deficits (including memory impairment) that are due to the direct physiological effects of general medical condition, to the persisting effects of a substance, or to multiple etiologies (e.g., the combined effects of cerebrovascular disease and Alzheimer's disease)." At the request of real party in interest, without objection by petitioner, we take judicial notice of the cited portions of DSM-IV.

concludes that dementia is a qualifying diagnosis for hospitalization in a State Hospital under the LPS Act. (72 Ops.Cal.Atty.Gen. 41 (1989).)[12]

The linchpin of petitioner's rejection of this authority and contrary interpretation of the LPS Act lies in its contention that the Legislature's enactment of Probate Code section 2356.5 in 1996 mandates a re-interpretation of the LPS Act that excludes dementia from the mental disorders that come within its terms. Probate Code section 2356.5 added extensive provisions respecting the powers of probate conservators to address the rights and needs of individuals suffering from dementia, as opposed to other forms of mental disability. It expressly provides that the applicable definition of dementia is set forth in the last-published edition of the DSM, and that people with dementia "should have a conservatorship to serve their unique and special needs." (Prob. Code, § 2356.5, subd. (a)(1).)

Because Probate Code section 2356.5 deals specifically with conservatorships for individuals with dementia, which is not specifically mentioned in section 5008, petitioner argues that section 2356.5 must be interpreted to set forth the exclusive means for dealing with these individuals; the provisions for "gravely disabled" individuals in section 5008, subdivision (h)(1) of the LPS Act must be interpreted to have been superseded and to no longer apply to those whose mental impairment results from dementia. "Clearly," the petition contends, the passage of Probate Code section 2356.5 was intended by the Legislature "to ensure that dementia patients would not be made conservatees under the LPS Act, but only under the Probate Code."

We are not persuaded that this is what the Legislature intended. Neither section 2356.5 nor any other provision of the Probate Code purports to say that this section

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[12] "Persons over 21 years of age suffering from Alzheimer's disease, brain injuries or other organic brain disorders may fall within the scope of section 5150 of the Welfare and Institutions Code and be eligible for evaluation and treatment if as a result thereof they are a danger to themselves or others or are gravely disabled. [¶] . . . Short-Doyle funds or state hospital facilities would be legally available for the provision of evaluation and treatment services to such individuals." (72 Ops.Cal.Atty.Gen. 41, 42 (1989).)

supersedes the adoption by existing authorities of the DSM as an expression of the LPS Act's meaning of the term "mental disorder"—which includes disorders resulting from dementia. (See fns. 10 & 11, *ante*.) And neither section 2356.5 nor any other provision of the Probate Code fills the gap in the law that would result if the LPS Act were interpreted to preclude its application to those suffering from dementia.

Petitioner has argued that its interpretation of section 5008, subdivision (h)(1)(B) to exclude dementia as a qualifying mental disability is bolstered by the California Senate Rules Committee's legislative analysis of Senate Bill No. 1481 in the enactment Probate Code section 2356.5. We take notice of these materials (without objection by the People) pursuant to the petitioner's request. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 32 [re judicial notice of Legislative Committee Reports and Analyses].)

The Rules Committee analysis states that existing law (before the passage of Sen. Bill No. 1481) permitted placement of conservatees in locked facilities under both the LPS Act and the Probate Code, but that most courts at that time would not authorize placement of a dementia patient in a secured facility except under an LPS conservatorship—a requirement that it found to be "unnecessarily cumbersome . . . and unnecessary as applied to dementia patients." To resolve this problem, Senate Bill No. 1481 would incorporate into the Probate Code "the protections of the LPS conservatorship," in order to alleviate this unnecessary burden by allowing courts to authorize placement of probate conservatees with dementia in locked or secured facilities, under the same circumstances and conditions as apply to LPS conservatorships.

Far from indicating a legislative intention that dementia is not a qualifying mental disability under section 5008, subdivision (h)(1)(B), the Rules Committee analysis suggests the opposite. First, the Rules Committee analysis refers only to "LPS conservatorships" under section 5008, subdivision (h)(1)(A), not to Murphy conservatorhips under section 5008, subdivision (h)(1)(B), and not to dementia patients who are charged with violent crimes and who pose a continuing threat of violence. Second, the Rules Committee analysis confirms that at the time Probate Code section

2356.5 was enacted, individuals who were "gravely disabled" by dementia were among the "gravely disabled" persons to whom the LPS Act was applied.

Probate Code section 2356.5 adds much to enable courts and conservators to protect the rights and needs of people suffering from dementia, and to provide conservatorship placements that are far less restrictive and cumbersome than those under the LPS Act, when those placements are appropriate. But that provision leaves wholly unmentioned those who are gravely disabled within the meaning of section 5008, subdivision (h)(1)(B), and who pose a continuing threat to public safety. Nothing in Probate Code section 2356.5 addresses the courts' obvious need to consider and provide for matters of public safety in dealing with individuals such as Kennebrew. We see no indication of a legislative intention that by enacting Probate Code section 2356.5 the Legislature intended to exclude dementia from the definition of mental disabilities that come within the LPS Act.

Section 5008, subdivision (h)(1)(B) provided for Murphy conservatorships in order to address the public's need for protection from the risks of violence by criminal defendants who are so mentally disabled that they cannot participate in the criminal justice system, yet continue to pose a risk of violence to the public. (*Karriker*, *supra*, 149 Cal.App.4th at pp. 776–777; *Conservatorship of Hofferber*, *supra*, 28 Cal.3d at pp. 176–177 ["the state may confine incompetent criminal defendants, *on grounds that they remain violently dangerous*, when a magistrate or grand jury has found probable cause to believe that they have committed violent felonies"].) Yet according to the public guardian, one who is diagnosed with dementia (rather than "a psychiatric diagnosis") is now rendered ineligible for placement in any type of locked facility that is available in an LPS conservatorship—in either a state hospital, or an IMD (Institution for Mental

Disease).[13] The elimination of dementia from the diagnoses to which the LPS Act applies therefore would render unavailable one of the only (perhaps the only) practical means for the court's protection of public safety in dealing with gravely disabled criminal defendants which in this context include those who pose a public danger whose mental disorders result from dementia.

The establishment of Kennebrew's existing probate conservatorship (the only apparent alternative if Kennebrew's Murphy conservatorship and placement at Patton is not renewed), did not require—or permit—the probate court to consider the potential threats to public safety resulting from his release from a secured facility and his placement with his son in a private residence. Under Probate Code section 1800.3, subdivision (b), the court's primary task is to ensure that any conservatorship will be the "least restrictive alternative needed for the protection of the conservatee"—not the public. Unless Kennebrew is a gravely disabled conservatee within the meaning of section 5008, subdivision (h)(1)(B), "protection of the public" is not among the factors that the court or his conservator may consider in his placement. (§ 5358, subd. (a)(1)(A).)

Section 5008, subdivision (h)(1)(B), permits the court to impose involuntary conservatorships, with confinement in locked and secure facilities, when a magistrate or grand jury has found probable cause to believe that the conservatee has committed a serious and violent felony, and remains violently dangerous. If dementia is excluded from the category of mental disabilities that may justify the court in taking action under that provision, as petitioner urges it must be, the court would be stripped of the ability to address the public safety issues that are the central concern of section 5008, subdivision (h)(1)(B). For each of these reasons, we conclude that the trial court correctly ruled that

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[13] As the public guardian's report explains, Kennebrew is ineligible for an IMD placement, which under federal law is available only to those under the age of 65. Yet the court has no power to require private nursing facilities to accept placements, and 30 private facilities had already refused the public guardian's requests for Kennebrew's placement.

Kennebrew's dementia is a "mental disorder" within the meaning of section 5008, subdivision (h)(1)(B) of the LPS Act.

3. The order requiring the public guardian to seek a Murphy conservatorship for Kennebrew did not exceed the trial court's authority or abuse its discretion.

The public guardian was required to "investigate all available alternatives to conservatorship and [to] recommend conservatorship to the court only if no suitable alternatives are available." (§ 5354.) The public guardian reported that no conservatorship under the LPS Act was appropriate for Kennebrew, both because Kennebrew's dementia is not a mental disability under the LPS Act (as discussed above), and also because Kennebrew's earlier-imposed probate conservatorship is a suitable and less-intrusive alternative to an LPS conservatorship. The trial court found, however, that the existing probate conservatorship neither addressed or satisfied the court's public safety concerns. These factual determinations are amply supported in the record, and the petition does not contend otherwise.[14]

Petitioner contends also that the trial court abused its discretion by ordering the public guardian to seek an LPS Act conservatorship for Kennebrew because only the conservatorship investigator (in this case the public guardian)—not the court—has discretion to decide whether to seek an LPS conservatorship in any particular case. (*Karriker, supra*, 149 Cal.App.4th at pp. 777-778, 782-787.)

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[14] The petition does not challenge the court's orders on the ground that the record lacks substantial evidence to support any of their factual bases. We disregard the petitioner's argument, made for the first time in its Reply To Opposition To Petition For Writ Of Mandate, that Kennebrew's alleged violent felonies, his threat to kill his roommate at Patton, his lack of remorse and continuing persecutory delusions, and his physicians' reports of continuing dangerousness, might not be enough to support the trial court's finding that he continues to pose a public danger. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [issues not raised or supported by argument or citation to authority are waived].)

The *Karriker* decision discusses this proposition at some length (*Karriker*, *supra*, 149 Cal.App.4th at pp. 782-788), and concludes that "the determination of whether [the proposed conservatee] is gravely disabled as a result of a mental disorder and amenable to treatment under the [LPS] Act, justifying the filing of a petition under the LPS Act, is vested solely in [the conservatorship investigator's] discretion." (*Karriker*, *supra*, 149 Cal.App.4th at p. 782.) Although a court may determine that a conservatorship petition should be rejected, "the court may not control the discretion conferred upon another public official to determine whether to seek such relief." (*Id.* at p. 787.)

But the *Karriker* decision also expressly states that whether the court did or did not have authority to review the investigator's refusal to seek an LPS conservatorship was irrelevant to its decision. "Accepting the premise that a public conservator might abuse his or her discretion in refusing to file a petition for a conservatorship under the LPS Act," the *Karriker* decision explains, still no LPS Act conservatorship was available under applicable law. (*Karriker*, *supra*, 149 Cal.App.4th at p. 788.) Moreover, as petitioner expressly confirms, the court in *Karriker* left undecided the question whether a public guardian might abuse its discretion by failing to seek an LPS conservatorship "under some other set of facts."[15] In other words, *Karriker* did not determine whether a public guardian's refusal to establish an LPS conservatorship might be reviewed as an abuse of discretion.

The case at hand arose "under some other set of facts" than those in *Karriker*. In this case, unlike in *Karriker*, the public guardian's refusal to seek an LPS conservatorship resulted from its erroneous interpretation of the law, to preclude a Murphy conservatorship when dementia is involved. And unlike in *Karriker*, the alternative

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[15] "Leaving open the question if a public guardian, under some other set of facts, might abuse their discretion for failing to file a petition for LPS conservatorship, the court concluded that there was no such abuse of discretion in the *Karriker* case because the Public Guardian had conducted a proper investigation and because a defendant with dementia would properly be the subject of a probate conservatorship. (*Karriker* at p. 788.)"

remedy sought by the public guardian—a probate conservatorship outside of the court's jurisdiction, lacking the protections of a locked or secure facility and the oversight of personnel trained in the care of dangerous criminals suffering from dementia—failed to address or to satisfy the concerns for public protection and safety that are legally mandated with respect to the placement of criminal defendants such as Kennebrew. (§ 5350, subds. (b)(2), (e)(4); § 5358, subd. (c)(2) ["first priority" with respect to placement of defendant eligible for Murphy conservatorship "shall be placement in a facility that achieves the purposes of treatment of the conservatee and protection of the public"].)[16] The public guardian's failure to consider whether Kennebrew remained dangerous to the public is hardly surprising. The duties of the conservatorship investigator under the LPS Act, and the subjects to be addressed in its report to the court, are set forth at length in section 5354. They include a duty to determine the availability of suitable alternatives to an LPS Act conservatorship; but they do not include consideration of the issue that is central to the determination of eligibility for a Murphy conservatorship: whether the potential conservatee presents a risk of serious danger to the public.

Section 5354 does imply that the court has authority to order the conservatorship investigator to establish an LPS conservatorship if the investigator has abused its discretion in declining to recommend that remedy. Section 5354 provides that "[i]f the officer providing conservatorship investigation recommends against conservatorship," in rendering judgment on the investigator's negative recommendation the court may

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[16] We decline to consider further whether the public guardian abused its discretion by determining that Kennebrew's probate conservatorship was an inadequate alternative to a Murphy conservatorship, as the public guardian advised, because the petition does not contend that the trial court's order lacks supporting evidence on that ground, and does not provide this court with the probate conservatorship order. We note, however, that the probate conservatorship apparently approved Kennebrew's placement in his son's home in Michigan, out of the court's jurisdiction, in a facility that apparently is neither licensed, locked, nor secure, and with no indication of a full-time caretaker or caretakers who have training or experience with dementia patients with a history and continuing potential for violence. On this incomplete record we share the trial court's concern that the public safety is not adequately addressed.

"consider the contents" of the investigator's report. Thus section 5354 provides that the court has discretion to render judgment on the availability of the conservatorship under the LPS Act, and the alternatives to it, even when the conservatorship investigator has recommended against that remedy. The court has discretion to review and consider the negative recommendation, then to enter an order that either does or does not follow that recommendation. Unless the court has discretion to override the investigator's negative recommendation, there would be no reason for it to "consider the contents" of the report when determining whether a conservatorship should be imposed. Unless the court has discretion to order the establishment of an LPS conservatorship notwithstanding the investigator's negative recommendation, the provision would have no meaning or purpose.

We therefore conclude that *Karriker* correctly stands for the proposition that when the statutory requirements for an LPS conservatorship are not met, the superior court may abuse its discretion by ordering the public guardian to seek such a conservatorship. But we decline to extend that rule to hold that the superior court lacks authority to determine that the public guardian has abused its discretion when its erroneous interpretation of a controlling statute has resulted in a refusal to seek an LPS conservatorship when the statutory requirements for that remedy are met.

Conclusion

Penal Code section 1370, concerning the treatment of defendants who are charged with serious and violent felonies but are unable to stand trial due to their mental condition, provides that when such a defendant is found by the court to be gravely disabled as defined by section 5008, subdivision (h)(1)(B), "the court shall order the conservatorship investigator . . . to initiate conservatorship proceedings" under the LPS Act. (Pen. Code, § 1370, subd. (c)(2).) We believe that under this provision the initiation of conservatorship proceedings refers to petitioning for conservatorship under the LPS Act, enabling the court to appoint counsel for the defendant and to commence the investigation and investigator's report that is mandated by section 5354. Then, as provided by section 5354, upon consideration of the report and any other evidence

presented to it, the court may render judgment—either following or diverging from the conservatorship investigator's recommendation.

Disposition

The writ is denied, and the stay of proceedings in the superior court is lifted as of the date this decision becomes final. (See Cal. Rules of Court, rule 8.490(b)(2).)

TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

Case Study

Attachment Three

Power Point: Basic, Best Practices and Trends

Basics, Best Practices and Trends

Scarlet Hughes
Public Guardian/Conservator
San Joaquin County
Connie D. Draxler
Deputy Director Office of the Public Guardian
Los Angeles County
Thursday, September 24, 2015

Course Outline

Basics of LPS & Probate Conservatorships

- Major Difference between LPS & Probate
- Good To Know Basics

Best Practices

- Value of Standards & Certification
- Cons. of Person Best Practices (deputy level)
- Cons. of Estate Best Practices (deputy level)
- Management Best Practices – Critical Oversight Recommendations

Course Outline

Trends

- Forensic/Criminal Court Referrals
- Incompetent to Stand Trial (IST)
- Mentally Disordered Offender (MDO)
- Not Guilty by Reason of Insanity (NGI)
- Sexually Violent Predators (SVP)
- AB 109

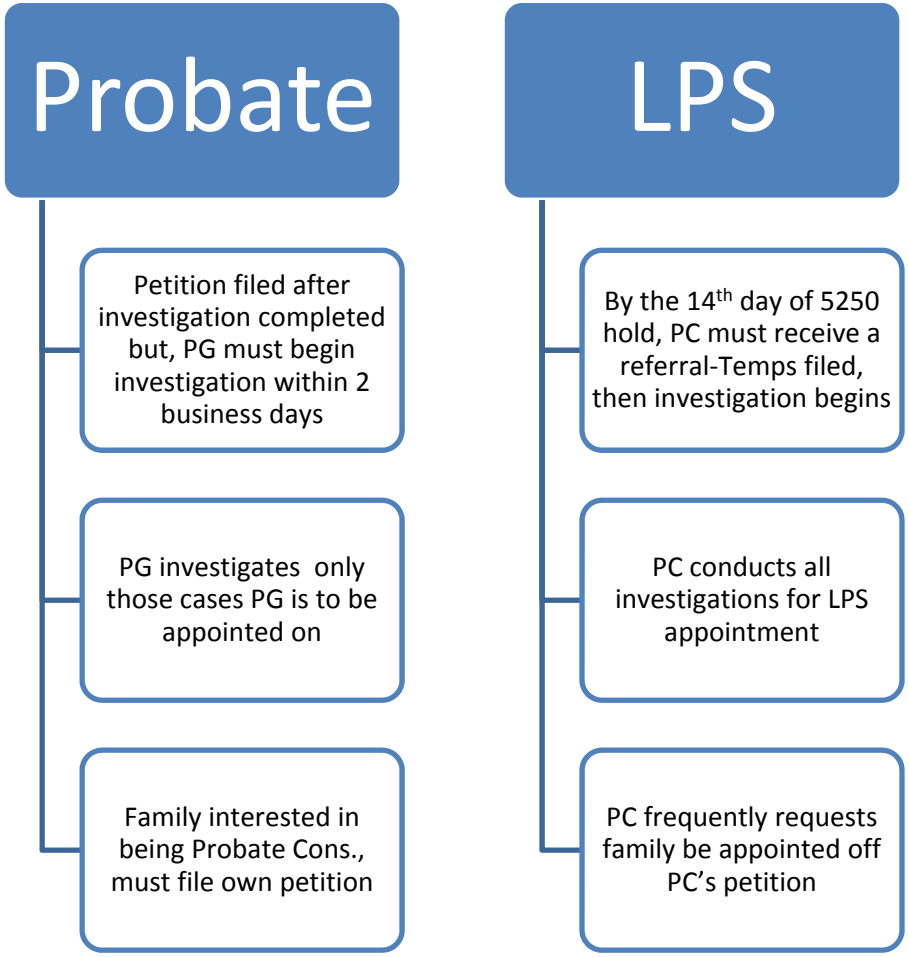
Course Outline

Trends Continued

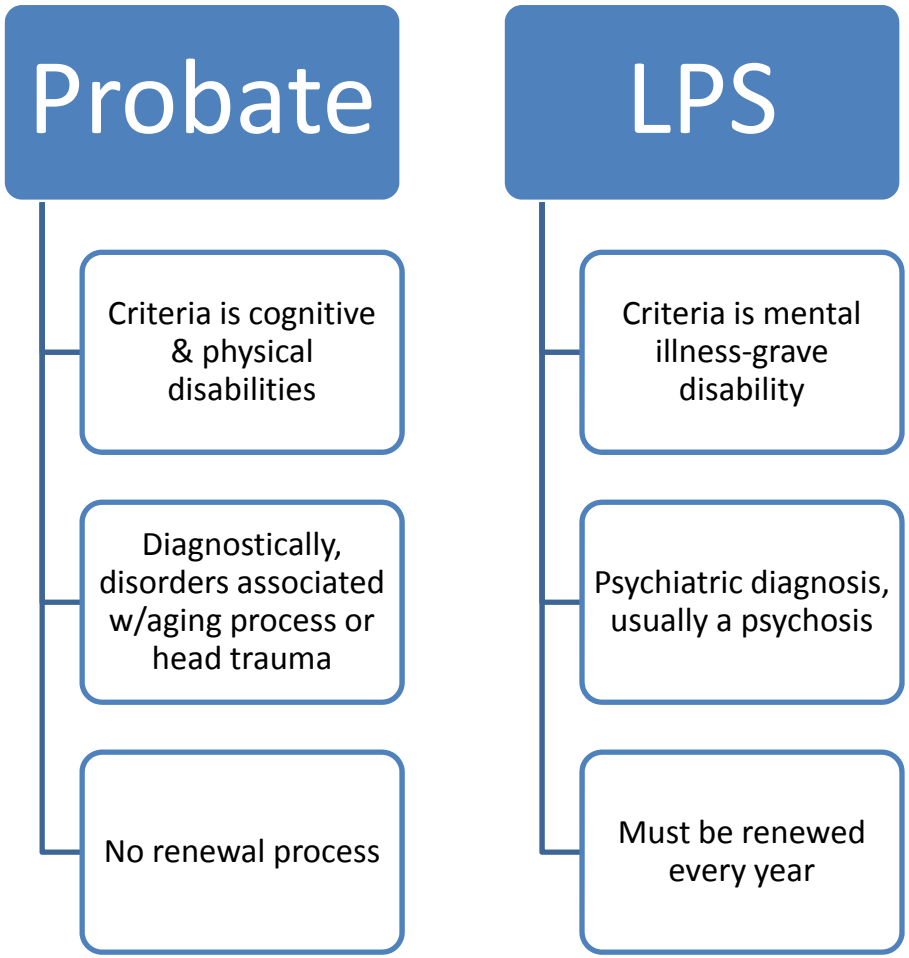
- Ideas & Solutions-Criminal Case Referrals
- Kennebrew Fallout
- Kennebrew Ideas & Solutions
- Parolees & Post Release Community Supervision
- AB 193
- Ideas and Solutions – The Long View

The Basics
LPS & Probate Conservatorship

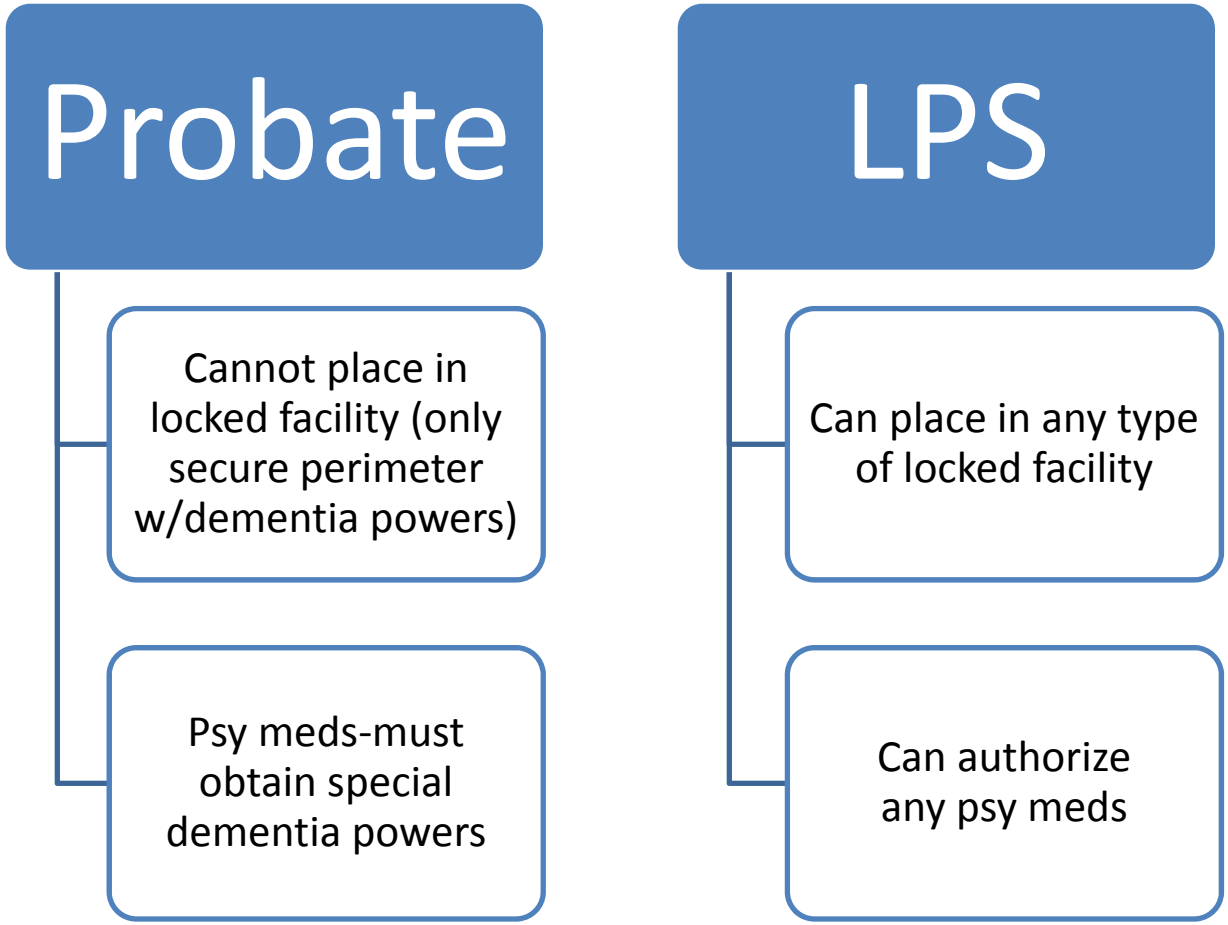
Major Differences LPS vs Probate



Major Differences LPS vs Probate



Major Differences LPS vs Probate



Major Differences LPS vs Probate

Probate

- Can obtain authority for blanket medical powers/consent
- No automatic termination process

LPS

- Does not have blanket medical powers (only condition specific)
- Automatically terminates @ one year, unless renewal petition is filed

Major Differences LPS vs Probate

Probate

- Referrals can come from any source: SNFs, acute hosp., banks, family, private attorneys, etc.
- Court can order the PG to file a petition
- Court can appoint the PG w/o notice & against PG's wishes

LPS

- Referrals can only come from designated Short-Doyle facility, VA Hosp. or State Hosp.
- Court **cannot** order the PC to file a petition (Karriker Decision-2007)
- However, under Kennebrew court can order PC to file a Murphy

Good To Know Basics

In probate cases PG must file a petition

- If there is an **imminent threat to the person's health or safety or the person's estate**.
- *Probate Code* §2920 (a) (1).

PG/PC staff are required to be certified through the CA PA/PG/PC Association

- Probate Code Sections 1456.2 (PC) and 2923 (PG)
- New staff have 4 years from the date of hire to obtain 40 training credits for certification
- Then every two years must have 20 credits of continuing education credits
- PG/PC employee must be a member of the CA PA/PC/PG Association in good standing to achieve and maintain certification.

Good To Know Basics

Must file an I&A within 90 days of appt.

Court Accountings (PC §2620)

- One year after appointment
- Every two years thereafter (bi-annually)
- Final accounting required after termination
- Court may waive requirement
- Court *must* issue a written notice to Cons. if Accounting is not filed timely (PC §2620.2.

Good To Know Basics

PG/PC must place the Conservatee in the least restrictive appropriate placement–PC §2352 (a) (b)

PG/PC is required to have a photograph of all Conservatees, and it must be updated annually–PC §2360

PG/PC's authority ends at the state line

Good To Know Basics

Probate Code §2900 & §2901

- Power unique to PG/PC
- Power to marshal real or personal property prior to appointment
- Power to restrain the transfer, encumbering or disposal of trust assets prior to appointment
- Purpose – to safeguard assets
- Assets must be subject to loss, injury, waste or misappropriation
- Must intend to file a petition (within 15 days)
- Written certificate needed
- Consult your County Counsel

Best Practices

Value of Standards & Certification

- Creates a PA/PC/PG professional identify
- Ensures PA/PG/PC staff receive specialized & on-going training
- Continuing education requirement is a hallmark of every quality profession
- Reduces variability in service delivery standards

Cons. of Person Best Practices

Face to face visits

- Frequency – minimum every 90 days
- Monthly collateral contacts
  - Phone calls to facility
  - Visit by another agency (BHS), family, friends

Monitoring care

- Physical/emotional health & well being - check
  - Hygiene
  - Weight (loss/gain)
  - Skin (decubitus
  - Podiatry needs/nails/hair
  - Participation is leisure activities/depression
  - Medication issues (side effects/compliance?)

Cons. of Person Best Practices

Monitoring care (continued)

- Living environment-regularly inspect:
  - Adequate food/beverages
  - Hazards (chemicals/structural/illegal drugs)
  - Cleanliness of facility (urine smell, garbage, etc.)
  - Client has clean & adequate clothing/linens

Cons. of Estate Best Practices

Conduct Thorough Investigations

- Look at every piece of paper
- Talk to every possible contact
- Search data bases for real property/family

Conduct Timely Cursory Searches

- For cash & other valuables
- Next-of-kin information
- Financial information (bank accounts, stocks/bonds, etc.)

Always Maintain "Two Person Rule" During

- Cursory searches
- Cleaning out safe deposit boxes

Cons. of Estate Best Practices

Marshal Assets ASAP

- Portable valuables (cash, jewelry, high end art or electronics)
- Bank accounts after permanent appointment

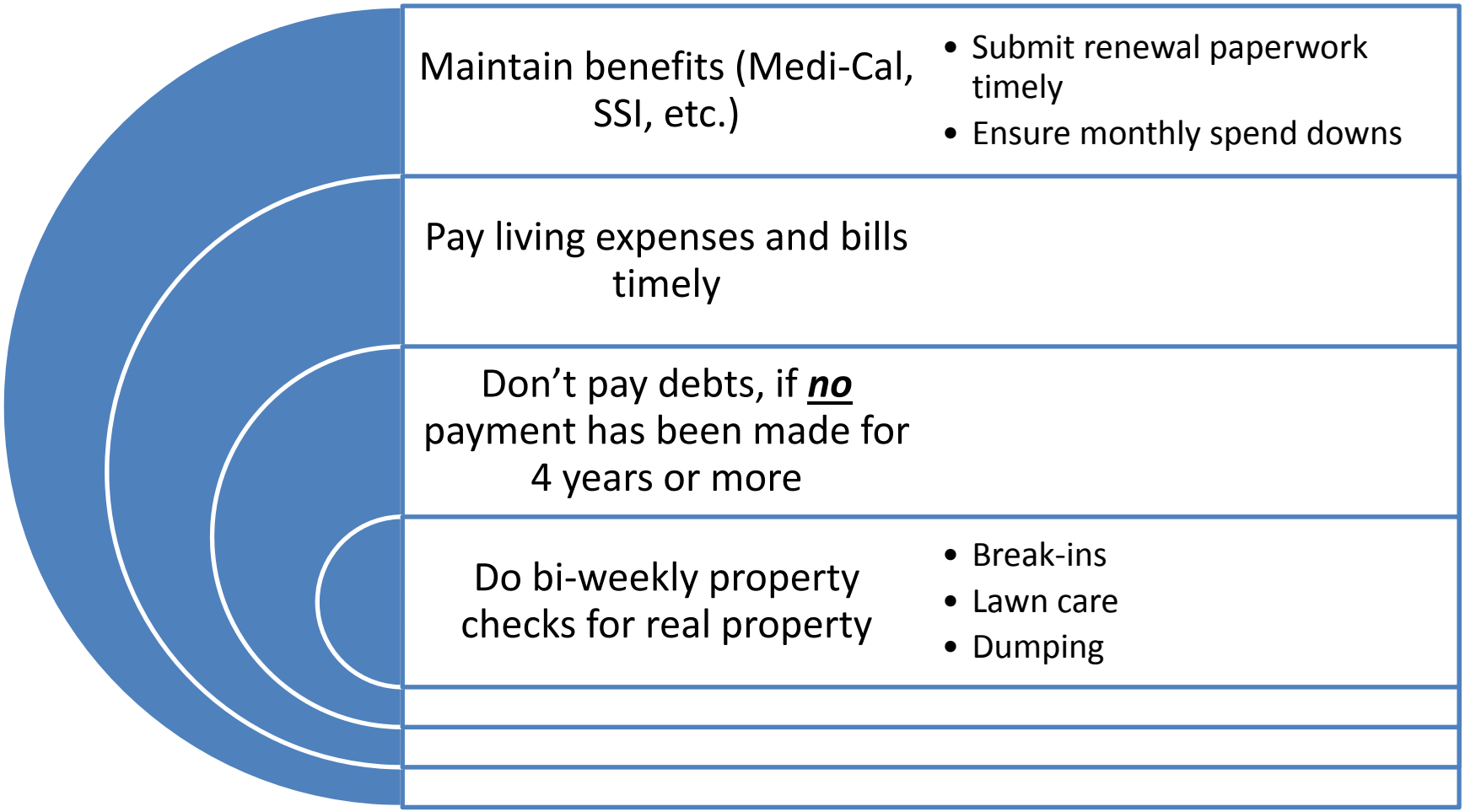
Access Mail

- Submit a change of address on a case by case basis
- Always once Cons. of Estate Appointment

Make an Estate Plan

- Determine long term financial needs (review stock portfolios)
- Need to sell personal or real property
- Safe storage of personal property

Cons. of Estate Best Practices



Management Best Practices
Critical Oversight Recommendations

Caseload sizes

- Size which allows PG/PC to:
  - Accurately & adequately support & protect conservatee
  - Allows for one visit each 90 days
  - Allows regular contact w/all service providers
  - Allow for a monthly review of the estate

Management Periodic Case Reviews

- Quarterly
- Random 5-10% of cases
- Check
  - Visits made timely
  - Case note documentation appropriate
  - Estate management (bills paid, income received, P&I sent, benefits renewed, etc.)

Management Best Practices
Critical Oversight Recommendations

Monitoring Fiscal & Estate Issues

- Real property insurance
- Warehouse/cars
- Monthly estate meetings w/Co. Co.
- Separation of duties
  - Vendor creation
  - Creation of payment request/authorization levels
  - Check printing/deposits
- Cash Control Procedures
  - Daily cash reconciliation
  - Monthly bank reconciliation

Management Best Practices
Critical Oversight Recommendations

Monitoring Legal/Court Issues

- Petitions filed timely
- I&As filed timely
- Court accountings correct & filed timely

Monitoring Referrals

- LPS deadline met
- Flow
  - Chart created and given to investigator
  - Priority petitions filed first

Trends

PUBLIC GUARDIAN IS THE SOLUTION

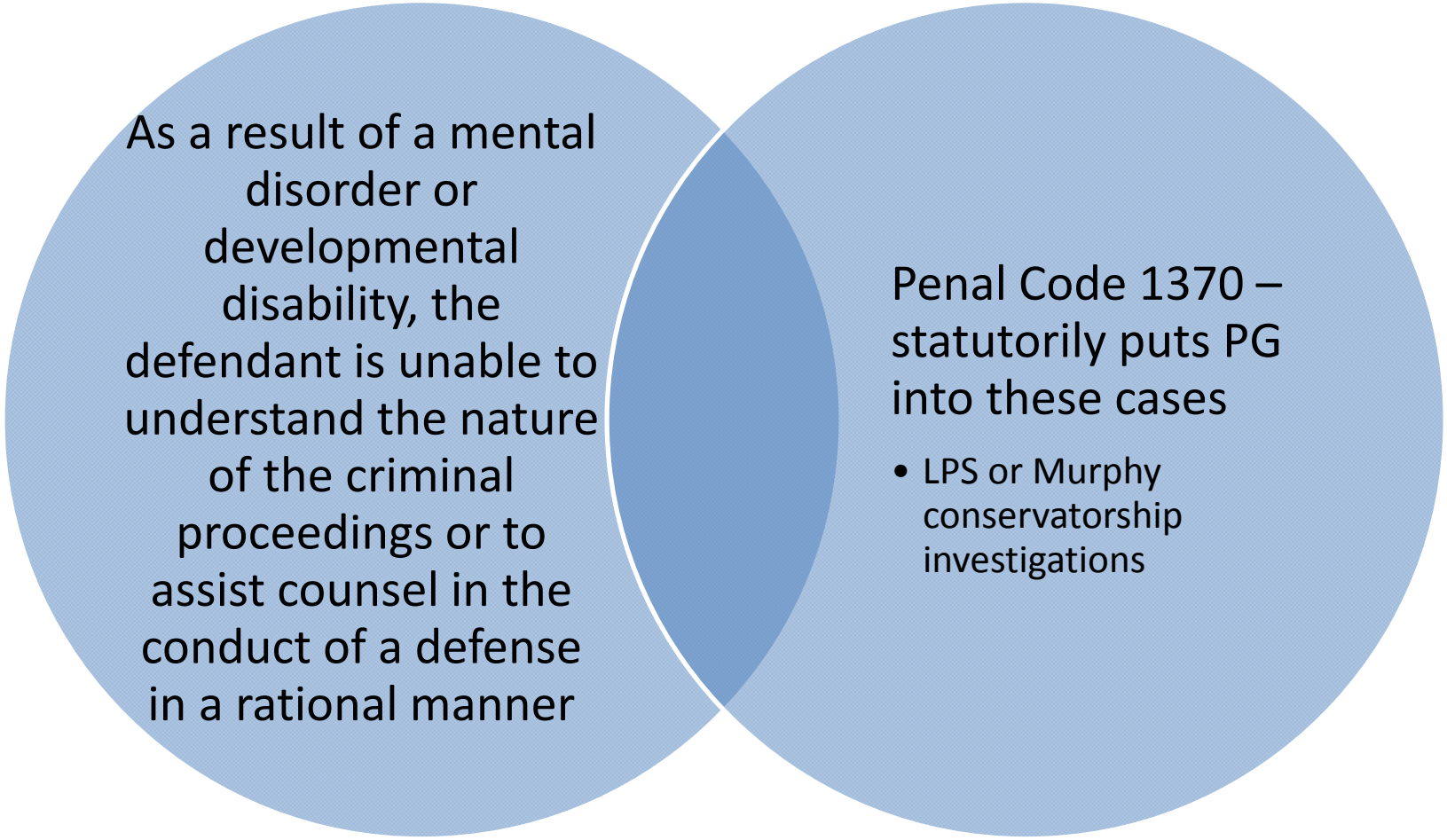
- Criminal Court Referrals
- Kennebrew Fallout
- Parolees and Post Release Supervision
- AB 193
  - AND SO MUCH MORE

Forensic/Criminal Court Referrals

Types of Forensic Cases

- Incompetent to Stand Trial (Penal Code 1370)
- Mentally Disordered Offenders (Penal Codes 2962-2972)
- Guilty But Not Guilty by Reason of Insanity (Penal Code 1026)
- Sexually Violent Predator (SVP)
- AB 109 – Public Safety Realignment

Incompetent to Stand Trial (IST)



IST Continued

Misdemeanor or Felony

- Declaration of Doubt
- Court ordered evaluations
- Court proceedings suspended
- Local treatment (jail or community) for MIST
  - 1 year maximum commitment
- State Hospital for FIST
  - 3 year maximum commitment

IST continued

First Report – 30 days or 90 days

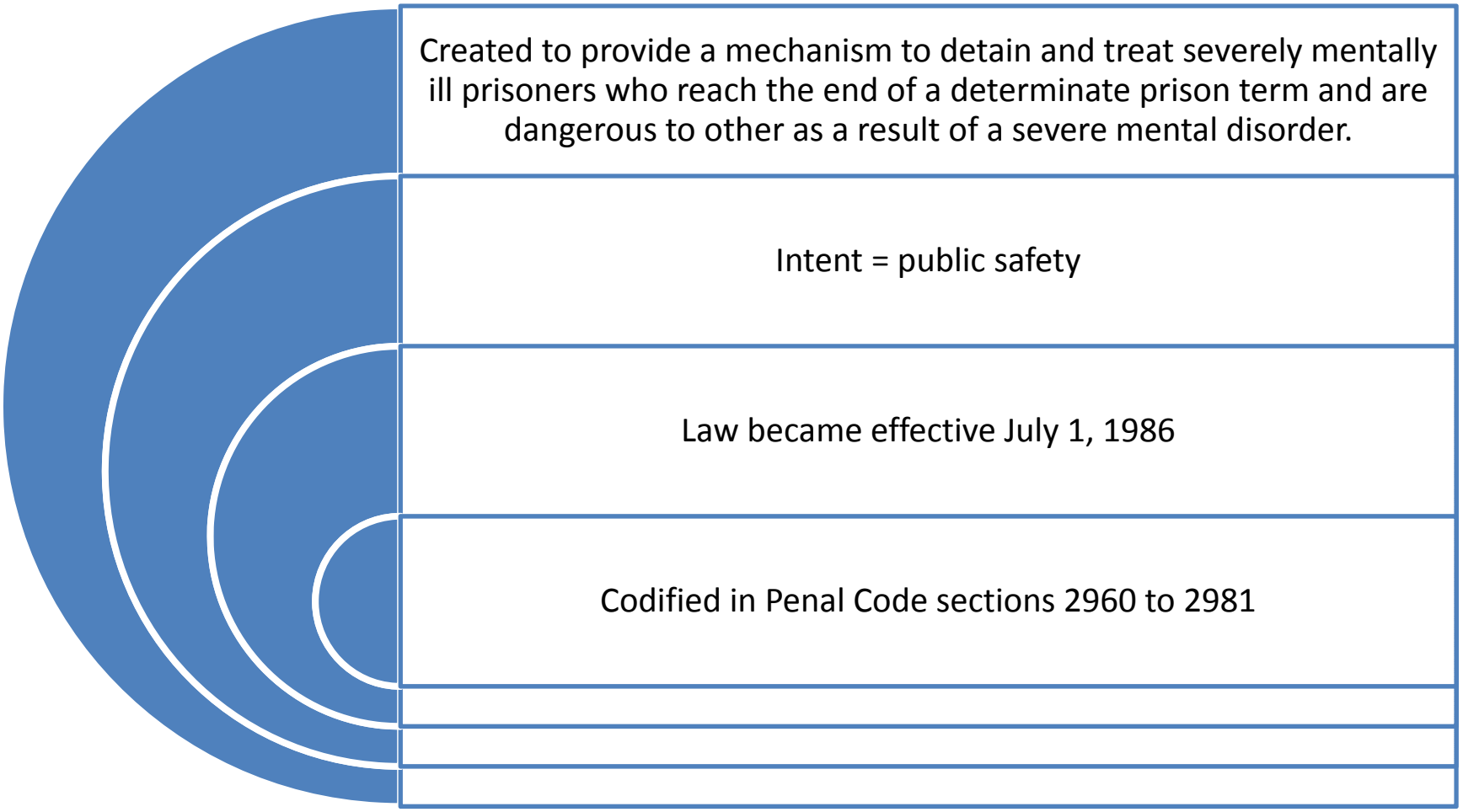
Can be declared "un-restorable" at any point

- Maximum commitment date irrelevant
- Point of referrals for PG?

Can restore and become incompetent multiple times

Can refuse medications

Mentally Disordered Offender (MDO)



MDOs continued

2 phase commitment process

- CDCR Psychiatrist certification and Parole Condition Imposed
- Treatment is Mandated Inpatient Until DSH certifies parolee can be treated outpatient
- Certification, Placement and Annual Reviews
- Conditional Release Program (CONREP) for outpatient treatment

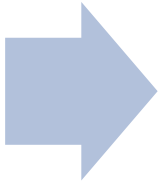
MDOs continued

Criteria for MDO Certification

- Severe mental disorder
- Used force or caused serious bodily injury in one of the commitment crimes
- Severe mental disorder was one of the causes or was an aggravating factor in the commission of the crime
- Severe mental disorder is not in remission or cannot be kept in remission without treatment
- Has been in treatment for the severe mental disorder for 90 days or more within the year prior to prisoners parole or release
- As a result of severe mental disorder – presents a substantial danger of physical harm to others

MDOs continued

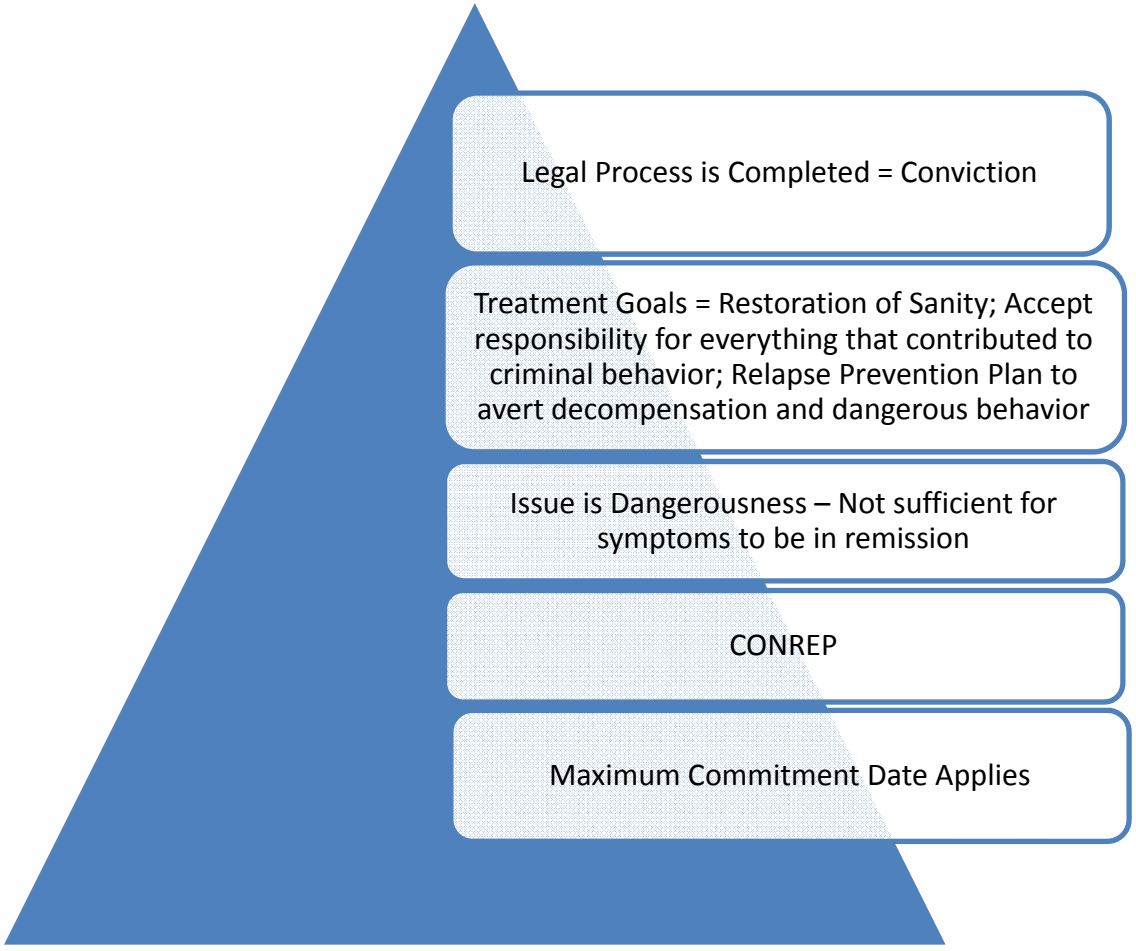
Annual review



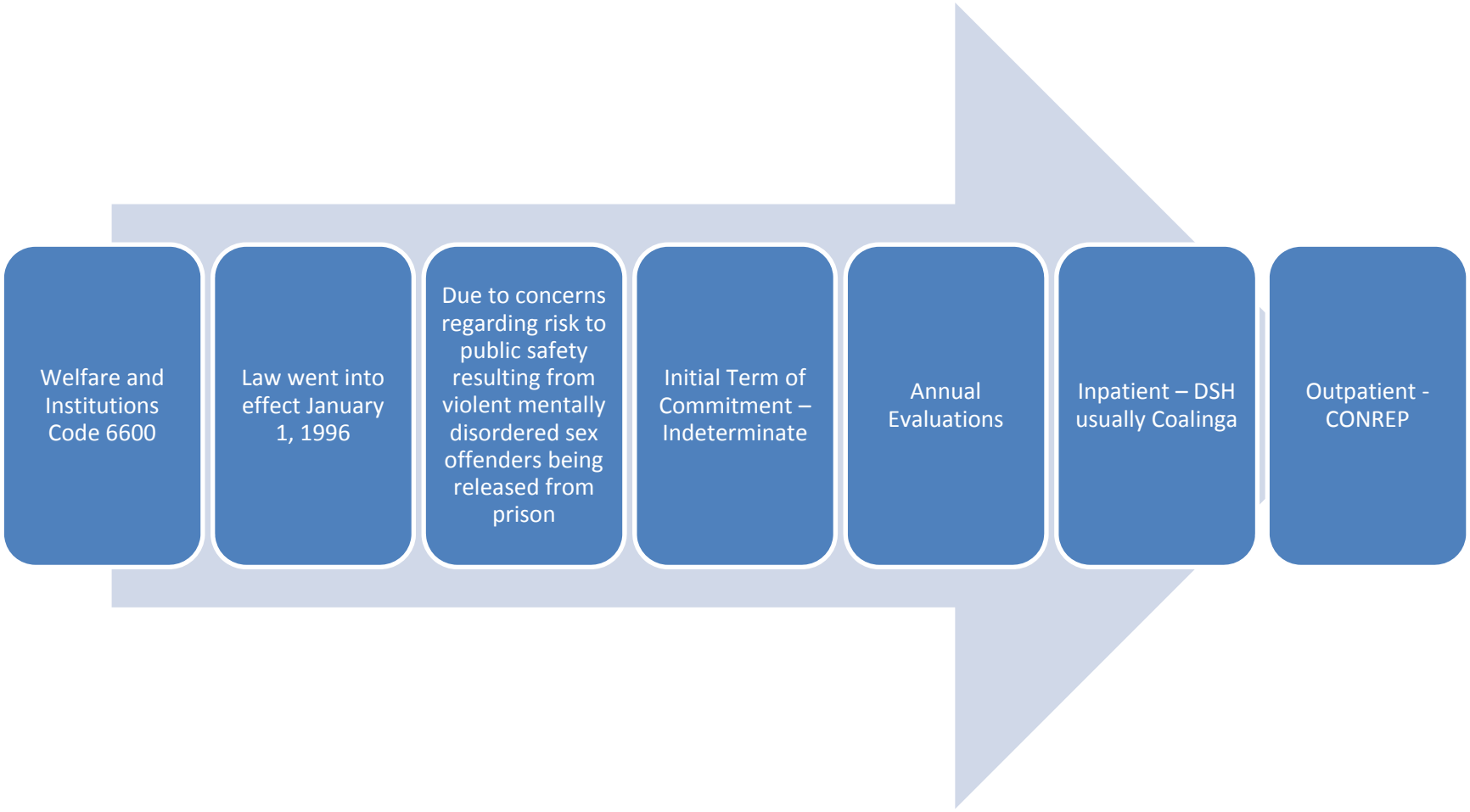
Recertification criteria

- Severe mental disorder
- Severe mental disorder is not in remission or cannot be kept in remission without treatment
- As a result of severe mental disorder – presents a substantial danger of physical harm to others
  - Lack of dangerousness – no petition by DA but referral to PG

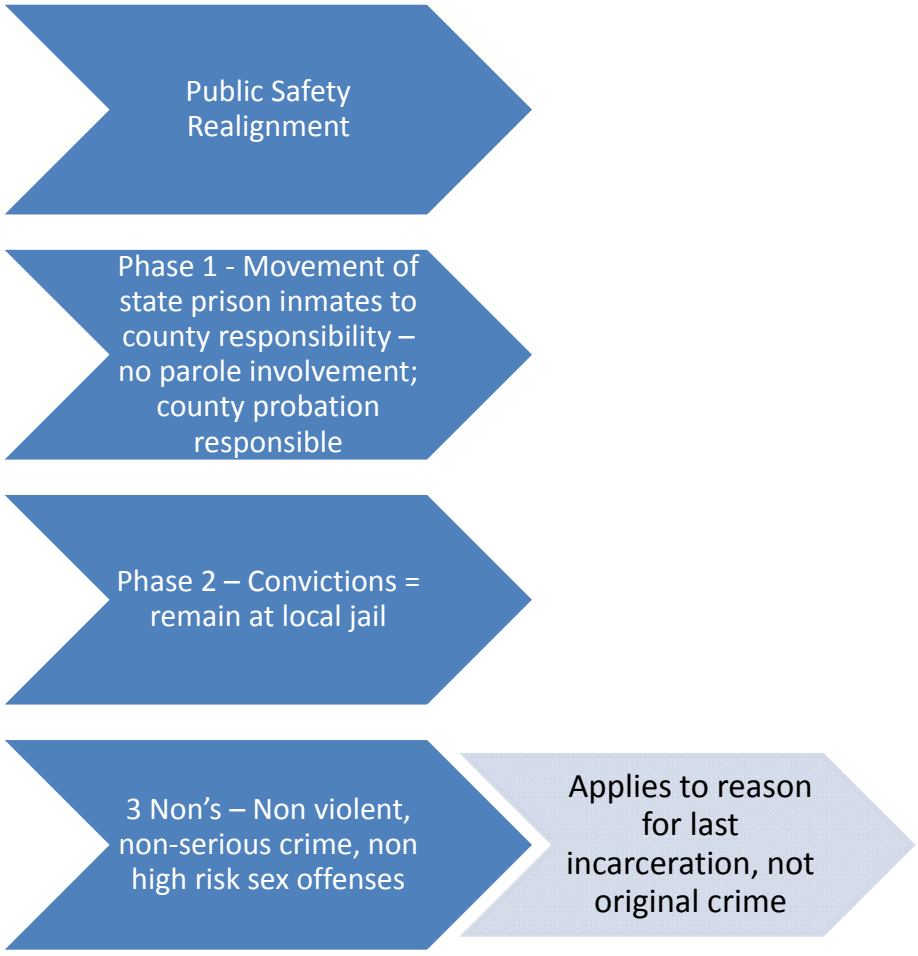
Not Guilty by Reason of Insanity (NGI)



Sexually Violent Predators (SVP)



AB 109


Public Safety Realignment
Phase 1 - Movement of state prison inmates to county responsibility – no parole involvement; county probation responsible
Phase 2 – Convictions = remain at local jail
3 Non's – Non violent, non-serious crime, non high risk sex offenses
Applies to reason for last incarceration, not original crime

AB 109 continued

LA Process

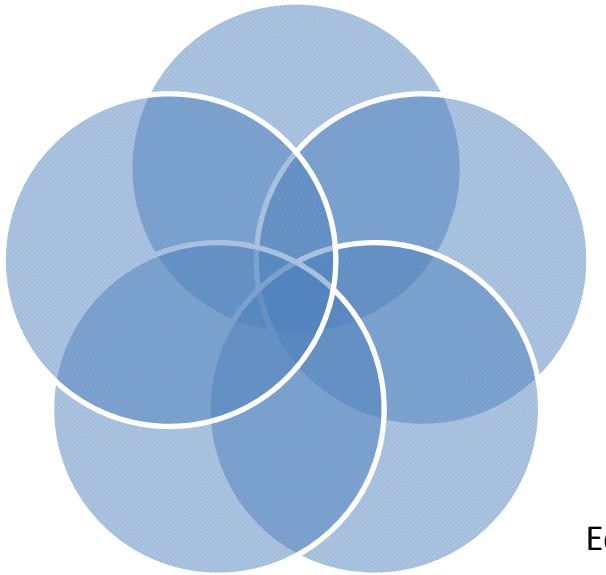
- Probation Hub (Probation, DMH and DPH)
  - Probation Conditions; Mental Health Assessment and Substance Abuse Assessment
- Failure with Conditions = Flash Incarceration
- Maximum Commitment = 180 days
- No return to prison
- Referrals from AB 109 court and from hospitals due to mental health assessments

Ideas and Solutions – Criminal Case Referrals?

Know the LAWS

Alternatives

- Regional Center/WIC 6500
- CONREP
- Probate Conservatorship



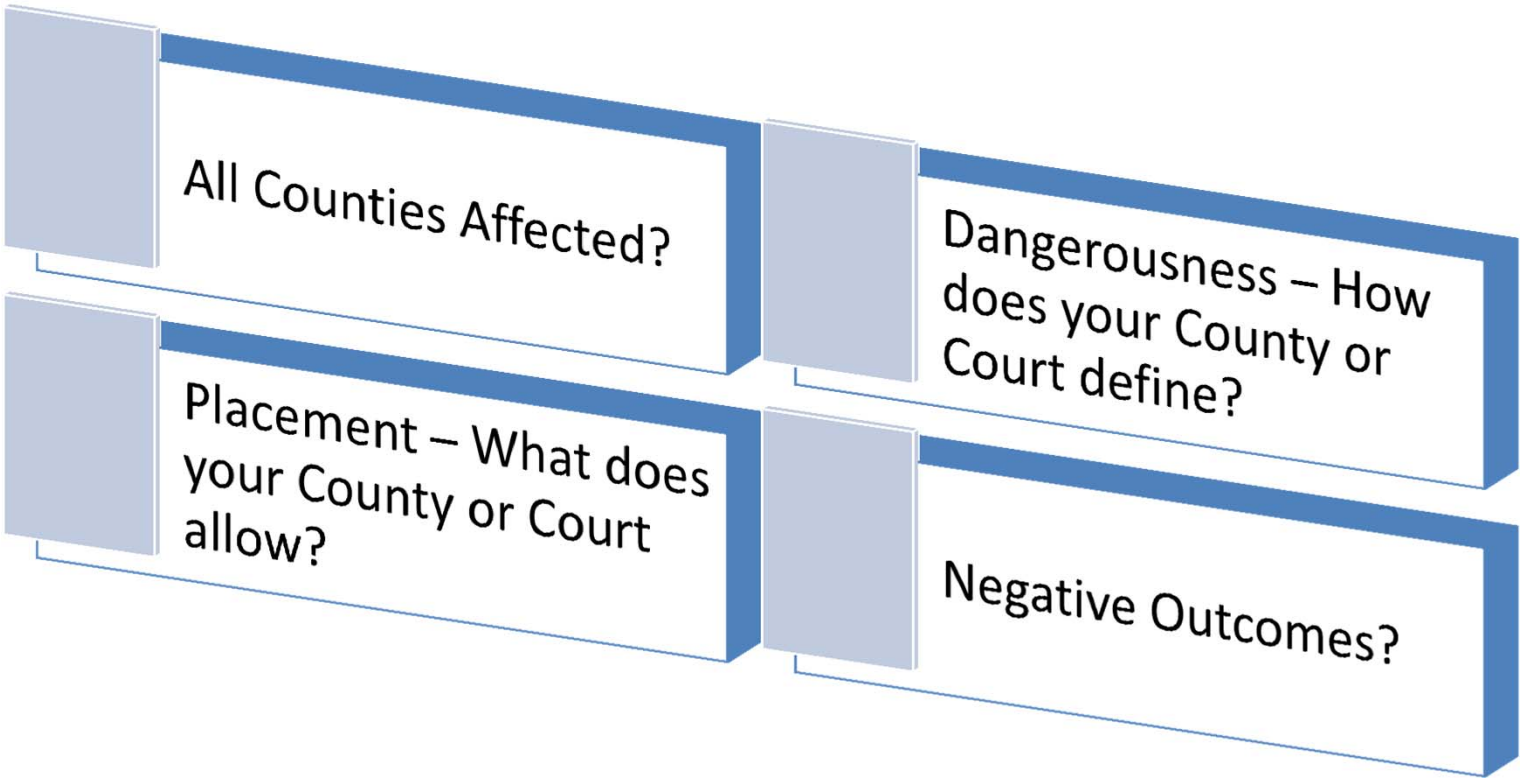
Communication with Justice Partners

Diversion

- Pre-Booking
- Mental Health Courts/Court Linkage
- Community Treatment for MISTs

Education of Justice Partners

Kennebrew Fallout



Kennebrew Ideas and Solutions

Know the LAW

- Elements for Murphy Exist?
- Discretion or Ministerial?

Motive for Murphy Order?

Dangerousness

- **Conservatorship of Hofferber , 28 Cal.3d 161**
- **September 15, 1980**
  - every judgment creating or renewing a conservatorship for an incompetent criminal defendant under section 5008, subdivision (h)(2) must reflect written findings that, by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others.
  - We have indicated that the initial determination of probable cause, coupled with the defendant's continuing incompetence, permits separate legislative concern and treatment. For several reasons, however, it cannot give rise to a permanent, conclusive presumption of continuing dangerousness.

Parolees and Post Release Community Supervision

SB 1412 (2014)

Adds Section 1370.02

- Parole or Community Supervision Violation
- Allows for a determination of Competency
- Court may, using the least restrictive option to meet the mental health needs of the defendant do the following:

Parolees and Post Release Community Supervision continued

- Modify terms and conditions of supervision to include mental health treatment
- Refer the matter to any local mental health court, reentry court or other collaborative justice court available for improving the mental health of the defendant
- Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings. PG shall investigate all available alternatives. The court shall order the matter to PG only if there are no other reasonable alternatives to establishment of conservatorship to meet mental health needs of the defendant.

Challenging Legislation

AB 193

Proposal to allow Probate Court to order PG to investigate LPS conservatorships

- Probate conservatorship petition
- Medical Evidence of mental health disorder sufficient to trigger court order
- Circumvents involuntary treatment process (5150, 5250, etc.)
- Issues: Staffing, Placement, Funding, Legal Challenges

Ideas and Solutions
Longer View

- Representation at State Level
  - Executive Director
  - County Involvement
- Legislation Advocacy
- Legislation Proposals/Changes
- Coordination with CBHDA, CWDA, CSAC
- Government Code Change
- Funding Source Development

Ideas and Solutions
Longer View Continued

Local Ideas

- Spreading the Word
- Collaboration
- CoCo net; Email Digest

Contracts

- Multi County Consortium?
- State Hospital Capacity?

Other?