Case No. C081673

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

LEE KELLY CLARK, *Defendant and Respondent,*

SHASTA COUNTY PUBLIC GUARDIAN, *Objector and Appellant.*

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE CALIFORNIA ASSOCIATION OF PUBLIC ADMINISTRATORS, PUBLIC GUARDIANS, AND PUBLIC CONSERVATORS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS BRIEF IN SUPPORT OF APPELLANT SHASTA COUNTY PUBLIC GUARDIAN

On Appeal from Orders Disqualifying Shasta County Counsel's Office and Substituting Shasta County District Attorney's Office in its Place to Represent the Shasta County Public Guardian
Case Nos. LPSQ15-3664, 14F2461
The Honorable Daniel E. Flynn

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INTRODUCTION

This Court is confronted with a problem that, with varying factual circumstances, occurs throughout the State. A criminal defendant found incompetent to stand trial is returned to the court from the state hospital on a finding that the defendant is not likely to regain competence. Often such persons have potentially violent tendencies that understandably make courts reluctant to release the person back into the public. A so-called "Murphy" conservatorship may be available, but since conservatorships are a drastic restriction on the person's liberty interests, such conservatorships are only available when strict statutory requirements are met. And even then, these conservatorships are only a viable option if there is an appropriate placement available and there is funding to pay for that placement.

As such, the reality is that this population of mentally incompetent criminal defendants often falls within a gap of our criminal justice and mental health systems. This gap can occur because of certain procedural issues during their criminal proceedings that do not properly address their constitutional liberty interests, or it can occur because there is simply no available placement or funding source designated to provide the appropriate level of care. Though this population is typically a very small percentage of our criminal defendants or conservatees, their unique mental health and criminal backgrounds make them particularly problematic and expensive to address.

Given this difficult problem, it is understandably attractive to the trial courts to "solve" the question of what to do with the defendant before them by simply ordering the Public Guardian to file a conservatorship petition. But that court order cannot overlook the protections afforded to the proposed conservatee before his liberty interests are infringed. That court order cannot usurp the independent authority of the Public Guardian to decide whether to file a petition, any more than the court could order the District Attorney to file criminal charges. And that court order certainly does not create a placement that is appropriate for the person's unique mental health issues and criminal tendencies, nor does it create a funding source to pay for that type of expensive placement if one is available.

The District Attorney's brief in this case assumes that a Public Guardian is shirking his or her duties in failing to file a petition. The Public Guardian, however, must work within the applicable statutory scheme and the resources that are available in our State. It is absolutely appropriate, therefore, for the Public Guardian to consider whether the statutory scheme has been satisfied, and to also consider issues of funding and placement in investigating whether to file a petition to establish a conservatorship. Receiving legal advice on these issues by the attorney designated by the Board of Supervisors to serve as counsel to the Public Guardian is likewise appropriate.

Addressing the needs of incompetent-to-stand-trial defendants in a manner that protects the public is an important statewide issue that is worthy of a significant undertaking by the applicable State administrative agencies and the Legislature. It will require a comprehensive approach and sufficient funding. But the problem is not solved by individual trial court orders that violate separation of powers and the statutory scheme that governs conservatorships. (*See, e.g., Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 892 ["The quandary described in the complaint is lamentable, but the remedy lies squarely with the Legislature, not the judiciary."].)

The trial court's order in this case directing the Public Guardian to file a conservatorship petition, and even further disqualifying County Counsel for raising appropriate objections to the court's various orders, must be reversed.

LEGAL ARGUMENT

I. The Separation of Powers Doctrine Requires that the Discretion as to Whether to File a Conservatorship Petition Rests With the Public Guardian and Prevents the Court from Demanding "Prosecution" of the Petition by the County Counsel.

California Constitution Article III, section 1 provides:

> The powers of the government of the State of California shall be divided into three separate departments -- the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in

> this Constitution expressly directed or permitted.
> (Cal. Const., art. III, § 1.)

The Public Guardian is part of the executive branch of government. As stated by the Court in *Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, "[h]ere, as in the case of a criminal defendant, it is appropriate that when the power of the state is invoked to deprive an individual of her freedom, the decision to commence judicial proceedings should be left to a public officer." Moreover, exercise of an executive officer's discretion cannot be compelled by writ of mandate. As stated in *People v. Cimarusti* (1978) 81 Cal.App.3d 314, 322, "[i]t is well established that where a prosecutor is vested with discretionary power in the investigation and prosecution of charges a court cannot control this discretionary power even by mandamus." That principle extends to the decision to institute civil proceedings, as the decision is "analogous to a criminal proceeding with respect to the division of power between the executive and judicial branches of the government." (*Id*. at p. 323.) In both civil and criminal proceedings, "the charging function [lies] within the exclusive control of the executive." (*Ibid*.)

One of the basic philosophies behind the doctrine of separation of powers is that both the executive and judicial branches must concur before acting to strip someone of their liberty. The doctrine's "primary purpose is to prevent the combination, in the hands of a single person or group, of the basic or fundamental powers of government." (*People v. Superior Court*

(Romero)(1996) 13 Cal.4th 497, 509.) Indeed, liberty interests are protected by the checks and balance provided by the separation of powers. (*Obrien v. Jones* (2002) 23 Cal.4th 40, 65; *Steen v. Appellate Division of the Superior Court* (2014) 59 Cal.4th 1045, 1060.)

In this case, the representative of the executive branch, the Public Guardian, followed the sequential prerequisites of the LPS Act and determined that a conservatorship is not appropriate. By ordering the Public Guardian to file a conservatorship petition that the court itself would then adjudicate, the lower court turned these protections on their head. This violation of the separation of powers doctrine must be rejected.

Another important reason the decision on whether to file a conservatorship petition should be left to the Public Guardian's discretion is that the Public Guardian is in the best position to understand how to allocate finite resources. The court does not have before it the full budgetary picture necessary to weigh the various economic and public safety considerations. The Public Guardian would know, for example, that the resources needed to place one particular conservatee could fund placements for ten others who also pose safety risks to the community. (See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 134 [exercise of executive authority (prosecutorial authority in this case) involving complex considerations necessary for effective and efficient administration not subject to judicial supervision].) Contrary to Respondent People's assertions, it is not only appropriate, but a fundamental role of the executive

branch to make those types of funding allocation decisions. By contrast, the court is limited to the record before it in a given case, and therefore can only base its decision on that particular conservatee. In that situation, it may be appealing to order the conservatorship no matter the cost. But such order does not address the totality of circumstances, and necessarily means that other needs will go unfunded. The courts are not well suited to make such determinations, and as such the separation of powers doctrine precludes the judiciary from exercising executive branch functions.

II. Penal Code Section 1370(C)(2)'S Phrase "To Initiate Conservatorship Proceedings . . ." Refers to the Entire Proceedings Described In Chapter 3 (Commencing With Section 5350) of the Welfare and Institutions Code, Including an Investigation and Recommendation for *or Against* a Conservatorship.

One of the most basic rules of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*DuBois v. Workers' Comp Appeals Bd*. (1993) 5 Cal.4th 382, 387-388.) Statutes should also be read in context of the statutory framework in which they appear. (*Smith v. Workers' Comp Appeals Bd*. (2002) 96 Cal.App.4th 117, 123 ["In examining the language of the statute, we must consider 'the context of the statute . . . and the statutory scheme of which it is a part.'"].)

Applying these basic rules of statutory construction to Penal Code section 1370(c)(2), the term "proceedings" was used by the Legislature to include the entire conservatorship process, which starts with an

investigation by an individual qualified to make such an assessment as to whether a conservatorship for a particular individual is warranted. This conclusion is reached by reviewing both the "plain meaning" of the statute, the statutory context in which it was enacted, and by the fact that harmony between both the LPS Act and Penal Code section 1370(c)(2) can be achieved by such an interpretation.

Penal Code section 1370(c)(2) reads in pertinent part:

> Whenever any defendant is returned to the court pursuant to paragraph (1) or (2) of subdivision (b) or paragraph (1) of this subdivision and it appears to the court that the defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate conservatorship proceedings for the defendant *pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.* (emphasis added)

Notably, the statute does not state that the conservatorship "investigator" is to "file a petition" for conservatorship. Rather, the statute merely states that the investigator is to "initiate conservatorship proceedings for the defendant *pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code."* The phrase "pursuant to Chapter 3" must be given significance, as it contains many important provisions relating to the duties of Public Guardians.

Chapter 3 includes Welfare and Institutions Code sections 5350 through section 5371. These sections mandate Public Guardians to provide conservatorship investigations (Welf. & Inst. Code, § 5350, subd.(f)), recommendations for or against conservatorships (Welf. & Inst. Code, § 5354), and petitions for a conservatorship only if the Public Guardian "concurs with the recommendation" (Welf. & Inst. Code, § 5352). Penal Code section 1370(c)(2) specifically refers to Welfare and Institutions Code section 5350 *et seq*., and states that the proceedings are to be initiated pursuant to the sequential prerequisites of these sections.

III. This Court Should Adopt the Line of Cases Consistent With *Karriker* Finding that the Entirety of Section 5350 *Et Seq*. Must be Complied With, Including an Investigation and Concurrence By the Public Guardian, Prior to the Initiation of any Conservatorship Petition.

As stated in the County's Opening Brief and Defendant and Respondent Clark's Brief, *People v. Karriker* (2007) 149 Cal.App.4th 763, is on point and properly decided. The lower court's order is inconsistent with established principles of statutory interpretation, setting Penal Code section 1370 in needless and improper tension with the remainder of the statutory scheme, creating absurd results, and violating the separation of powers requirement in article III, section 1 of the California Constitution.

In addition to *Karriker*, the case of *Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, is particularly illustrative. In *Kaplan*, a husband sought to petition the Court to have his wife placed on an LPS conservatorship, relying on certain provisions of the Probate Code. The

appellate court found that the husband had no right to file such a petition since, under the LPS Act, only the Public Guardian had such authority. The court reasoned that " . . . the Probate Code itself, which petitioner relies on to justify his assertion that he may prosecute an LPS proceeding, *refers him back to LPS* in order to exercise the exact authority he seeks." (*Id.* at p. 1359 (emphasis added).) And since the LPS Act provided that only the Public Guardian could file for a conservatorship, the Court held the husband's petition was invalid. (*Ibid.*)

Here, just as in *Kaplan,* the fact that the relevant statute refers back to the LPS Act is significant. More specifically, the fact that Penal Code section 1370(c)(2) refers back to the sequential provisions of Chapter 3 (commencing with Welfare and Institutions Code section 5350 *et seq*.) is significant. Each of the provisions of Chapter 3 must be followed—including the ones providing for the Public Guardian's sole duty to investigate and make recommendations with respect to conservatorships. As stated by the court in *In re Martha P.* (2004) 117 Cal.App.4th 857, it is the Public Guardian who is the "public official that has the duty to investigate the need" for an LPS conservatorship and has "the sole discretion to file a petition in light of that investigation" as well as the "discretion to dismiss or withdraw a petition." (*Id.* at p. 868.)

This court recognized the importance of the prerequisites for filing a petition by rejecting a conservatorship in *Conservatorship of Christopher B.* (2015) 240 Cal.App.4th 809, because a required element was missing—a

pending indictment. This court has also recognized that a criminal court's authority in these circumstances is limited. (*People v. Quiroz* (2016) 244 Cal.App.4th 1371.) In *Quiroz*, after a Public Guardian declined to file a conservatorship petition, the criminal court convened a competency hearing for a defendant who had been involuntarily confined for three years due to incompetence to stand trial and was not likely to regain competency. This court concluded that the competency hearing exceeded the criminal court's jurisdiction. (*Id.* at p. 1377.)

There is not support for the position that by enacting Penal Code section 1370(c)(2), the Legislature intended to dispense with all of the sequential prerequisites to filing a petition for an LPS conservatorship expressly set forth in Welfare and Institutions Code section 5350 *et seq*., including the medical evaluation, investigation, and subsequent exercise of discretion by the Public Guardian.

The more recent case of *County of Los Angeles v. Superior Court* (2013) 222 Cal.App.4th 434 ("*Kennebrew*") does not dictate a contrary result. In that case, the Second District interpreted Penal Code section 1370 (c)(2) to allow a court to direct a public guardian to file a petition. (*Kennebrew*, *supra*, 222 Cal.App.4th at pp. 453-454.) However, *Kennebrew* is distinguishable on several grounds. First, the *Kennebrew* case involved a statutory interpretation issue. The Public Guardian in that case declined to file a Murphy conservatorship on the grounds that dementia is not a mental disorder within the meaning of the applicable

statute. (*Id.* at p. 445.) The *Kennebrew* court interpreted Welfare and Institution Code section 5008 to include dementia as a mental disorder. (*Ibid.*) Unlike the present case, the court order in *Kennebrew* involves a statutory interpretation question that the court was well within its purview to make. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311 ["Questions of statutory interpretation are, of course, pure matters of law upon which we may exercise our independent judgment."].)

Second, it is uncontested that the proposed conservatee in *Kennebrew* was charged by information with dangerous felonies (murder, assault with a deadly weapon, and attempted murder.) (*Kennebrew, supra*, 222 Cal.App.4th at p. 439.) As appellant makes clear, the proposed conservatee here was not charged by a valid information, nor was it clear that the crimes with which he was charged met the statutory definition for a Murphy Conservatorhship.[1] (Appellant's Opening Br., pp. 53-57.) Respondent People make no effort to establish that a valid information – an essential component of a Murphy conservatorship – existed in this case. Respondent instead concedes that at the time the proposed conservatee was returned following a determination that he was not likely to regain

[1] A Murphy Conservatorship requires "a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person." As noted on page 58 of Appellant's Opening Brief, the proposed conservatee here was charged under Penal Code section 273.5 (infliction of injury on present or former spouse, present or former cohabitant, present or former fiance/fiancee, present or former dating partner, or parent of child). Penal Code section 667.5, subdivision (c) lists crimes that qualify for a violent felony enhancement, and Penal Code section 273.5 is not listed as a violent felony.

competency, there was no information or indictment. Without reference to statute or case law to support the assertion, Respondent merely goes on to state that given the lack of information or indictment, the court held a preliminary hearing and "by stipulation, the complaint was deemed the information." (Respondent Brief, p. 6.) That process does not comply with the statutory scheme put in place to protect the liberty interest of the proposed conservatee. The Public Guardian and the County Counsel therefore appropriately declined to file a petition under these circumstances.

Finally, to the extent *Kennebrew* may apply in this case, this Court should reject the Second District's interpretation of Penal Code section 1370 (c)(2) to allow a court to direct a Public Guardian to file a petition. The *Kennebrew* interpretation interferes with the duty and authority of Public Guardians across the State. "Ordering the Conservator to file a petition and attempt to prove its allegations when the Conservator in good conscience does not believe that the allegations are merited would . . . create an irreconcilable ethical dilemma for more than one public official. Moreover, permitting the court to act both as prosecutor and potentially as the trier of fact would be inconsistent with the statutory scheme of protection that is built into the LPS Act." (*Karriker*, supra, 149 Cal.App.4th at p. 786.)

The statutory scheme reflects a balancing of the State's concern with public safety and the rights of an incompetent criminal defendant who has yet to be convicted of a crime. (See *People v. Skeirik* (1991) 229

Cal.App.3d 444, 456.) A Murphy conservatorship is part of a civil commitment scheme; it is not a continuation of the criminal proceedings. (See *Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 432 [LPS commitment is not punishment in design or purpose].) Here, by ignoring the statutory scheme as designed, the criminal court has also ignored the constitutional protections and other policy provisions underlying Murphy conservatorships.

IV. The Trial Court Erred in Ordering The Public Guardian to File the Petition in Violation of California Code of Civil Procedure Section 128.7.

California Code of Civil Procedure section 128.7 provides in pertinent part that:

> (a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record . . .or . . . the party. . . .
>
> (b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition . . . an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: . . .
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law . . . [and]
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support . . . .

By filing a petition for conservatorship, the Public Guardian, and in the case of most counties, the County Counsel, represents to the Court that the proposed conservatee meets the requirements of a LPS Act conservatorship. However, just because a court may order the Public Guardian to "initiate conservatorship proceedings" does not necessarily mean the requirements are met. The definition for gravely disabled for Murphy Conservatorships under Welfare and Institutions Code section 5008(h)(1)(B) is:

> A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:
>
> (i) The indictment or information pending against the person at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.
>
> (ii) The indictment or information has not been dismissed.
>
> (iii) As a result of mental health disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.

Moreover, the Supreme Court has added an additional fourth requirement that the judgment creating or renewing a conservatorship for an incompetent criminal defendant under Welfare and Institutions Code section 5008(h)(1)(B) 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." (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177, *citing* Penal Code § 1026.5, subd. (b)(1).) The "beyond a reasonable doubt" standard of proof applies to showing that a mental condition is dangerous. (*Id.* at p. 178.)

Therefore, the Public Guardian would have to allege all of the above, or at least believe that the conditions for establishment of a conservatorship are present, in order to comply with Code of Civil Procedure section 128.7. Establishing conservatorships that the Public Guardian believes are unsupported is contrary to the statutory scheme that states once an LPS conservatorship is established, and a progress review reveals to the Public Guardian that the conservatee is no longer gravely disabled, the Public Guardian must report that fact to the Court and the conservatorship "shall be terminated." (Welf. & Inst. Code, § 5352.6.)

In light of the burden of proof and the ethical duties imposed by both Code of Civil Procedure section 128.7 and Welfare and Institutions Code section 5352.6, a court cannot order a Public Guardian to file a petition for conservatorship. A court is limited to ordering an investigation. (*Karriker, supra*, 149 Cal.App.4th at pp. 782-783 ["initiate proceedings" under Penal Code section 1370 means only an investigation be conducted, not that a conservatorship petition be filed].)

V. The Lower Court's Interpretation of the Statutory Scheme Leads to Absurd Results.

In addition to the ethical issues, the criminal court's ruling creates

practical absurdities. The statutory scheme as designed supports the distinct roles of the Public Guardian, County Counsel, the District Attorney, and the courts. But the lower court here blurred those line in unsupportable ways, creating absurdities in this case—the unwarranted disqualification of the Public Guardian's counsel and the unprecedented appointment of the District Attorney. By disregarding the statutory requirements, the court created the dilemma of who would defend a petition that was legally deficient and was only filed under a court order. The County Counsel, as legal advisor for the Public Guardian, could not ethically defend the petition and that created the very unusual situation of the County Counsel being disqualified in favor of the District Attorney.

The criminal court's interpretation sets the stage for other absurd results that are not raised by the specific facts of this case. For example, what if the proposed conservatee voluntarily accepts meaningful treatment and also sought to be placed on a conservatorship, despite that fact that no case in chief was presented by the Public Guardian? (Cf. *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092-93 [no conservatorship is permitted where the patient voluntarily accepts treatment]; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 ["a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof"].) If the trial proceeded nonetheless, the Public Guardian could then exercise its discretion under the holding of the *Martha P.* case and withdraw the petition. (See *In re Martha P., supra*, at 872 [when the Public

Guardian withdraws an LPS petition, the trial court only retains jurisdiction to issue an order terminating the proceedings].) Similarly, Murphy conservatorships are one year in duration, and the Public Guardian must petition each year to renew the conservatorship. (Welf. & Instit. Code, §§ 5350, 5361.) If the lower court order is affirmed, is the Public Guardian also required to refile the petition the next year? Must the Public Guardian defend the matter if the conservatee appeals? At what point in time does discretion re-vest in the Public Guardian? These questions reveal the absurdities of the trial court requiring the exercise of discretion in a manner contrary to the decision of the Public Guardian. The legislative scheme is simply not designed for the type of order issued by the lower court, and it must be reversed.

CONCLUSION

CSAC and CAPCPGPA respectfully ask this court to reject the criminal court's order disqualifying the Shasta County Counsel and further, ask this court to provide guidance to the lower court on how to proceed in accordance with the statutory requirements governing Murphy conservatorships. This court should reject the absurd result that has been created by the criminal court's interpretation of the LPS statutory scheme. Under the criminal court's order, county officials are being asked to act in a manner that is in conflict with their legal and ethical obligations. For all the foregoing reasons, CSAC and CAPCPGPA respectfully request that the

court reverse the disqualification order and provide guidance as to the nature and scope of the Public Guardian's discretion, both to petition and prosecute Murphy conservatorship cases.

Dated: May 24, 2017

Respectfully submitted,

/s/

By _____
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California State Association of Counties and California Association of Public Administrators, Public Guardians, and Public Conservators

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 4,499 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of May, 2017 in Sacramento, California.

Respectfully submitted,

/s/

By: _____

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