

Memorandum 89-97

Subject: Study L-3029 - Court-Authorized Medical Treatment

The Commission's *Tentative Recommendation Relating to Miscellaneous Probate Code Revisions* includes a proposal to expand the power of the court to authorize medical treatment of a threat to a person's mental health. We have prepared this proposal in the form of a separate recommendation which is attached.

The tentative recommendation was distributed to our list of interested persons and organizations for review and comment. We received only favorable comments on this portion of the tentative recommendation. However, we received two communications suggesting the need for revision of the proposed legislation. One is a letter from Grace Tam, Deputy County Counsel, Alameda County, which is attached as Exhibit 1. The other communication consists of unsigned revisions written on a copy of the relevant pages of the tentative recommendation received from the firm of Fulbright Jaworski & Reavis McGrath; the substance of these notes is set out below, but not reproduced.

Both writers are concerned with the relation of the proposal to the restrictions involved in involuntary placement under the Lanterman-Petris-Short Act (Welf. & Inst. Code § 5000 *et seq.*). Probate Code Sections 2356(a) and 3211(a) provide limitations on the use of the Probate Code provisions insofar as mental health treatment is concerned:

2356. (a) No ward or conservatee shall be placed in a mental health facility under this division against the will of the ward or conservatee. Involuntary civil mental health treatment for a ward or conservatee shall be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

3211. (a) No person shall be placed in a mental health treatment facility under the provisions of this part.

The notes from Fulbright Jaworski & Reavis McGrath suggest revising Sections 2357 and 3208 to make clear that they apply notwithstanding Sections 2356 and 3211. This would resolve any conflict that might be thought to exist between the Probate Code provisions and LPS. However, we prefer to deal with the potential conflict more directly.

Ms. Tam suggests that the meaning of "involuntary civil mental health treatment" in Section 2356(a) should be clarified. Note that the first sentence of Section 2356(a) refers to involuntary "placement" whereas the second refers to involuntary civil mental health "treatment." Ms. Tam writes that the reference to treatment is interpreted by some to mean any involuntary mental health treatment, and by others to mean placement in a mental health facility for treatment. If the restriction on the application of the procedure in Section 2357 is read to apply to all involuntary mental health treatment, Ms. Tam points out that an anomaly results whereby wards and conservatees who do not meet the stringent LPS standards would not be treatable. The staff agrees with Ms. Tam and proposes to revise Section 2356(a) to make clear that LPS does not apply where there is not an issue of involuntary placement.

In her letter, Ms. Tam also refers to the *Riese* case, a class action in which it was held that involuntarily committed mental patients have the right to refuse treatment absent a judicial determination of incompetence. See *Riese v. St. Mary's Hospital & Medical Center*, 209 Cal. App. 3d 1303 (1987). This case supports the position that the type of conservatorship (whether LPS or Probate Code) is irrelevant to the issue of capacity to consent. Thus the issue of capacity to give informed consent will be present in both types of proceedings and the person is protected to the same degree. The Probate Code sections already provide for a judicial determination of whether the person has the capacity to give informed consent. See Prob. Code §§ 2354(a), 2355, 2357(b), 3201, 3208.

The staff recommends that the Commission approve the attached recommendation for printing and submission to the 1990 Legislature.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel



C O U N T Y C O U N S E L

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COUNTY COUNSEL

September 26, 1989

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Re: Tentative Recommendation of the California Law Revision Commission,
Dated September, 1989, Relating to Miscellaneous Probate Code
Revisions

Dear Kathleen:

I have the following comments on the tentative recommendation:

1. The titles of Probate Code §§ 2901, 7603 should be changed to reflect the deletion of "County Recorder" in the body of each section.
2. Probate Code § 2333(e) should be retained for Probate law to be consistent with general civil law on tolling. The recommended change is unwarranted because conservatorships are in fact different from decedent's estates.
3. In light of the Riese case (on LPS conservatees' capacity to give consent), and the proposed changes in Probate Code §§ 2357, 3208, I suggest that Probate Code § 2356(a) be clarified as well, especially as to the meaning of "involuntary civil mental health treatment." The phrase has been interpreted variously. One interpretation is that it means involuntary mental health treatment of any kind, including use of psychotropic medication and psychotherapy. This interpretation would result in the anomalous situation where a probate conservatee who is mentally ill, and needs treatment, but has no capacity to give consent, would not receive treatment at all. There are in fact many probate conservatees who are mentally ill but do not meet the LPS standard.

A better interpretation is that the phrase covers involuntary placement at a mental health facility only. This interpretation is consistent with the Riese case in recognizing that the issue is not what kind of conservatorship the patient is under, but rather, whether the conservatee has the mental capacity to give medical consent. It is also consistent with the proposed changes in §§ 2357 and 3208, and would be more realistic in application.


I therefore propose that § 2356(a) be clarified to reflect the second interpretation.

Please submit my comments to the Law Revision Commission before October 31, 1989. Thank you for your attention to this matter.

Very truly yours,

KELVIN H. BOOTY, JR.
County Counsel

By


GRACE TAM,
Deputy County Counsel

GT/me: 1271J

cc: Don Graff
Earl Churchill

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Court-Authorized Medical Treatment

December 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 569 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

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December 1, 1989

To: **The Honorable George Deukmejian**
Governor of California, and
The Legislature of California

Existing law permits a court to authorize medical treatment for a person unable to give informed consent. The court can authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person. This recommendation proposes to expand this standard to include a serious threat to the person's mental health.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

If an adult for whom no conservator of the person has been appointed is in need of medical treatment, but is unable to give informed consent, an interested person can petition the court to authorize the medical treatment.¹ If a ward or conservatee is in need of medical treatment that may not be authorized by the guardian or conservator and the ward or conservatee is unable to give informed consent, the guardian or conservator can petition the court to authorize the medical treatment.² In either of these situations the court may authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person.³

This standard is unduly narrow in its restriction of medical treatment of problems that are a threat to the person's *physical* health, as distinct from the person's *mental* health. The court's power to authorize medical treatment in these situations should be expanded to cover serious threats to the person's mental health. There are numerous protections against abuse built into the statutes, including (1) appointment of an attorney to consult with and represent the person,⁴ (2) giving notice to interested persons, including the spouse and relatives of the person needing treatment,⁵ (3) judicial determination that the proposed medical treatment is necessary,⁶ and (4) limitations on the type of treatment that can be given.⁷

1. Prob. Code § 3201.

2. Prob. Code § 2357.

3. Prob. Code §§ 2357(h)(2), 3208(a)(2).

4. Prob. Code §§ 2357(d), 3205.

5. Prob. Code §§ 2357(f), 3206.

6. Prob. Code §§ 2357(h), 3208.

7. E.g., Prob. Code §§ 2356(a)-(d) & 3211(a)-(d) (prohibitions on involuntary placement, experimental drugs, convulsive treatment, sterilization); 2356(e) & 3211(e) (court authority subject to patient's directive under Natural Death Act and power of attorney for health care); 3208(b) (procedure initiated by interested person inapplicable where patient has capacity but refuses to consent to treatment).

The recommended legislation also clarifies the relationship between the power of a guardian or conservator to petition for an order authorizing medical treatment and the procedures under the Lanterman-Petris-Short Act (LPS) pertaining to involuntary placement in a medical treatment facility⁸ and establishing conservatorships for the gravely disabled.⁹ By providing authority to give necessary medical treatment affecting the mental health of the ward or conservatee, the recommended legislation resolves an anomaly in the law that would result where a ward or conservatee needs treatment but does not meet the standards applicable under LPS. The restrictions applicable under LPS to involuntary placement¹⁰ should not stand in the way of needed medical treatment of mental conditions that do not involve involuntary detention or the appointment of a conservator for a gravely disabled person.

The recommended legislation amends sections of the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended legislation will become operative at the same time as the new Probate Code becomes operative.

8. Welf. & Inst. Code §§ 5150-5344.

9. Welf. & Inst. Code §§ 5350-5371.

10. The provisions of the Welfare and Institutions Code (part of the Lanterman-Petris-Short Act) cited in the exclusionary language in the second sentence of Probate Code Section 2356 govern situations where a person may be involuntarily placed (e.g. Welf. & Inst. Code §§ 5150, 5351), detained (e.g. Welf. & Inst. Code § 5151), confined (e.g. Welf. & Inst. Code § 5260), or committed (e.g. Welf. & Inst. Code § 5300).

PROPOSED LEGISLATION

The Commission's recommendation would be implemented by enactment of the following amendments:

Probate Code § 2356 (amended). Prohibited treatment and drugs

2356. (a) No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. *Involuntary civil placement of a ward or conservatee in a mental health treatment for a ward or conservatee facility* may be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

(b) No experimental drug as defined in Section 26668 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee under this division. Such an experimental drug may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 26668) of Chapter 6 of Division 21 of the Health and Safety Code.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a ward or conservatee under this division. Convulsive treatment may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) No minor may be sterilized under this division.

(e) This chapter is subject to any of the following instruments if valid and effective:

(1) A directive of the conservatee under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).

(2) A power of attorney for health care, whether or not a durable power of attorney.

Comment. Subdivision (a) of Section 2356 is amended to resolve an inconsistency in language between the first and second sentences. This amendment recognizes that the provisions of the Welfare and Institutions Code (part of the Lanterman-Petris-Short Act) cited in the second sentence govern situations where a person may be involuntarily placed (e.g. Welf. & Inst. Code §§ 5150, 5350.1), detained (e.g. Welf. & Inst. Code § 5151), confined (e.g. Welf. & Inst. Code § 5260), or committed (e.g. Welf. & Inst. Code § 5300). The language as revised is also consistent with Section 3211(a). This amendment also recognizes the court's power under Section 2357 to authorize treatment in the case of a serious threat to the mental health of the ward or conservatee. See Section 2357.

Note. This amendment is made to Section 2356 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 2357 (amended). Court-authorized medical treatment for ward or conservatee

2357. (a) As used in this section:

(1) "Guardian or conservator" includes a temporary guardian of the person or a temporary conservator of the person.

(2) "Ward or conservatee" includes a person for whom a temporary guardian of the person or temporary conservator of the person has been appointed.

(b) If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under Section 2252, 2353, 2354, or 2355, and the ward or conservatee is unable to give an informed consent to such medical treatment, the guardian or conservator may petition

the court under this section for an order authorizing such medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to such medical treatment.

(c) The petition shall state, or set forth by medical affidavit attached thereto, all of the following so far as is known to the petitioner at the time the petition is filed:

(1) The nature of the medical condition of the ward or conservatee which requires treatment.

(2) The recommended course of medical treatment which is considered to be medically appropriate.

(3) The threat to the health of the ward or conservatee if authorization to consent to the recommended course of treatment is delayed or denied by the court.

(4) The predictable or probable outcome of the recommended course of treatment.

(5) The medically available alternatives, if any, to the course of treatment recommended.

(6) The efforts made to obtain an informed consent from the ward or conservatee.

(d) Upon the filing of the petition, the court shall notify the attorney of record for the ward or conservatee, if any, or shall appoint the public defender or private counsel under Section 1471, to consult with and represent the ward or conservatee at the hearing on the petition and, if such appointment is made, Section 1472 applies.

(e) The hearing on the petition may be held pursuant to an order of the court prescribing the notice to be given of the hearing. The order shall specify the period of notice of the hearing and the period so fixed shall take into account (1) the existing medical facts and circumstances set forth in the petition or in a medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the ward or conservatee permits, of giving adequate notice to all interested persons.

(f) A copy of the notice of hearing or of the order prescribing notice of hearing, and a copy of the petition, shall be personally served or mailed, as prescribed in the order, on all of the following:

(1) The ward or conservatee.

(2) The attorney of record for the ward or conservatee, if any, or the attorney appointed by the court to represent the ward or conservatee at the hearing.

(3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the ward or conservatee and any known relatives of the ward or conservatee within the second degree.

(g) Notwithstanding subdivisions (e) and (f), the matter may be submitted for the determination of the court upon proper and sufficient medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and further stipulate that there remains no issue of fact to be determined.

(h) The court may make an order authorizing the recommended course of medical treatment of the ward or conservatee and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the recommended course of medical treatment for the ward or conservatee if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical *or mental* health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.

(i) Upon petition of the ward or conservatee or other interested person, the court may order that the guardian or

conservator obtain or consent to, or obtain and consent to, specified medical treatment to be performed upon the ward or conservatee. Notice of the hearing on the petition under this subdivision shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Subdivision (h)(2) of Section 2357 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 3208.

Note. This amendment is made to Section 2357 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 3208 (amended). Court ordered medical treatment for person unable to consent to treatment

3208. (a) The court may make an order authorizing the recommended course of medical treatment of the patient and designating a person to give consent to the recommended course of medical treatment on behalf of the patient if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

(b) If the patient has the capacity to give an informed consent to the recommended course of medical treatment but refuses to do so, the court is not authorized to make an order under this part. If an order has been made under this part, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization of the course of medical treatment.

Comment. Subdivision (a)(2) of Section 3208 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 2357.

Note. This amendment is made to Section 3208 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.