SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1416 (Eggman)
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AWM

SUBJECT

Mental health services: gravely disabled persons

DIGEST

This bill expands the definition of "gravely disabled" under the Lanterman-Petris-Short (LPS) Act for purposes of determining who may be involuntarily confined against their will to include a condition in which a person, as a result of a mental health disorder or chronic alcoholism, is unable to provide for their basic needs for medical care. For purposes of the bill, a person is unable to provide for their basic personal needs for medical care when the person is at risk of substantial bodily harm, dangerous worsening of any concomitant serious physical illness, or significant psychic deterioration.

EXECUTIVE SUMMARY

The California Legislature has long sought to achieve the right balance between providing for the safety and well-being of those suffering from severe mental illness, those who are seen as gravely disabled or at risk of harming themselves or others, and recognizing their inherent due process and civil rights. In the 1960s, the Legislature enacted the LPS Act to develop a statutory process under which individuals could be involuntarily held and treated in a mental health facility in a manner that safeguarded their constitutional rights.

Under the LPS Act, a person is "gravely disabled" if they, as a result of a mental disorder, are unable to provide for their basic personal needs for food, clothing, or shelter. The LPS Act was intended to balance the goals of maintaining the constitutional right to personal liberty and choice in mental health treatment, with the goal of safety when an individual may be a danger to oneself or others. The LPS Act authorizes the superior court to appoint a conservator of a gravely disabled person, so that they may receive individualized treatment, supervision, and placement.

At the time of its enactment, the LPS Act was considered progressive because it afforded persons with mental illness more legal rights than most other states. Since its passage in 1967, the law in the field of mental health has continued to evolve toward even greater legal rights for those suffering from severe mental illness. The state's and counties' implementation of the LPS Act has also been problematic because of a lack of mental health and housing resources; many, including the State Auditor, have found that there are insufficient resources for persons who are already in the LPS Act system resulting in, for example, waits of over a year for high-level care or continuing care in the broader mental health system.

Within the realm of the LPS Act, existing law also provides that anyone who, as a result of a mental health disorder, is either a danger to self or to others or is gravely disabled, can be involuntarily hospitalized in a facility, as provided, for periods of 72 hours (a 5150 hold), 14 days, or 30 days, provided certain provisions are met. (Welf. & Inst. Code,§§ 5150, 5250, 5270.15.) If the person is seen as a danger to themselves or others, a peace officer, a professional person in charge of an evaluation facility, staff member, or other specified professional who has probable cause, may take the person into custody. If the person being held stabilizes during this period, they must be released from detention and not placed under a conservatorship.

Additionally, to provide counties with tools beyond involuntary holds and LPS conservatorships, the Legislature enacted the Assisted Outpatient Treatment (AOT) Demonstration Project Act of 2002, also known as Laura's Law. (AB 1421, Thomson, Ch. 1017, Stats. 2002; *see* Welf. & Inst. Code, §§ 5345 et seq.) Laura's Law permits counties to provide court-ordered outpatient treatment services for people with serious mental illnesses when a court finds that a person's recent history of hospitalizations or violent behavior, coupled with noncompliance with voluntary treatment, indicate that the person is likely to become dangerous or gravely disabled without the court-ordered outpatient treatment. Laura's Law follows the involuntary commitment procedures established by LPS, but is aimed at providing out-patient treatment through community services and preventing its participants from deteriorating to the point of being gravely disabled for purposes of involuntary detention. Counties must provide AOT unless they specifically opt out of participation.

This bill would expand the definition of "gravely disabled" for the LPS Act, thus expanding the number of persons who could be involuntarily detained and forcibly treated. The bill would provide that gravely disabled means a condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for food, clothing, shelter, *or medical care*. The bill further provides that "[a] person is unable to provide for their basic personal needs for medical care when the person is at risk of substantial bodily harm, dangerous worsening of any concomitant serious physical illness, or significant psychiatric deterioration."

This bill is sponsored by the Big City Mayors Coalition, the California State Association of Psychiatrists, and the Psychiatric Physicians Alliance of California, and is supported by Alameda County Families Advocating for the Seriously Mentally Ill, the California Police Chiefs Association, the City of San Diego, the Inland Empire Coalition of Mayors, the Steinberg Institute, and 76 individuals. It is opposed by ACLU California Action, Cal Voices, the California Association of Mental Health Peer-Run Organizations, the California Association of Social Rehabilitation Agencies, the Citizens Commission on Human Rights, the County Behavioral Health Directors Association, Disability Rights California, Mental Health America of California, the National Health Law Program, and the Western Center on Law and Poverty. This bill passed out of the Senate Health Committee with a vote of 9-0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the LPS Act, which provides for the involuntary detention for treatment and evaluation of people who are gravely disabled or are a danger to self or others. (Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.)

2) Defines "grave disability" as a condition in which a person, as a result of a mental disorder, or impairment by chronic alcoholism, is unable to provide for the person's basic personal needs for food, clothing, or shelter. (Welf. & Inst. Code, § 5008(h)(1)(A), (2).)
    a) When applying the definition of a mental disorder for purposes of, among other things, a 14-day involuntary hold, the historical course of the person's medical disorder be considered; "historical course" is defined to include evidence presented by persons who have provided, or are providing, mental health or related support services to the patient, the patient's medical records as presented to the court, including psychiatric records, or evidence voluntarily presented by family members, the patient, or any other person designated by the patient. (Welf. & Inst. Code, § 5008.2.)

3) Establishes a series of escalating detentions for involuntary treatment of a person who meets the criteria above, which may culminate in a renewable 1-year conservatorship for a person determined to be gravely disabled. Specifically:
    a) If a person is gravely disabled as a result of mental illness, or a danger to self or others, then a peace officer, staff of a designated treatment facility or crisis team, or other professional person designated by the county, may, upon probable cause, take that person into custody for a period of up to 72 hours for assessment, evaluation, crisis intervention, or placement in a designated treatment facility (known as a "5150 hold"). (Welf. & Inst. Code, § 5150.)
    b) A person who has been detained for 72 hours may be further detained for up to 14 days of intensive treatment if the person continues to pose a danger to

self or others, or to be gravely disabled, and the person has been unwilling or unable to accept voluntary treatment. (Welf. & Inst. Code, § 5250.)

c) After the 14 days, a person may be detained for an additional 30 days of intensive treatment if the person remains gravely disabled and is unwilling or unable to voluntarily accept treatment. (Welf. & Inst. Code, §§ 5260, 5270.15.)

4) Establishes the following review procedures for the 14-day and 30-day intensive treatment detentions set forth in 3(b) and 3(c):
   a) The person certified must be notified that they are entitled to a certification review hearing to determine whether probable cause exists for the continued detention related to the mental disorder or chronic alcoholism, or, in lieu of the hearing, to seek judicial review by habeas corpus. (Welf. & Inst. Code, §§ 5254, 5254.1, 5270.15.)
   b) A certification review hearing must be held within four days of the date the person was certified for additional treatment unless postponed at the request of the attorney or advocate for the person certified. (Welf. & Inst. Code, § 5256.)
   c) The certification review must be conducted by either a court-appointed commissioner or referee, or a certification review hearing officer who must be either a state-qualified administrative law hearing officer or a medical professional as specified. (Welf. & Inst. Code, § 5256.1.)
   d) At the hearing, evidence in support of the certification must be presented by a person designated by the director of the facility in which the person is being detained, and a district attorney or county counsel may, at their discretion, also present evidence. (Welf. & Inst. Code, § 5256.2.)
   e) The person certified must be present at the hearing unless they, with the assistance of counsel or an advocate, waive that right. The person may represent themselves or be represented by counsel, and may present evidence in their defense. (Welf. & Inst. Code, § 5256.4(a).)
   f) The hearing must be conducted in an impartial and informal manner and the person conducting the hearing is not bound by the rules of procedure or evidence applicable in judicial proceedings. All evidence relevant to establishing that the person certified is or is not gravely disabled must be admitted and considered. (Welf. & Inst. Code, § 5256.4(b), (d).)
   g) If the person conducting the hearing finds, at the conclusion of the hearing, that there is no probable cause to believe that the person certified is gravely disabled, then the person certified may no longer be involuntarily detained. (Welf. & Inst. Code, § 5256.5.)
   h) As an alternative to the hearing procedures above, the person certified may seek judicial review by a writ of habeas corpus. The person certified has the right to counsel, appointed by the county if necessary, in the habeas proceeding. The person must be released if the court finds that the person is not gravely disabled or a danger to themselves or others, had not been advised of the option of voluntary treatment, had accepted voluntary

treatment, or the facility providing the intensive treatment is not equipped to do so. (Welf. & Inst. Code, § 5276.)

5) Provides that, at the end of a 30-day detention for intensive treatment, the person must be released unless:
    a) The person agrees to receive further treatment on a voluntary basis;
    b) The patient is the subject of a conservatorship petition, as set forth in 6); or
    c) The patient is the subject of a petition for postcertification treatment of a dangerous person pursuant to article 6 of part 1 of division 5 of the Welfare and Institutions Code. (Welf. & Inst. Code, § 5270.35(b).)

6) Provides that a person in charge of a facility providing a 5150 hold or 14- or 30-day involuntary detention for intensive treatment may recommend an LPS conservatorship for the person treated, when the person being treated is unwilling or unable to accept voluntary treatment; if the county conservatorship investigator agrees, the county must petition the superior court to establish an LPS conservatorship. (Welf. & Inst. Code, §§ 5350 et seq.)
    a) If, while a petition for a full LPS conservatorship is pending, the investigating officer recommends a "temporary conservatorship" until the petition is ruled on, the court may establish a temporary conservatorship of no more than 30 days, until the point when the court makes a ruling on whether the person is "gravely disabled." (Welf. & Inst. Code, § 5352.1.)

7) If a conservatorship referral was not made during the 14-day period and it appears during the 30-day period that the person is likely to require the appointment of a conservator, the referral for a conservatorship must be made to allow sufficient time for conservatorship investigation and other related procedures.
    a) If a temporary conservatorship is obtained pursuant to the pending petition, the temporary conservatorship period must run concurrently with the 30-day intensive treatment period, not consecutively.
    b) The maximum involuntary detention period for gravely disabled persons pursuant to the 5150 hold and the 14-day and 30-day intensive treatment detentions is 47 days. (Welf. & Inst. Code, § 5270.55.)

8) Requires the court to appoint a public defender or other attorney for the proposed conservatee within five days after the petition is filed. (Welf. & Inst. Code, § 5365.)

9) Provides that a person for whom an LPS conservatorship is sought has the right to demand a court or jury trial on the issue of whether they are gravely disabled. (Welf. & Inst. Code, § 5350(d).)

10) Provides that, for purposes of establishing a conservatorship, a person is not "gravely disabled" if they can survive safely without an involuntary detention with the help of responsible family members or others who are both willing and able to

help provide for the person's basic personal needs for food, clothing, and shelter, and these persons have specifically indicated their willingness and ability to provide such help. This limitation does not apply to a person who was found incompetent to stand trial under Penal Code section 1370, as specified. (Welf. & Inst. Code, §§ 5008(h)(1)(B), 5350(e).)

11) Provides that, for a conservatorship to be established, the court or the jury must find that a person is gravely disabled beyond a reasonable doubt, and in the case of a jury trial, the verdict must be unanimous. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235.)

This bill:

1) Modifies the definition of "gravely disabled" under the LPS Act to mean a condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for food, clothing, shelter, or medical care.

2) Provides that, for purposes of 1), a person is unable to provide for their basic personal needs for medical care when the person is at risk of substantial bodily harm, dangerous worsening of any concomitant serious physical illness, or significant psychiatric deterioration.

3) Modifies section 1799.111 of the Health and Safety Code, which employs the same definition of "gravely disabled" as the LPS Act, to reflect the changes made in 1)-2).

4) Makes nonsubstantive technical and conforming changes.

COMMENTS

1. Author's comment

According to the author:

> This bill would modernize the definition of "gravely disabled" within the Lanterman-Petris-Short Act to provide for the needs of individuals experiencing an emergency condition because of severe mental illness more accurately and comprehensively. SB 1416 would include under the definition of "gravely disabled" a condition in which a person, as a result of a mental health disorder, is unable to provide for the basic human need for medical care and this causes the person to be at risk of substantial bodily harm, dangerous worsening of any concomitant serious physical illness, or significant psychiatric deterioration. Involuntary treatment is a serious intervention, and one that should only be used as a last resort. Our current model is leaving too many people suffering with significant psychotic disorders in incredibly unsafe situations, leading to severe

injury or death. This bill will help to provide dignity and treatment to those who are the most difficult to reach.

2. The LPS Act framework

The California Legislature has long sought to achieve the right balance between providing for the safety and well-being of those suffering from severe mental illness, those who are seen as gravely disabled or at risk of harming themselves or others, and recognizing their inherent due process and civil rights. In the 1960s, the Legislature enacted the LPS Act to develop a statutory process under which individuals could be involuntarily held and treated in a mental health facility in a manner that safeguarded their constitutional rights.[1] The goals of the Act include "ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious 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."[2]

The LPS Act provides for involuntary commitment for varying lengths of time for the purpose of treatment and evaluation, provided certain requirements are met.[3] The LPS Act also authorizes the establishment of LPS conservatorships, which can result in involuntary commitment for the purposes of treatment, if an individual is found to meet the "grave disability" standard.[4]

"Before a person may be found to be gravely disabled and subject to a year-long confinement, the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment."[5] The common thread within the existing LPS framework is that the person must be found to have a "grave disability" that results in physical danger or harm to the person. This "grave disability" finding requires that the person *presently* be unable to provide for food, clothing, and shelter due to a mental disorder, or severe alcoholism, to the extent that this inability results in physical danger or harm to the person.[6] In making this determination, the trier of fact must consider whether the person would be able to provide for these needs with a family member, friend, or other third party's assistance if credible evidence of such assistance is produced at the LPS conservatorship hearing.[7]

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[1] *See* Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.
[2] *Id.*, § 5001.
[3] *Id.*, §§ 5150 et seq.
[4] *Id.*, §§ 5350 et seq.
[5] *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541.
[6] Welf. & Inst. Code, § 5008(h).
[7] *Id.*, §§ 5250(c), 5350(e); *Conservatorship of Benevuto* (1986) 180 Cal.App.3d 1030; *Conservatorship of Early* (1983) 35 Cal.App.3d 244; *Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453.

Typically, a person is generally brought under the ambit of the LPS act through what is commonly referred to as a "5150 hold." This allows an approved facility to involuntarily commit a person for 72 hours for evaluation and treatment if they are determined to be, as a result of a mental health disorder, a threat to themselves or others, or gravely disabled.[8] The peace officer or other authorized person who detains the individual must know of a state of facts that would lead a person of ordinary care and prudence to believe that the individual meets this standard.[9] When making this determination, the peace officer, or other authorized person, may consider the individual's past conduct, character, and reputation, and the historical course of the individual's mental illness, so long as the case is decided on facts and circumstances presented to the detaining person at the time of detention.[10]

Following a 72-hour hold, the individual may be held for an additional 14 days without court review if the professional staff of the agency or facility evaluating the individual finds that the individual continues to be, as a result of a mental health disorder, a threat to themselves or others or gravely disabled.[11] The professional staff conducting the evaluation must also find that the individual has been advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis.[12] The individual cannot be found at this point to be gravely disabled if they can survive safely without involuntary detention with the help of responsible family, friends, or third parties who are both willing and able to help.[13] The certification for the 14-day hold must be reviewed at a certification hearing before an appointed hearing officer, unless the individual seeks judicial review via a petition for habeas corpus.[14]

If professional staff finds that the person is still gravely disabled and unwilling or unable to accept voluntary treatment following their additional 14 days of intensive treatment, they may be certified for an additional period of not more than 30 days of intensive treatment.[15] Like the 14-day hold, the 30-day hold must be reviewed by a hearing officer or, at the request of the individual, in a habeas corpus proceeding.[16] For the duration of the 30-day treatment, the professional staff of the agency or facility providing the treatment must analyze the person's condition at intervals not to exceed 10 days, and determine whether the person continues to meet the criteria for continued

[8] Welf. & Inst. Code, § 5150.
[9] *People v. Triplett* (1983) 144 Cal.App.3rd 283, pp. 287-288.
[10] Welf. & Inst. Code, § 5150.05; *Heater v. Southwood Psychiatric Center* (1996) 42 Cal.App.4th 1068.
[11] Welf. & Inst. Code, § 5250.
[12] *Id.*, § 5250(c).
[13] *Id.*, § 5250(d).
[14] *Id.*, §§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.
[15] *Id.*, § 5270.15.
[16] *Id.*, § 5270.15(b).

confinement.[17] If the person is found to no longer meet the requirements for the 30-day hold before the 30 days is up, the certification must be terminated.[18]

"This series of temporary detentions may culminate in a proceeding to determine whether the person is so disabled that he or she should be involuntarily confined for up to one year."[19] The LPS Act provides for a conservator of the person, of the estate, or of both the person and the estate for a person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism.[20] An LPS conservatorship is intended to provide individualized treatment, supervision, and placement for the gravely disabled individual.[21]

Because an LPS conservator's powers often include the power to confine a person in a treatment facility, courts have recognized that the liberty, property, and reputational interests at stake are comparable to those in criminal proceedings; consequently, the party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the finding must be made by the court or a unanimous jury.[22] The proposed conservatee has the right to counsel at their proceeding—appointed for them, if necessary—and is entitled to demand a jury trial on the issue of their grave disability.[23] A conservatee may twice petition for rehearing during the one-year conservatorship.[24] At a rehearing, a conservatee need only prove by a preponderance of the evidence that they are no longer gravely disabled.[25]

Since the beginning of the century, the Legislature has implemented programs intended as less restrictive alternatives to involuntary confinement under the LPS Act. In 2002, the Legislature passed Laura's Law, which created a pilot program for assisted outpatient treatment (AOT).[26] AOT allows courts and behavioral health departments to create a court-ordered treatment plan for persons who, as a result of a mental illness, are substantially deteriorating and/or are in need of assistance to present a relapse that would render them gravely disabled for purposes of a 5150 hold.[27] Laura's Law has been made permanent and is available across the state except in counties that specifically opted out of providing AOT.[28]

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[17] *Id.*, § 5270.15(b)(2).
[18] *Ibid.*
[19] *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 541.
[20] Welf. & Inst. Code, § 5350.
[21] *Id.*, § 5350.1.
[22] *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235; *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at pp. 537-538.
[23] Welf. & Inst. Code, § 5350, 5365.
[24] *Id.*, § 5364.
[25] *Conservatorship of Everette M.* (1990) 219 Cal. App. 3d 1567, 1573.
[26] *See* AB 1421 (Thomson, Ch. 1017, Stats. 2002); Welf. & Inst. Code, § 5345.
[27] Welf. & Inst. Code, § 5346.
[28] *See* AB 1976 (Eggman, Ch. 140, Stats. 2020).

Additionally, the Legislature is currently considering SB 1338 (Umberg & Eggman, 2022), which would establish the Community Assistance, Recovery, and Empowerment (CARE) Act. The CARE Act would establish CARE court proceedings, through which individuals with schizophrenia or other psychotic disorders who were identified by behavioral health professionals or family members could participate in the creation of a court-ordered treatment plan. Like AOT, the CARE Act is intended to catch persons with mental illness before their condition deteriorates to the point of involuntary detention.

3. Background of the current definition of "gravely disabled" and the shortcomings in the implementation of the LPS Act

The LPS Act authorizes the involuntary detention and treatment of a person when they are, as a result of a mental illness or chronic alcoholism, a danger to themselves or others or "gravely disabled,"[29] and extended detention and the establishment of a conservatorship for gravely disabled persons.[30] The original LPS Act defined "gravely disabled" as "a condition in which a person, as a result of mental disorder or impairment by chronic alcoholism, is unable to provide for his basic needs for food, clothing, or shelter."[31] The definition was subsequently amended to include, in the alternative, a condition in which a person has been found mentally incompetent to stand trial, if certain other conditions are met; and to include, in certain circumstances, a person who is unable to provide for their basic needs for food, clothing, and shelter due to impairment by chronic alcoholism.[32] The Legislature also codified a holding by the California Supreme Court that a person is not gravely disabled for purposes of the appointment of a conservator if the person can survive safely without involuntary detention with the aid of willing third parties.[33]

Prior to the LPS Act, persons with mental illness could be confined if they were considered " 'in need of treatment,'" even if they were not dangerous to themselves or others.[34] The switch to allowing confinement only where persons, as a result of a mental illness or impairment by chronic alcoholism, could not tend to their basic food, shelter, and clothing needs "reflect[ed] a legislative determination to meet the constitutional requirements of precision."[35] The need for precision in this context is high: if a person is determined to be gravely disabled, the LPS Act can "assure in many cases an unbroken and indefinite period of state-sanctioned confinement…'The theoretical maximum period of detention is Life.' "[36] As such, "[t]he law must still strive to make certain that

[29] Welf. & Inst. Code, §§ 5150, 5250,
[30] *Id.*, §§ 5270.15, 5350.
[31] *See* (Lanterman, Ch. 1667, Stats. 1967).
[32] *See* Welf. & Inst. Code, § 5008(h).
[33] *See* Welf. & Inst. Code, § 5350(e); *Conservatorship of Early*, *supra*, 35 Cal.3d at p. 251.
[34] *Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284.
[35] *Ibid.*
[36] *Roulet*, *supra*, 23 Cal.3d at p. 224.

only those truly unable to take care of themselves are being assigned conservators under the LPS Act and committed to mental hospitals against their will."[37]

In the 2010s, the Legislature saw several bills that would have broadened the definition of "gravely disabled." None passed. The most recent one to be heard by this Committee was AB 1971 (Santiago, 2018), which, as heard by this Committee, would have amended the definition of gravely disabled as follows:

> A condition in which a person, as a result of a mental health disorder, is unable to care for his or her basic personal needs for food, clothing, shelter, *or medical treatment, if the failure to receive medical treatment results in a deteriorating physical condition or death*.

The bill further specified that "medical treatment" meant the administration or application of remedies for a mental health condition, as identified by a licensed mental health professional, or a physical health condition, as defined by a licensed medical professional.[38]

This Committee, due to concerns that the bill's definition was overbroad, amended the bill to (1) require that a licensed medical professional attest in writing that, in their best medical judgment, the medical condition will more likely than not, lead to death within six months, and (2) limited the application of the new definition to the County of Los Angeles on a temporary basis in order to test it on a pilot basis.[39] The bill ultimately died on the Senate floor.

In 2020, the California State Auditor issued a report on the implementation of the LPS Act, which set forth the results of an audit conducted at the direction of the Joint Legislative Audit Committee.[40] The report, *Lanterman-Petris-Short Act: California Has Not Ensured That Individuals With Serious Mental Illnesses Receive Adequate Ongoing Care* (the Auditor's Report), concluded that there were "significant issues" preventing the state from adequately caring for Californians with serious mental illnesses.[41] The auditor identified several structural problems preventing states and counties from providing that care, including a shortage of treatment beds for persons in need of specialized care, counties' failure to consistently follow up with continuing care for persons who are released from LPS holds, and a lack of reporting on the implementation of the LPS Act and other mental health initiatives to the point that "policymakers and other

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[37] *Id.* at p. 225. The California Supreme Court also quoted Justice Brandeis, who cautioned " 'Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.' " (*Ibid.*)
[38] *See* AB 1971 (Santiago, 2018), as amended April 12, 2018.
[39] *See* Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1971 (Santiago, 2018) (2017-2018 Reg. Sess.) as amended April 12, 2018.
[40] Auditor for the State of California, Report 2019-119, *Lanterman-Petris-Short Act: California Has Not Ensured That Individuals With Serious Mental Illnesses Receive Adequate Ongoing Care* (Jul. 2020), at p. iii.
[41] *Id.* at p. 2.

stakeholders do not have the information they need to understand the extent to which [funds appropriated for treating persons with mental illnesses] affect people's lives."[42] The Report made several recommendations to resolve these shortcomings, such as requiring the Department of Health Care Services to obtain daily information about the availability of beds in health care facilities and requiring counties to connect persons who have left LPS Act holds with community-based programs that would benefit them.[43]

One aspect of the LPS Act the State Auditor recommended against changing was the definition of "gravely disabled."[44] The Report found that "the LPS Act's criteria are defined well enough to serve [the] purposes" of "provid[ing] for prompt evaluation and treatment, to protect the public, and to safeguard personal rights through consistent standards."[45] The Report also concluded that "[e]xpanding or revising the LPS Act's criteria for involuntary holds to include standards that are overly broad—such as the ability to live safely in one's community—could widen the use of involuntary holds and pose significant concerns about the infringement on individual rights" and that there was "no evidence to justify such a change."[46] The Report noted that the programs for caring for persons with mental illness seem to be inadequate both at the pre-hold and the post-hold stage, in that persons who are experiencing difficulty that does not yet arise to the level of requiring involuntary treatment were not being provided with assistance, and that persons leaving an involuntary hold were not consistently connected with wraparound services or other continuing care.[47]

4. <u>This bill expands the definition of "gravely disabled" within the LPS Act</u>

This bill expands the definition of "gravely disabled" under the LPS Act as follows:

> A condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for food, clothing, shelter, *or medical care. A person is unable to provide for their basic personal needs for medical care when the person is at risk of substantial bodily harm, dangerous worsening of any concomitant serious physical illness, or significant psychiatric deterioration.*

The bill's expanded definition is significantly broader than the definition this Committee declined to implement in AB 1971. While both bills added the failure to care for basic personal medical care to the list of criteria, AB 1971 was specifically aimed at a failure to obtain medical care that would result in a deteriorating physical condition or

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[42] *Id.* at pp. 2-3.
[43] *Id.* at pp. 37, 65.
[44] *Id.* at p. 21.
[45] *Ibid.*
[46] *Ibid.*
[47] *Id.* at pp. 21, 31-37.

death. While that definition had its own problems—hence the Committee's refusal to pass the bill with that language—it did not go as far as this bill in defining a person as gravely disabled simply because of a *risk* of physical harm or other deterioration. As discussed further below, this bill goes substantially further in allowing a person to be placed in a conservatorship because of things that might happen in the future, not because the person is currently in crisis.

The bill's co-sponsors and supporters argue that the bill's expanded definition is necessary because the current definition is too narrowly interpreted and results in people who are at great risk of harm being left out. Several of the bill's proponents also argue that counties interpret "gravely disabled" differently, resulting in disparate application of the LPS Act across the state.

Opponents of the bill agree with the State Auditor's conclusion that the definition of "gravely disabled" is not a problem, and that the state should reform other aspects of its mental illness and housing programs instead. They argue that the persons included in the expanded definition who may be at risk of harm in the future should not be placed in conservatorships—the most restrictive option, intended as a last resort—but instead should be treated using less-restrictive alternatives. A coalition comprised of ACLU California Action, Cal Voices, the California Association of Mental Health Peer-Run Organizations, Disability Rights California, the National Health Law Program, and the Western Center on Law and Poverty point to data showing that the availability of housing is a key factor in whether an individual is likely to be placed in an LPS hold or a conservatorship, and argue that this bill will perpetuate over-reliance on conservatorships rather than enacting meaningful housing reform. They also argue that the state should adopt more voluntary Assertive Community Treatment (ACT) programs rather than expand its involuntary commitment program, because ACT has been demonstrated to be effective in helping persons with serious mental illnesses remain in the community.

5. Constitutional considerations

The Fourteenth Amendment to the United States Constitution prohibits a state from "depriv[ing] any person of life, liberty, or property without due process of law."[48] This clause "guarantees more than fair process, and the 'liberty' it protects is more than the absence of physical restraint."[49] The United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[50] The California Supreme Court has also held that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions."[51]

[48] U.S. Const., 14th amend.
[49] *Washington v. Glucksberg* (1997) 521 U.S. 702
[50] *Addington v. Texas* (1979) 441 U.S. 418, 425.
[51] *People v. Olivas* (1976) 17 Cal.3d 236, 251.

To determine whether a person's liberty interest has been violated, a court will balance the person's liberty interest against the relevant state interests.[52] When the interest at stake is a fundamental constitutional right, strict scrutiny applies, meaning the court will uphold the law only if it is narrowly tailored to promote a compelling government interest.[53] Additionally, a statute is unconstitutionally vague if it fails to "(1) give[] fair notice of the practice to be avoided, and (2) provide[] reasonably adequate standards to guide enforcement."[54]

As a general matter, the state's *parens patriae* authority gives it a compelling interest in "provid[ing] care for persons who are unable to care for themselves and in preventing an individual from harming himself or others."[55] Here, the question is precisely who is "unable to care for themselves," and whether the definition of "gravely disabled" in this bill is adequately narrowly tailored to avoid violating the liberty interests of persons whose condition does not warrant a conservatorship.

The current definition of "gravely disabled" has been upheld as constitutional in part because it "is sufficiently precise to exclude unusual or nonconformist lifestyles…[and] connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs" while providing "fair notice of the proscribed conduct to the proposed conservatee."[56] Additionally, the current definition rejects the imposition of a conservatorship based on "probabilistic pessimism"—the fear or perceived likelihood that the individual will relapse or destabilize in the future, despite not currently meeting the definition of "gravely disabled."[57]

This bill is not so limited. As bill opponent Cal Voices notes, there are several terms in the bill's explanation of what constitutes an inability to care for one's basic personal needs for medical care that are undefined and susceptible to a number of different interpretations. The provision that a person is unable to provide for their basic personal needs when they are "at risk of" a range of harms necessarily requires the decisionmaker to guess about future events; moreover, because "at risk" is not qualified in any way, it appears that *any* level of risk could render a person "gravely disabled" under this bill. Similarly, the terms "substantial bodily harm" and "dangerous worsening of a concomitant physical illness" contain terms—"substantial," "dangerous"—that are undefined and open to many different interpretations. One person's "substantial" injury could be another person's "moderate" injury; the bill provides no guidance as to where the line should be drawn.

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[52] *Love v. State Department of Education* (2018) 29 Cal.App.4th 980, 989.
[53] *Ibid.*
[54] *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 702.
[55] *State Dept. of State Hospitals v. A.H.* (2018) 27 Cal.App.5th 441, 447.
[56] *Conservatorship of Chambers*, *supra*, 71 Cal.App.3d at p. 284.
[57] *Conservatorship of Benvenuto*, *supra*, 180 Cal.App.3d at p. 1034, fn. 2; *Conservatorship of Murphy*, *supra*, 134 Cal.App.3d 15, 18-19.

The bill's expansion of "grave disability" to include a person who is "at risk of…significant psychic deterioration" is perhaps the most troubling. The LPS Act, by definition, applies only to persons with a mental health disorder or chronic alcoholism;[58] it seems likely that many individuals with such conditions, particularly when unhoused, are at *risk* of significant psychiatric deterioration even if they are currently able to provide for their other basic personal needs.

Overall, these provisions appear to present both constitutional vagueness and overbreadth concerns. The terms are open to a broad range of interpretations, and because they incorporate *future* harms, they necessarily allow a person to be deemed "gravely disabled" who is currently able to care for all of their needs. Moreover, there are options available for treating people who have not yet deteriorated to the point of needing involuntary treatment, such as AOT, and potentially the new CARE court framework proposed by the Governor.[59] Conservatorship is intended to be the measure of last resort; this expansion of "gravely disabled" seems to authorize conservatorships for persons who are not so destabilizes as to require that final, drastic step.

What is more, these are not problems that can be alleviated by the procedural due process provided by the bill: the right to a jury trial, for example, does not protect a person if the underlying statutory definition is overbroad. A jury's verdict is dictated by the terms of the statute; if the statute's definition of "gravely disabled" is overbroad or vague, the jury's verdicts will necessarily also be overbroad or inconsistent because the terms provide inadequate guidance. In other words, a jury, faced with a person who is currently able to function and care for their needs, would have no choice but to follow the jury instructions and find an individual gravely disabled if the state has proven that the individual is *at risk of* significant psychiatric deterioration in the future. In other words, procedural protections are cold comfort when the underlying substance of the law is overbroad.

For all these reasons, it is unclear if this bill's definitions would be deemed adequately narrowly tailored to survive judicial review. To address these concerns, the author and Committee may wish to amend the bill using the same language the Committee requested for AB 1971 (Santiago, 2018). The amended definition would read as follows, subject to technical and nonsubstantive changes from Legislative Counsel:

> A condition in which a person, as a result of a mental health disorder, is unable provide for their basic personal needs for food, clothing, shelter, *or medical care if the failure to receive medical care results in a deteriorating physical condition that a licensed medical professional, in their best medical judgment, attests in writing, will more likely than not lead to death within six months.*

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[58] Welf. & Inst. Code, § 5008(h).
[59] *See* SB 1338 (Umberg and Eggman, 2022); AB 2830 (Bloom, 2022).

6. Arguments in support

According to bill co-sponsor California State Association of Psychiatrists:

> Despite all efforts to reduce the need for conservatorships, they can sometimes be the last resort to provide critical treatment to those who are gravely disabled. These individuals are the hardest to reach and often suffer from anosognosia, a condition that prevents them from being cognitively aware of the severity of their illness. The current definition and interpretation of "gravely disabled" does not accurately include all who it should. SB 1416 would include in this definition a person's ability to provide for their own [medical care], to ensure that those who are truly vulnerable receive the help they need.

According to the Steinberg Institute, writing in support:

> Modernizing [the definition of "gravely disabled"] allows providers to include the effects of mental health disorders in their considerations of whether a conservatorship or other involuntary detention is appropriate. Broadening the criteria of what it means to be "gravely disabled" seeks to mend a decades-long gap in mental healthcare in this state…
>
> SB 1416 allows providers to intervene on behalf of a patient who has become "gravely disabled"; such intervention may reduce the suffering Californians with mental disorders face as they cycle between homelessness, incarceration, and hospitalizations. For these reasons, we are pleased to support this measure and request your aye vote.

7. Arguments in opposition

A coalition comprised of ACLU California Action, Cal Voices, the California Association of Mental Health Peer-Run Organizations, Disability Rights California, the National Health Law Program, and the Western Center on Law and Poverty write in opposition:

> Any changes to California's mental health system should be driven by clear data that supports the changes. As discussed at length during the day-long hearing held in the Assembly last December, data about all aspects of care provided under the LPS Act are severely lacking. Significantly, there is no statewide data tracking the outcomes for people placed on short-term holds or conservatorships under the LPS Act. Put simply, there is no evidence to suggest that expanding the ability to place people on LPS Act holds under the criteria of "gravely disabled" will lead to good long-term outcomes for people…

Currently, there is legislation pending in both the Assembly and the Senate that is aimed at addressing the dearth of data related to LPS Act outcomes. If enacted, such legislation will create a framework for collecting outcomes data that can be analyzed and provide the basis for challenges to the laws that govern the delivery of mental health treatment in California. Until outcomes data is available, the Legislature should not act to infringe on civil liberties of Californians living with mental health disabilities by expanding the ability to subject people to involuntary treatment.

SUPPORT

Big City Mayors Coalition (co-sponsor)
California State Association of Psychiatrists (co-sponsor)
Psychiatric Physicians Alliance of California (co-sponsor)
Alameda County Families Advocating for the Seriously Mentally Ill
California Police Chiefs Association
City of San Diego
Inland Empire Coalition of Mayors
Steinberg Institute

OPPOSITION

ACLU California Action
Cal Voices
California Association of Mental Health Peer-Run Organizations
California Association of Social Rehabilitation Agencies
Citizens Commission on Human Rights
County Behavioral Health Directors Association
Disability Rights California
Mental Health America of California
National Health Law Program
Western Center on Law and Poverty

RELATED LEGISLATION

Pending Legislation:

SB 1338 (Umberg and Eggman, 2022) implements the CARE Act, which will implement a statewide framework for court-ordered mental illness treatment and services. SB 1338 is pending before Senate Judiciary Committee and is set to be heard on the same date as this bill.

SB 1238 (Eggman, 2022) requires the State Department of Health Care Services, in consultation with each council of governments, to determine the existing and projected need for behavioral health services, including AOT, for each region in a specified manner and would require, as part of that process, councils of governments to provide the department-specified data. SB 1238 is pending before the Senate Health Committee.

SB 1227 (Eggman, 2022) modifies the Lanterman-Petris-Short (LPS) Act to allow a second 30-day intensive treatment hold for a person who has been certified as "gravely disabled" on top of the existing 3-day, 14-day, and 30-day treatment holds, without needing to file a conservatorship petition or seek judicial review. SB 1227 is pending before the Senate Judiciary Committee and is scheduled to be heard on the same day as this bill.

SB 1154 (Eggman, 2022) requires, by January 1, 2024, the State Department of Public Health, in consultation with the State Department of Health Care Services and the State Department of Social Services, and by conferring with specified stakeholders, to develop a real-time, internet-based database to collect, aggregate, and display information about beds in inpatient psychiatric facilities, crisis stabilization units, residential community mental health facilities, and licensed residential alcoholism or drug abuse recovery or treatment facilities in order to facilitate the identification and designation of facilities for the temporary treatment of individuals in mental health or substance use disorder crisis. SB 1154 is pending before the Senate Appropriations Committee.

SB 929 (Eggman, 2022) requires DHCS to collect and publish annually quantitative data relating to the LPS Act, including information relating to, among other things, the number of persons detained for 72-hour evaluation and treatment, clinical outcomes for individuals placed in each type of hold, services provided in each category, waiting periods, and needs for treatment beds, as specified. The bill would additionally require each other entity involved in implementing the provisions relating to detention, assessment, evaluation, or treatment for up to 72 hours to provide data to the department upon its request, as specified. SB 929 is pending before the Senate Appropriations Committee.

SB 516 (Eggman, 2021) provides that a person's medical condition may be considered in determining their mental condition for purposes of certifying them for a 14- or 30-day involuntary detention for treatment and evaluation under the LPS Act. SB 516 is pending before the Assembly Health Committee.

AB 2830 (Bloom, 2022) implements the CARE Act and CARE courts and is virtually identical to SB 1338 (Umberg, 2022). AB 2830 is pending before the Assembly Judiciary Committee.

AB 2020 (Gallagher, 2022) authorizes a county to elect between two definitions of "gravely disabled" for the LPS Act: the definition currently in statute, or "a condition in which a person, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, the person's own basic personal needs for food, clothing, or shelter without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions, the person is at risk of substantial bodily harm, dangerous worsening of a concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of the person's essential needs that could result in bodily harm." AB 2020 is pending before the Assembly Health Committee.

Prior Legislation:

SB 507 (Eggman, Ch. 426, Stats. 2021) broadened the criteria to permit AOT for a person who is in need of AOT services, as specified, without also requiring the person's condition to be substantially deteriorating; permitted specified individuals to testify at an AOT hearing via videoconferencing, as specified; and permitted a court to order AOT for eligible conservatees, as specified, when certain criteria are met.

AB 2015 (Eggman, 2020), which was substantially similar to SB 516 (Eggman, 2021), would have expanded on the type of information that could be admitted at a hearing on the certification of a person for a 14-day or 30-day detention for intensive treatment, to include matters relating to the historical course of the person's mental illness and treatment compliance. AB 2015 died in the Senate Judiciary Committee.

AB 1946 (Santiago, 2020) would have expanded the definition of "gravely disabled" in the LPS Act to be "[a] condition in which a person, as a result of a mental health disorder, is unable to provide for their basic personal needs for food, clothing, shelter, or medical treatment, if the failure to receive medical treatment would likely result in serious bodily harm or death, as attested to in writing by a medical professional in the medical professional's best medical judgment." The bill further defined "medical treatment" as the administration or application of remedies for a mental health condition, as identified by a licensed mental health professional, or a physical health condition, as identified by a licensed medical professional, and provided that any person considered gravely disabled would have the right to refuse medical treatment subject to the provisions set forth in this part. AB 1946 died in the Assembly Health Committee.

SB 640 (Moorlach, 2019) would have authorized a county to elect between two definitions of "gravely disabled" for the LPS Act: the definition currently in statute, or "a condition in which a person, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, the person's own basic personal needs for food, clothing, or shelter without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions,

the person is at risk of substantial bodily harm, dangerous worsening of a concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of the person's essential needs that could result in bodily harm. This condition may be demonstrated by both the person's treatment history and recent acts or omissions." SB 640 failed passage in the Senate Health Committee.

AB 1572 (Chen, 2019) would have expanded the definition of "gravely disabled" in the LPS Act to be "[a] condition in which a person, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, the person's basic personal needs for food, clothing, or shelter without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions, the person is at risk of substantial bodily harm, dangerous worsening of a concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of the person's essential needs that could result in bodily harm." AB 1572 died in the Assembly Health Committee.

AB 2156 (Chen, 2018) would have expanded the definition of "gravely disabled" in the LPS Act to read, in part, a condition in which a person, as a result of a mental health disorder, is incapable of making informed decisions about, or providing for, his or her own basic personal needs for food, clothing, shelter, or medical care without significant supervision and assistance from another person and, as a result of being incapable of making these informed decisions, the person is at risk of substantial bodily harm, dangerous worsening of a concomitant serious physical illness, significant psychiatric deterioration, or mismanagement of his or her essential needs that could result in bodily harm. This bill died in the Assembly Health Committee

AB 1971 (Santiago, 2018) would have expand the definition of "gravely disabled" as described in this analysis. AB 1971 died on the Senate Floor.

AB 1539 (Chen, 2017) would have expanded the definition of "gravely disabled" similar to AB 1971 (Santiago, 2018). This bill died without a hearing in Assembly Health Committee.

PRIOR VOTES:

Senate Health Committee (Ayes 9, Noes 0)

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