

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 35 (Umberg)  
Version: September 8, 2023  
Hearing Date: September 13, 2023  
Fiscal: Yes  
Urgency: Yes  
AWM

**PURSUANT TO SENATE RULE 29.10(d)**

**SUBJECT**

Community Assistance, Recovery, and Empowerment (CARE) Court Program

**DIGEST**

This bill modifies the Community, Assistance, Recovery, and Empowerment (CARE) Act, which requires certain counties to implement the CARE Court Program beginning October 1, 2023.

**EXECUTIVE SUMMARY**

In 2022, the Legislature enacted, and the Governor signed, SB 1338 (Umberg, Ch. 319, Stats. 2022), known as the CARE Act, which is intended to deliver mental health and substance use disorder services for persons with certain severe mental illness diagnoses as an alternative to incarceration in a jail or psychiatric facility or to being subjected to a conservatorship under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.). The CARE Act provides for court-ordered CARE Plans for qualified persons suffering from a mental health or substance abuse disorder crisis for up to 12 months, with possible extensions. The plan is supposed to provide individuals with clinically appropriate, community-based services. A cohort of seven counties will implement the CARE Act by October 1, 2023; the remaining counties will implement the CARE Act by December 1, 2024.

This bill is intended to clean up the CARE Act and address concerns raised by certain stakeholders in advance of the implementation date. Among other things, the bill is intended to provide protections for county entities that are obligated to obtain medical information about CARE Act respondents and ensure that the CARE Act does not inadvertently run afoul of state and federal law. When this bill left the Senate, it did not include matter within the jurisdiction of this Committee. The bill was then amended in the Assembly to add changes to the CARE Court process and provisions relating to the disclosure of medical records, which are matters within this Committee's jurisdiction.

Accordingly, this bill was referred to this Committee pursuant to Senate Rule 29.10(d) when it returned to the Senate.

This bill is sponsored by the author and is supported by the California State Association of Counties, Rural County Representatives of California, and Urban Counties of California. This bill is opposed by ACLU California Action, Disability Rights California, and the Electronic Frontier Foundation.

### **PROPOSED CHANGES TO THE LAW**

Existing state law:

- 1) Establishes the CARE Act. (Welf. & Inst. Code, div. 5, pt. 8, §§ 5970 et seq.)
- 2) Defines the following relevant terms:
  - a) "Care agreement" is a voluntary settlement agreement entered into by the parties, and includes the same elements as a CARE plan to support the respondent in accessing community-based services and supports.
  - b) "Care plan" is an individualized, appropriate range of community-based services and supports, which include clinically appropriate behavioral health care and stabilization medications, housing, and other supportive services, as appropriate.
  - c) "CARE process" is the court and related proceedings to implement the CARE Act.
  - d) "Department" is the State Department of Health Care Services (DHCS).
  - e) "Petitioner" is the entity who files a CARE Act petition with the court; if the petitioner is a person other than the director of a county behavioral health agency (CBHA), or their designee, the court shall substitute the director or their designee for the county in which the proceedings are filed as the petitioner at the first hearing.
  - f) "Psychiatric advance directive" is a legal document, executed on a voluntary basis by a person who has the capacity to make medical decisions, that allows a person with mental illness to protect their autonomy and ability to self-direct care by documenting their preferences for treatment in advance of a mental health crisis.
  - g) "Respondent" is the person who is subject to the petition for the CARE process.
  - h) "Supporter" is an adult, designated as specified, who assists the person who is the subject of the petition, which may include supporting the person to understand, make, communicate, implement, or act on their own life decisions during the CARE process; a supporter may not act independently. (Welf. & Inst. Code, § 5971.)

- 3) Provides that the CARE Act shall be implemented as follows:
  - a) A first cohort of counties, including Glenn, Orange, Riverside, San Diego, Stanislaus, Tuolumne, and the City and County of San Francisco, shall begin no later than October 1, 2023.
  - b) A second cohort of counties, representing the remaining counties in the state, shall begin no later than December 1, 2024.
  - c) DHCS shall issue guidelines under which counties can apply for, and be provided, additional time in which to implement the CARE Act, subject to certain conditions and restrictions. (Welf. & Inst. Code, § 5970.5.)
  
- 4) Establishes criteria for a person to qualify for the CARE process, including that the person is 18 years of age or older; the person is experiencing a severe mental illness and has a diagnosis in the disorder class of schizophrenia spectrum and other psychotic disorders; the person is not clinically stabilized in ongoing voluntary treatment; and participation in a CARE plan or agreement would be the least restrictive alternative necessary to ensure the person's recovery and stability. (Welf. & Inst. Code, § 5972.)
  
- 5) Provides that the following adult persons may file a petition to initiate the CARE process:
  - a) A person with whom the respondent resides.
  - b) A spouse, parent, sibling, child, or grandparent or other individual who stands in loco parentis to the respondent.
  - c) The director of a hospital, or their designee, in which the respondent is hospitalized, including pursuant to certain temporary holds under the LPS Act.
  - d) The director of a public or charitable home, or a licensed behavioral health professional, or their designee, who has had a specified interaction with the respondent within the previous 30 days.
  - e) A first responder, as specified, who has had repeated interactions with the respondent in the form of multiple arrests, multiple detentions and transportations pursuant to the LPS Act, multiple attempts to engage the respondent in the form of voluntary treatment, or other repeated efforts to aid the respondent in obtaining professional assistance.
  - f) The public guardian or public conservator, or their designee, of the county in which the respondent is present or reasonably believed to be present.
  - g) The director of a CBHA or county adult protective services, or their designee, of the county in which the respondent resides or is found.
  - h) The director of a California Indian health services program, California tribal behavioral health department, or their designee.
  - i) The judge of a tribal court that is located in California, or their designee.
  - j) The respondent. (Welf. & Inst. Code, § 5974.)

- 6) Allows a court, if a criminal defendant is found to be mentally incompetent and ineligible for a diversion, to refer the defendant to the CARE program, as provided. (Pen. Code, § 1370.1(b)(1)(D)(iv).)
- 7) Requires the Judicial Council to create a mandatory court form to file a CARE process petition, together with any other forms necessary during the CARE process. The petition must be signed under penalty of perjury and set forth specified information, including either an affidavit of a licensed behavioral health professional setting forth specified information about the respondent, or evidence that the respondent was detained for a minimum of two intensive treatments pursuant to the LPS Act, the most recent of which was no more than 60 days prior to the date of the petition. (Welf. & Inst. Code, § 5975.)
- 8) Establishes requirements for the jurisdiction in which a CARE Act petition may be filed, for the filing of a CARE Act petition, and for instances in which a CARE Act petition is filed to harass the respondent. (Welf. & Inst. Code, §§ 5973, 5975, 5975.1.)
- 9) Establishes the rights of the respondent, including the right to be represented by counsel at all stages of a CARE proceeding, regardless of ability to pay. (Welf. & Inst. Code, § 5976.)
- 10) Establishes that the respondent has the following rights:
  - a) To receive notice of the CARE hearings.
  - b) To receive a copy of the court-ordered evaluation.
  - c) To be represented by counsel at all stages of a proceeding commenced under this chapter, regardless of the ability to pay.
  - d) To be allowed to have a supporter.
  - e) To be present at the hearing unless they waive the right to be present.
  - f) To present evidence.
  - g) To call witnesses.
  - h) To cross-examine witnesses.
  - i) To appeal decisions, and to be informed of the right to appeal. (Welf. & Inst. Code, § 5976.)
- 11) Provides for the following regarding CARE Act hearings:
  - a) Establishes that hearings are presumptively closed to the public, but permits the respondent to demand that the hearings be public.
  - b) Permits the respondent to request the presence of a family member or friend without waiving the right to keep the hearing closed to the rest of the public.
  - c) Permits the court to grant a request by another party to make a hearing public if the judge conducting the hearing finds that the public interest clearly outweighs the respondent's interest in privacy.
  - d) Declares that all reports, evaluations, diagnoses, or other information related to the respondent's health shall be confidential.

- e) Requires the judge, before commencing a hearing, to inform the respondent of their rights under this section. (Welf. & Inst. Code, § 5976.5.)
- 12) Requires the court, upon receipt of a CARE Act petition, to promptly review it to determine whether a prima facie showing has been made that the respondent is or may be a person described in 6), and then do one of the following:
- a) If the court finds the petitioner has not made the required prima facie showing, then dismiss the case without prejudice. (Welf. & Inst. Code § 5977(a)(2).)
  - b) If the court finds the petitioner has made the required prima facie showing, and the petitioner is the director of a CBHA, then the court must do all of the following:
    - i. Set the matter for initial hearing within 14 court days.
    - ii. Appoint counsel.
    - iii. Determine if the petition includes a determination as to whether the respondent meets the criteria for the CARE process and is willing to engage voluntarily with services, and, if not, order the county to submit a report containing this information within 14 court days.
    - iv. Require notice be provided to the respondent, respondent's counsel, and the CBHA where the respondent resides. (Welf. & Inst. Code § 5977(a)(3)(A).)
  - c) If the court finds the petitioner has made the required prima facie showing, but the petitioner is not a CBHA, then the court must do all of the following:
    - i. Order a county agency to investigate whether the respondent meets the criteria for the CARE process and is willing to engage voluntarily with services.
    - ii. File a written report with the court within 14 court days.
    - iii. Provide notice to the respondent and the petitioner that a report has been ordered.
    - iv. Upon receipt of the report, within 5 days, do one of the following:
      - 1. If the county's report does not support a prima facie showing under 6), or if the county determines that the respondent has enrolled or is likely to enroll in voluntary behavioral health treatment, dismiss the matter.
      - 2. If the county's report does support a prima facie showing under 6), set the matter for initial hearing within 14 court days, appoint counsel, and order the county to provide notice of the hearing as specified. (Welf. & Inst. Code § 5977 (a)(3)(B).)
- 13) Establishes procedures and requirements for the following:
- a) Initial hearing on a CARE Act petition. (Welf. & Inst. Code, § 5977(b).)
  - b) Hearing on the merits of the petition. (Welf. & Inst. Code, § 5977(c).)
  - c) Case management hearing. (Welf. & Inst. Code, § 5977.1(a).)
  - d) Clinical evaluation review hearing. (Welf. & Inst. Code, § 5977.1(c).)
  - e) Hearing to review proposed CARE plans. (Welf. & Inst. Code, § 5977.1(d).)

- f) Status review hearing that occurs at least every 60 days during the one-year (potentially two-year) CARE plan implementation. (Welf. & Inst. Code, §§ 5977.2, 5977.3.)
- 14) Allows the court, at any point during CARE proceedings, if it determines, by clear and convincing evidence, that the respondent, after receiving notice, is not participating in the CARE process or is not adhering to their CARE plan, to terminate respondent's participation. The court is then permitted to make a referral under the LPS Act, as provided. (Welf. & Inst. Code § 5979(a).)
- 15) Provides that, if a respondent was timely provided with all services and supports required by their CARE plan, the fact that the respondent failed to successfully complete the plan and reasons for that failure (a) are facts to be considered by a court in a subsequent hearing under the LPS Act, provided that the hearing occurs within six months of termination of the CARE plan; and (b) create a presumption at that hearing that the respondent needs additional interventions beyond the supports and services provided by the CARE plan. (Welf. & Inst. Code, § 5979(a)(3).)
- 16) Creates a process for penalizing counties or other local government entities that do not comply with CARE court orders. (Welf. & Inst. Code § 5979(b).)
- 17) Provides that either a respondent or a CBHA may appeal an adverse court determination. (Welf. & Inst. Code, § 5979(c).)
- 18) Establishes the LPS Act to end inappropriate, indefinite, and involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to provide prompt evaluation and treatment of those with mental health disorders or impaired by chronic alcoholism. (Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.)
- 19) Establishes the Confidentiality of Medical Information Act (CMIA). (Civ. Code, §§ 56-56.37.)
- 20) Defines the term "provider of health care" under CMIA to include medical practitioners licensed under state law, as specified, or a clinic, health dispensary, or health facility licensed under state law, as specified. (Civ. Code, § 56.05(o).)
- 21) Prohibits a provider of health care, health care service plan, or contractor from disclosing medical information regarding a patient without first obtaining an authorization, subject to specified exceptions, including where disclosure is compelled by a court order, a subpoena, the patient, or otherwise specifically required by law. (Civ. Code, § 56.10.)

Existing federal law:

- 1) Establishes the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which, among other things, sets standards for the privacy of individually identifiable health information and security standards for the protection of electronically transmitted health information. (Pub. L. 104-191, 110 Stat. 1936.)
- 2) Provides that if a HIPAA provision conflicts with state law, the provision that is most protective of patient privacy prevails. (45 C.F.R. 160.203.)
- 3) Defines the term “covered entity” under HIPAA as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA. (45 C.F.R. § 160.103.)

This bill:

- 1) Requires, after a criminal court has referred a defendant to the CARE program, the hearing to determine the defendant’s eligibility to be held within 14 court days after the date on which the petition for the referral is filed.
- 2) Specifies that a county shall be granted only one extension for implementing the CARE Act. The final date for implementation under any circumstances is December 1, 2025.
- 3) Clarifies that legal representation of a respondent in CARE Act proceedings, and in matters related to CARE agreements and CARE plans, does not alter an attorney’s obligations under the State Bar Act and the California Rules of Professional Conduct, including obligations relating to the attorney’s duty of confidentiality.
- 4) Defines “legal proceeding” as any administrative, civil, or criminal proceeding, including, but not limited to, juvenile courts and family court proceedings and services, and any form of alternative dispute resolution, including arbitration and mediation, except for: (1) a CARE Act proceeding; (2) an LPS Act proceeding; (3) a proceeding from which the respondent was referred to CARE Act proceedings, as specified; (4) an attorney disciplinary hearing, as defined; or (5) an appeal of any of the proceedings identified in (1)-(4).
- 5) Makes clarifications regarding the parties, as follows:
  - a) “Parties” include any local government entity added by the court, as specified.
  - b) “Petitioner” means the person who files the initial CARE petition; the original petitioner may retain specified rights, at the court’s discretion.

- 6) Clarifies when certain individuals may file a CARE petition, including:
  - a) A public guardian or public conservator, or their designee, of a county may file a petition if the respondent resides or is found in that county.
  - b) The director or a Californian Indian health services program, California tribal behavioral health department, or their designee may file a petition if they have provided, within the previous 30 days, or are providing behavioral services to the respondent.
  - c) The judge of a tribal court, or their designee, located in California may file a petition if the respondent has appeared before the judge within the prior 30 days.
- 7) Provides that, if a person other than the respondent files a petition for a CARE Act proceeding in order to gain an advantage over the respondent in another legal proceeding, then, notwithstanding any other provision of the CARE Act, it is cause for suspension, disbarment, or other discipline if a member of the State Bar is found to have filed the petition or assisted in the filing of the petition with knowledge that the filing was being made in order to gain that advantage. For purposes of this provision, "legal provision" does not include a proceeding under the LPS Act or a dependency proceeding.
- 8) Authorizes a CARE Act proceeding to be conducted by a superior court judge, a court-appointed commissioner, or other subordinate juvenile officer.
- 9) Provides that there shall be no filing fee for any CARE Act filing, nor shall any fees be charged by any public officer for services in filing or serving papers or for the performance of any duty enjoined by the CARE Act.
- 10) Adds and clarifies, to the list rights held by a respondent in a CARE proceeding, the rights to:
  - a) Have a supporter be present with them to perform the functions of a supporter as provided for in the CARE Act.
  - b) Have an interpreter present in all proceedings if necessary for the respondent to fully participate.
- 11) Clarifies that all reports, evaluations, or other information filed with the court related to the respondent's health shall be confidential, and permits the respondent, at any time, to petition the court for an order sealing those records or any other court records in a CARE Act proceeding. Notwithstanding any rule of court prohibiting records kept confidential by law from consideration for sealing, there is a presumption in favor of sealing the records if such a petition is filed.
- 12) Provides that the fact that evidence is admitted at a proceeding held under the CARE Act shall not be the basis for admission of that evidence in any subsequent legal proceeding.



- 13) Provides that photographs, recordings, transcripts, other records of proceedings held under the CARE Act, and testimony regarding proceedings held pursuant to the CARE Act, shall not be admissible in any subsequent legal proceeding except upon motion by one of the following in that subsequent legal proceeding:
  - a) The respondent; or
  - b) The CBHA, the public guardian, or the public conservator.
- 14) Provides that, in a CARE Act proceeding, the provisions relating to confidentiality of records and their use in subsequent proceedings do not affect the applicability of Welfare and Institutions Code section 5977.1(c)(2), make admissible any evidence that is not otherwise admissible, or permit a witness to base an opinion on any matter that is not a proper basis for that opinion. The admission or exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code, including, but not limited to, Section 352 of the Evidence Code, and by judicial decision.
- 15) Allows, in lieu of the appointment of a public defender to represent the respondent, for the appointment of counsel “working in [the] capacity” of a public defender to represent the respondent.
- 16) Requires, when a petition has been filed by an individual other than a CBHA and the court orders the CBHA to investigate the respondent and file a report with the court, the CBHA’s report to the court to include the information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report.
- 17) Clarifies the following regarding an original petitioner who is a person who lives with the respondent or an eligible family member of the respondent:
  - a) They have the right to be present and make a statement at the initial hearing on the merits of the petition.
  - b) The court may, at its discretion, assign ongoing rights of notice.
  - c) The court may allow them to participate in the respondent’s CARE proceedings to the extent that the respondent consents to their participation.
- 18) Clarifies that, if the original petitioner is not a person who lives with the respondent or eligible family member of the respondent, the original petitioner does not have ongoing rights other than the right to be present and make a statement at the initial hearing on the merits of the petition.
- 19) Requires additional evidence presented at the hearing on the merits of a petition to be “admissible” evidence.
- 20) Clarifies that if, at the hearing on the merits of the petition, the court finds there is not clear and convincing evidence that the respondent meets the specified CARE

criteria, the court shall dismiss the case without prejudice, unless the court makes a finding, on the record, that the original petitioner's filing was not in good faith, in which case the dismissal shall be with prejudice.

21) Provides that the following shall apply to any written report submitted by a CBHA to the court:

- a) The report is confidential and not subject to disclosure under the California Public Records Act (Gov. Code, tit. 1, div. 10, §§ 7920.000 et seq.) (CPRA).
- b) The report is inadmissible in any subsequent legal proceeding, except upon motion of the respondent in that subsequent legal proceeding.
- c) The report is confidential, as specified.
- d) These limitations do not affect the applicability of Welfare and Institutions Code section 5977.1(c)(2), make admissible any evidence that is not otherwise admissible, or permit a witness to base an opinion on any matter that is not a proper basis for that opinion. The admission or exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code, including, but not limited to, Section 352 of the Evidence Code, and by judicial decision.

22) Clarifies that if, at the case management hearing, the court finds that the parties have entered, or are likely to enter, into a CARE agreement, the court shall either:

- a) Approve the terms of the CARE agreement or modify it and approve the agreement as modified, continue the matter, and set a progress hearing for 60 days; or
- b) Continue the matter for 14 days to allow the parties additional time to enter into a CARE agreement upon stipulation of the parties.

23) Requires the Judicial Council to develop rules regarding communications between the CARE Court and the juvenile courts, if applicable.

24) Provides that, consistent with Civil Code section 56.10(b)(9), the CBHA shall include in any report evaluation, or other document filed with the court, the information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the filing. The CBHA shall not, unless ordered to do so by the court, submit to the court original or photocopied records underlying the information in a report evaluation or other document required or ordered under this subdivision. The CBHA shall serve an unredacted copy of any report evaluation, or other document filed with the court on the respondent and the respondent's counsel and, with the consent of the respondent, on the supporter in a manner authorized by law. Neither a county nor an employee or agent thereof shall be held civilly or criminally liable for any disclosure authorized or required by this paragraph.

- 25) Provides that, consistent with Civil Code section 56.10(b)(9), a provider of health care, as defined, or a covered entity, as defined, may disclose to the CBHA any information, including protected health information, and mental health records excluding psychotherapy notes, in its possession about the respondent that is relevant to the CBHA's provision, coordination, or management of services and supports under the CARE Act, including, but not limited to, the preparation of any required investigations, evaluations, or reports. Such a disclosure is a disclosure for treatment purposes, which may be made only to the extent permitted under federal regulations, as specified, and the information disclosed may include substance use disorder patient records only to the extent permitted by federal regulations, as specified.
- 26) Provides that, consistent with Civil Code section 56.10(b)(9), a provider of health care, as defined, or a covered entity, as defined, that filed a CARE Act petition or executed an affidavit included with a CARE Act petition shall provide to the CBHA any information, including protected health information, and mental health records excluding psychotherapy notes, in its possession about the respondent that may be relevant in connection with an investigation, evaluation, or other report or hearing under this part, or with the provision of services and supports under this part. The provision of information under this paragraph is a disclosure required by law, which may be made only to the extent permitted under federal regulations, as specified, and the information disclosed shall include substance use disorder patient records only to the extent permitted by federal regulations, as specified.
- 27) Authorizes a CBHA to apply to the court ex parte for an order requiring any provider of health care, as defined, or any covered entity, as defined, to provide to the county behavioral health agency, to the court, or both, any information, including, but not limited to, protected health information, and mental health records excluding psychotherapy notes, in its possession about the respondent that may be relevant in connection with an investigation, evaluation, or other report or hearing under this part, or with the provision of services and supports under this part. The provision of information under this paragraph is a disclosure required by law, which may be made only to the extent permitted under federal regulations, as specified, and the information ordered to be disclosed may include substance use disorder patient records only to the extent permitted by federal regulations, as specified.
- 28) Provides that a provider of health care or covered entity shall not be held civilly or criminally liable for any disclosure required or authorized under Welfare and Institutions Code section 59774.
- 29) Requires a CBHA to notify the respondent of a disclosure under 24)-27) as follows:
- a) By mail at the respondent's last known address, if any.
  - b) To respondent's counsel.

- c) By including a copy of the notification under (a) or (b) with the next notice of hearing served upon the respondent, if any.
- 30) Provides that all information shared under 24)-29), including facts and records, or summary thereof, shall further be disclosed to the respondent and their counsel, and with the consent of the respondent, to the supporter.
- 31) Provides that, except as expressly provided, further disclosure or redisclosure of information is not authorized by 24)-30).
- a) Information disclosed to a CBHA by a provider of health care, as defined, or a covered entity, as defined, is confidential and not subject to disclosure or inspection under the CPRA.
  - b) Disclosure of information under the CARE Act shall not be deemed in any way to alter the duties or responsibilities of a CBHA, or a provider of health care, as defined, or of a covered entity, as defined, with respect to the disclosed information under the CMIA or HIPAA.
- 32) Clarifies that, when an individual is referred to CARE Court from an LPS Act proceeding, the conservator or proposed conservator shall be the petitioner; and when an individual is referred to CARE Court from a misdemeanor proceeding, the CBHA or their designee shall be the petitioner.
- 33) Clarifies the timing of the information that DHCS must provide to the Legislature evaluating the effectiveness of the CARE Act, by specifying that the preliminary report is due to the Legislature by December 31, 2026, and the final report is due to the Legislature by December 31, 2028.
- 34) Makes technical and nonsubstantive conforming changes.
- 35) Includes an urgency clause.

### COMMENTS

#### 1. Author's comment

According to the author:

SB 1338 (Umberg 2022) created the CARE Act (also known as CARE Court) as a response to the urgent need for innovative solutions for individuals who are suffering with untreated schizophrenia spectrum and psychotic disorders, often unhoused in our communities, and who face high risks for repeated hospitalization, incarceration, institutionalization, mental health conservatorship, and premature death. Since the passage of SB 1338, California Health and Human Services (CalHHS) & Judicial Council of California (JCC) have worked

diligently with counties and stakeholders to ensure that CARE Court is implemented successfully. However, during this process, CalHHS and JCC have identified a few urgent changes needed to make CARE Court work better for the people that need it most. Therefore, SB 35 would modify various parts of CARE Court ahead of its implementation in October of 2023. For example, this bill eliminates the filing fee to support equitable access to petitioners with limited resources, allows proceedings to be conducted by subordinate judicial officers to ensure timely access for court proceedings to protect due process, and clarifies the due dates of the program’s preliminary and final evaluations. Changes like these are urgently needed to help CARE Court succeed.

## 2. Background on the CARE Act

Last year’s SB 1338 (Umberg, Ch. 319, Stats. 2022) established the Community Assistance, Recovery, and Empowerment (CARE) Act. The CARE Act is intended to provide essential mental health and substance use disorder services to severely mentally ill Californians – many of whom are homeless or incarcerated – while also preserving these individuals’ self-determination to the greatest extent possible.

The CARE Act will be implemented in two phases. The first cohort of counties – comprised of the Counties of Glenn, Orange, Riverside, San Diego, Stanislaus, and Tuolumne, and the City and County of San Francisco – must begin the CARE process no later than October 1 of this year.<sup>1</sup> The remaining counties must begin the CARE process no later than December 1, 2024.<sup>2</sup> DHCS may approve an implementation delay if a county experiences a state or local emergency and the implementation is necessary as a result of that emergency; an extension may be granted only once, and no later than December 1, 2025.<sup>3</sup> The County of Los Angeles has announced that, despite being in the second cohort, it intends to implement the CARE Act by December 1, 2023.<sup>4</sup>

The CARE process will be largely overseen by the courts, which are trusted with ensuring that eligible individuals – termed “respondents” – are delivered mental health and substance use disorder services, as an alternative to involuntary conservatorship or imprisonment. The California Health and Human Services Agency (CalHHS) describes the CARE process as “an upstream diversion to prevent more restrictive conservatorship or incarceration.”<sup>5</sup>

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<sup>1</sup> Welf. & Inst. Code, § 5970.5(a).

<sup>2</sup> *Id.*, § 5970.5(b).

<sup>3</sup> *Id.*, § 5970.5(c).

<sup>4</sup> E.g., Wiley & Curran, *L.A. County on track to join Newsom’s sweeping mental health plan a year early*, Los Angeles Times (Jan. 13, 2023), available at <https://www.latimes.com/california/story/2023-01-13/la-county-care-court-2023-newsom-mental-health-los-angeles>. All links in this analysis are current as of September 12, 2023.

<sup>5</sup> See CalHHS, *Community Assistance, Recovery & Empowerment Act*, <https://www.chhs.ca.gov/care-act/>.

The CARE process is unique within the state insofar as the court process can be initiated by a person who has a relationship with the potential respondent; other mental health procedures that go through the courts require a county actor to initiate the process.<sup>6</sup> Eligible petitioners include the CBHA; a spouse, parent, sibling, child, or grandparent; a treating behavioral health professional; the county public guardian or public conservator; and other enumerated persons and entities.<sup>7</sup>

There are strict criteria for CARE Act eligibility, including that the respondent suffer from severe mental illness, as defined; not be currently clinically stabilized in on-going voluntary treatment; and either be unlikely to survive safely in the community, or need services and supports to avoid grave disability or the risk of serious harm to themselves or others.<sup>8</sup> The CARE Act also imposes strict, and short, deadlines for the CARE process; for example, after a petition is filed, the court must set the matter for an initial appearance on the petition within 14 days if the petition establishes a prima facie case for CARE eligibility;<sup>9</sup> and if the court orders a clinical evaluation of the respondent, the hearing to review the evaluation must be held within 21 days, and the evaluation must be provided to the respondent's counsel no later than five days before that hearing.<sup>10</sup>

If the respondent and the CBHA ultimately agree to a CARE Plan, the CARE Plan becomes a court order that lasts for up to one year.<sup>11</sup> The CARE Plan may provide for behavioral health services and housing supports, as well as other services.<sup>12</sup> The court may order medication only if it finds, by clear and convincing evidence, that the respondent lacks the capacity to give informed consent to the administration of medically necessary stabilization medication; to the extent such medication is administered, the medication may not be forcibly administered, and the respondent's failure to comply with a medication order shall not result in a penalty, such as terminating the CARE process.<sup>13</sup>

Eleven months after the CARE Plan was put in place, the court shall hold a hearing to determine whether to graduate the respondent from the CARE Plan or whether, with or without the consent of the respondent, as specified, to keep the respondent in the CARE

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<sup>6</sup> *E.g.*, Welf. & Inst. Code, § 5346 (assisted outpatient treatment petition must be filed by a county behavioral health director or their designee; specified family members or other persons may request that a petition be filed, but may not file the petition themselves).

<sup>7</sup> Welf. & Inst. Code, § 5974.

<sup>8</sup> *Id.*, § 5972.

<sup>9</sup> *Id.*, § 5977.

<sup>10</sup> *Id.*, § 5977.1(b). The court may continue the evaluation hearing for a maximum of 14 days upon stipulation of the respondent and the CBHA, unless there is good cause for a longer extension.

<sup>11</sup> *Id.*, § 5977.1(d).

<sup>12</sup> *Id.*, § 5982.

<sup>13</sup> *Id.*, § 5977.1(d)(3).

program.<sup>14</sup> A respondent may be appointed to the CARE process only once, for up to one additional year.<sup>15</sup>

### 3. Concerns about the CARE Act leading up to implementation

As noted above, seven counties must implement the CARE Act on or before October 1, 2023. While a coalition of disability and civil rights groups petitioned for a writ of mandate to have the CARE Act declared unconstitutional prior to the implementation, the California Supreme Court rejected the petition without comment.<sup>16</sup> Disability Rights California and the ACLU continue to argue that the CARE Act will do more harm than good (see Comment 7 of this analysis for their arguments in opposition).

As the implementation date draws closer, other concerns have been raised about putting the CARE Act into practice. Counties have expressed concern that they will be overwhelmed by the number of CARE petitions filed and by the number of families who are frustrated that their loved ones do not satisfy the eligibility for CARE court participation.<sup>17</sup> Orange County, for example, estimates that it will receive 1,500 petitions in the first year of implementation.<sup>18</sup> Counties have also expressed concern that the allocated startup funds for implementation are insufficient, and that the state will not continue to adequately fund the CARE program as time goes on.<sup>19</sup> Some counties have tried to temper expectations, explaining that change brought on by the CARE Act will likely be incremental.<sup>20</sup>

Ironically, stakeholders also argue that the CARE Act both gives too small and too large a role for the family members of persons who may be eligible for the CARE Act. Some family members of persons experiencing mental illnesses have expressed dismay that the CARE Act allows respondents to limit participation by their family members, for example, by choosing a supporter who is not a family member.<sup>21</sup> Some family members

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<sup>14</sup> *Id.*, § 5977.3.

<sup>15</sup> *Ibid.*

<sup>16</sup> See *Disability Rights California v. Newsom*, Case No. S278330; Wiley, *California Supreme Court rejects lawsuit challenging Newsom's plan to treat mental illness*, L.A. Times (Apr. 22, 2023), available at <https://www.latimes.com/california/story/2023-04-22/california-supreme-court-newsom-care-court-mentally-ill-homeless-substance-disorder>.

<sup>17</sup> E.g., Curwen, 'Deep in the weeds': California counties face unknowns in launching mental illness court, L.A. Times (May 21, 2023), available at <https://www.latimes.com/california/story/2023-05-21/counties-scramble-care-court-preparations>.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Curwen, *Why California's much-touted CARE Court is no 'one and done' program*, L.A. Times (Jan. 1, 2023), available at <https://www.latimes.com/california/story/2023-01-01/care-court-challenges-orange-san-diego-counties>.

<sup>21</sup> Curwen, *CARE courts open in a month, promising hope for families. Not everyone is so sure*, L.A. Times (Sept. 4, 2023), available at <https://www.latimes.com/california/story/2023-09-04/care-courts-families-voluntary-compliance>.

also argue that the CARE Act grants respondents too much autonomy.<sup>22</sup> On the other side, some mental health advocates argue that bringing persons with mental illnesses before a court will be inherently traumatic to the respondents and will ultimately lead to more persons being treated involuntarily.<sup>23</sup>

Finally, counties raised concerns that CBHAs' obligations to conduct evaluations of respondents and report on respondents' health to the courts would inadvertently violate existing privacy laws. This issue, as well as several other modifications to clean up the CARE process in advance of implementation, are addressed in this bill.

#### 4. SB 35's path through the Legislature

This bill left the Senate as a minor clean-up bill that allowed DHCS to grant implementation delays through December 15, 2025 – a two-week extension from the current December 1, 2025, date. At that time, the bill did not alter the CARE process itself.

Once the bill reached the Assembly, however, the bill was amended to incorporate many new provisions, including ones allowing CARE Act proceedings to be conducted by court-appointed commissioners, and requiring respondents to be provided an interpreter if needed. The Assembly Judiciary committee subsequently amended the bill to add an urgency clause, and on August 28, 2023, SB 35 was amended again in order to allow health care providers, and others with medical information relevant to the determination of CARE Act eligibility, to share such information with CBHAs. Under the August 28 amendments, this information, in turn, can then be shared with the courts.

Following the August 28 amendments, the bill was re-referred to the Assembly Privacy and Consumer Protection Committee and the Assembly Appropriations Committee. The analysis of the Assembly Privacy and Consumer Protection Committee raised concerns that, as amended, SB 35's provisions regarding a CBHA's obligation to share health information could create a tension with HIPAA or other privacy protections. The author, therefore, accepted amendments to ensure the confidentiality of information submitted to the courts and compliance with applicable privacy laws, which were taken

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* If a court finds, by clear and convincing evidence, that respondent is failing to participate in the CARE process or is not adhering to their CARE plan, the court may refer the respondent for an evaluation for involuntary detention and treatment under the LPS Act. (Welf. & Inst. Code, § 5979.) A respondent's failure to successfully complete a CARE also gives rise to a presumption in an LPS Act hearing that a respondent needs additional intervention, if the LPS Act hearing occurs within six months of the termination of the CARE plan.<sup>23</sup> (*Ibid.*) Relatedly, pending legislation would lower the bar for a county to involuntarily detain and treat a person and, ultimately, place them in a conservatorship pursuant to the LPS Act (*see* SB 43 (Eggman, 2023)); together with the evidentiary presumption, respondents who failed to complete the CARE Act process will have fewer protections against involuntary treatment since the implementation of the LPS Act.



in the Assembly Appropriations Committee. After the Assembly passed the bill with a vote of 56-0, the bill was referred to this Committee pursuant to Senate Rule 29.10(d), for the Committee to vote on whether to concur in the Assembly amendments.

5. This bill makes a number of changes to the CARE Act on an urgency basis

In anticipation of the first cohort of counties' October 1, 2023, deadline for implementing the CARE Act, this bill makes a number of tweaks and modifications to the CARE Act on an urgency basis. The relevant modifications are set forth below.

Clarification of the availability of extensions of the implementation date. SB 35 clarifies that DHCS may grant a county only one extension of their implementation date. According to the Assembly Judiciary Committee's analysis, "[t]his change is apparently intended to push counties to implement the program, notwithstanding the fact that they may lack resources such as courtrooms, social workers, public defenders, mental health beds, drug treatment services, etc." The bill retains the existing due date for implementation, notwithstanding any extensions, at December 1, 2025.

Clarification regarding counsel. SB 35 makes modifications relating to the appointment and conduct of counsel in a CARE proceeding. These include:

- Clarifying that the representation of an attorney appointed or chosen by the respondent to represent the respondent must comply with specified state law and the California Rules of Professional Conduct. Given that all licensed attorneys must already apply with these provisions, this does not appear to affect a change in the law.
- Permitting the appointment of counsel "working in the capacity" of a public defender, rather than a public defender, to be appointed to represent the respondent.
- Providing that, if a person other than the respondent files a petition for CARE Act proceedings in order to gain an advantage over the respondent in another legal proceeding, as defined, it is cause for suspension, disbarment, or other discipline if a member of the State Bar is found to have filed the petition or assisted in the filing of the petition with knowledge that the filing was being made in order to gain that advantage. This provision is intended to bolster the existing provisions allowing a person to be declared a vexatious litigant if they repeatedly file frivolous or harassing CARE petitions.

Clarification regarding who may file a petition and the rights of original petitioners.

This bill tightens up the provisions regarding who may file a CARE petition and the rights of an original petitioner after the CBHA has been substituted in as the petitioner. Specifically, the bill clarifies that:

- A public guardian or public conservator, or their designee, may file a petition for a respondent who resides or is found in their county.

- The director of a California Indian health services program or California tribal behavioral health department may file a petition for a respondent for whom they have provided within the previous 30 days, or for whom they are currently providing, behavioral health services.
- The judge of a tribal court located in California may file a petition for a respondent when the respondent has appeared before the court within the previous 30 days.
- When an original petitioner resides with, or is an eligible family member of, the respondent, the original petitioner has the right to be present and make a statement at the initial hearing on the merits; the court may, at its discretion, assign notice rights to the original petitioner, and may allow the original petitioner to participate in the respondent's CARE process to the extent the respondent consents.
- When an original petitioner is not a person who resides with, or is an eligible family member of, the respondent, the original petitioner has no ongoing rights other than to be present and make a statement at the hearing on the merits of the petition.

Confidentiality and Privacy Protections. If a court determines that a CARE petition makes a prima facie showing that a respondent satisfies the criteria for CARE court eligibility, the CBHA may be required to submit a report to the court, within 14 days, that includes all of the following information:

- A determination as to whether the respondent meets, or is likely to meet, the criteria for the CARE process.
- The outcome of efforts made to voluntarily engage the respondent during the 14-day report period.
- Conclusions and recommendations about the respondent's ability to voluntarily engage in services.<sup>24</sup>

Based on this report, the court then determines whether to set an initial hearing on the petition and appoint counsel for the respondent.<sup>25</sup>

As explained by the Assembly Privacy and Consumer Protection Committee:

The privacy of medical information is largely governed by the federal Health Insurance Portability and Accountability Act (HIPAA) and California's Confidentiality of Medical Information Act (CMIA). Disclosure of medical information generally requires a patient's informed consent.

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<sup>24</sup> Welf. & Inst. Code § 5977(a)(3).

<sup>25</sup> *Id.*, § 5977(a)(5).

However, respondents who are eligible for the CARE process may not be able to grant informed consent for the release of information, due to the very circumstances that make them eligible for the CARE Act. Any disclosure must therefore be made on the basis of another valid exemption from medical privacy laws. Disclosure of medical information under the CARE Act is necessary because of the short time frame (14 court days) that county behavioral health agencies have to provide a written report as to a respondent's eligibility for the process. The Act explicitly excludes individuals with "a psychotic disorder that is due to a medical condition or is not primarily psychiatric in nature, including, but not limited to, physical health conditions such as traumatic brain injury, autism, dementia, or neurologic conditions."<sup>26</sup> As explained to Committee staff, acute psychosis may be precipitated even by something as simple as an untreated urinary tract infection, which, of course, would not be eligible for the CARE process. Yet there may be no way for a county behavioral health agency to rule out medical causes that do not give rise to CARE eligibility without first examining the respondent's medical records. (In addition, significant financial penalties can be levied against a county that fails to comply with court orders under the CARE Act.)

Amendments taken to the bill in the Assembly are intended to facilitate the sharing of information by health care providers and other entities covered by HIPAA and the MCI with CBHAs, including by specifying that information may be disclosed consistent with these state and federal laws. The bill also requires the respondent and the respondent's counsel to be notified by the CBHA when there has been a disclosure of their health information. Additionally, the bill adds protections for information filed with the court in a CARE proceeding, including permitting a respondent to seek to have the information filed in their case placed under seal and granting a presumption in favor of sealing.

Evidentiary matters. SB 35 makes a number of clarifications and changes regarding what evidence may be offered in CARE proceedings as well as to how a party may use evidence or testimony given in a CARE proceeding. These measures include:

- Specifying that any evidence offered in addition to the CBHA's report on whether the respondent meets the CARE court criteria must be admissible evidence. This should provide additional protections to the respondent, for example, by preventing hearsay testimony for which there is no exception being offered at the hearing on the merits of the petition.
- Providing that the fact that evidence is admitted in a CARE proceeding shall not be the basis for admitting the evidence in any subsequent legal proceeding.
- Providing that photographs, transcripts, other records of CARE proceedings, and testimony given in CARE proceedings shall not be admissible in any subsequent

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<sup>26</sup> *Id.*, § 5972(b).

legal proceeding except upon a motion from the respondent, the CBHA, the public guardian, or the public conservator.

- Clarifying that all applicable rules of evidence, including the Evidence Code, apply in CARE proceedings.

Expanding and clarifying the rights of the respondent. This bill provides the respondent with the right to an interpreter in all proceedings if necessary for the respondent to fully participate. Additionally, the bill clarifies that the respondent may have their supporter present with them and to perform the functions of a supporter, as specified.

Additional procedural provisions and changes. In addition to the changes above, SB 35 makes a number of changes to the CARE court procedures and similar matters. These include:

- Authorizing CARE proceedings to be conducted by a superior court judge or by a court-appointed commissioner or other subordinate judicial officer. “Subordinate judicial officers” are referees, commissioners, and hearing officers appointed by the courts pursuant to the California Constitution.<sup>27</sup> California Rules of Court require a subordinate judicial officer to be a member of the state bar and have been admitted to practice law in California for at least 10 years.<sup>28</sup> According to the author, this provision is intended to allow the courts to satisfy their CARE court obligations without overwhelming the courts. Opponents of the bill argue that this measure insufficiently protects the respondents who will be appearing before subordinate judicial officers instead of judges.
- Eliminating filing fees for filing under the CARE Act, and prohibiting any fees from being charged by any public officer for services in filing or serving papers or for the performance of any duty enjoined by the CARE Act. This measure will, presumably, eliminate financial barriers to filing a CARE petition; opponents of the bill argue that the lack of a filing fee will result in increased exposure of people with mental disabilities to the CARE process, causing undue harm.
- Clarifying that if, at a hearing on the merits of the petition, the court finds there is not clear and convincing evidence that the respondent meets the criteria for CARE court eligibility, the court shall dismiss the case without prejudice, unless the court makes an on-the-record finding that the original petitioner’s filing was not in good faith, in which case the case shall be dismissed with prejudice.

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<sup>27</sup> Cal. Const. art. VI, § 22.

<sup>28</sup> Cal. Rules of Court, r. 10.701(b). There are exceptions to these qualification criteria for subordinate judicial officers who were acting in that role as 2003 (*see ibid.*) and for judicial officers serving under specific statutory schemes that do not apply here (*see id.*, r. 10.701(d); Welf. & Inst. Code, §§ 255, 5256.1.).

6. Arguments in support

According to the California State Association of Counties, Rural County Representatives of California, and Urban Counties of California:

Last year, the Legislature passed and the Governor signed SB 1338 (Chapter 319, Statutes of 2022), which creates a new court process authorizing specified individuals to petition a civil court to create a voluntary CARE agreement or court-ordered CARE plan to provide behavioral health care, including stabilization medication, housing, and other enumerated services, to adults who are currently experiencing a severe mental illness and have a diagnosis identified in the disorder class schizophrenia and other psychotic disorders, and who meet other specified criteria.

Fulfillment of county behavioral health agencies' responsibilities under the CARE Act will require communication of detailed information regarding a respondent's behavioral health condition and treatment to the court. Such information is generally confidential under state and federal law and cannot be disclosed by any health care provider – including county behavioral health – without the respondent's consent. A respondent may decline to consent to release of their confidential medical and mental health information to the court – particularly during early phases of the case, when county behavioral health is preparing the initial report to the court required under the provisions of the CARE Act. As a result, express legal authority will be required for county behavioral health agencies to provide the court with the information contemplated by the CARE Act.

We appreciate the [Assembly Privacy and Consumer Privacy] Committee's engagement with our organizations to develop additional amendments to ensure the data sharing provisions included in the CARE Act maintain the necessary confidentiality requirements as required by existing state and federal law.

7. Arguments in opposition

According to ACLU California Action and Disability Rights California:

First, SB 35 will expand the number of CARE Court petitions by prohibiting a filing fee. Research shows that fees reduce filings. For example, in eviction cases, the larger the filing fee in a jurisdiction the lower the eviction rate – an effect that is disproportionately large in majority-Black neighborhoods. The lack of a filing fee will therefore increase exposure of people with mental health disabilities to CARE Court.

Second, SB 35 would give additional rights to the petitioners, thus weakening the rights of respondents. For example, the bill gives petitioners “the right to be present and make a statement on the merits of the petition at the initial hearing,” and extends those rights if the petitioner is “a spouse, parent, sibling, child, or grandparent or other person who stands in loco parentis to the respondent.”

Finally, SB 35 loosens criteria for who can be appointed as counsel and authorizes a “court-appointed commissioner or other subordinate judicial officer” to conduct proceedings in lieu of a superior court judge. This change eases the ability of counties to implement the CARE Act while doing nothing to safeguard the rights of respondents.

CARE Court is likely to do real harm to the populations the CARE Act intended to help, setting back decades of recovery tools designed to help those most marginalized. CARE Court will contribute to the re-institutionalization of people with disabilities, repeating a horrific history of civil rights abuses.

SB 35 will deepen the threat CARE Court poses to racial and economic justice. It will increase the harm and stigmatization of people with mental health disabilities, especially people within communities of color. Studies show Black, Indigenous and People of Color will disproportionately experience the harms that CARE Court poses. SB 35 will increase CARE Court’s exploitation of poor people who need mental health care. It is those people with low incomes and/or from communities of color who will be most victim to the chilling effects CARE Court will have in preventing people from seeking treatment and care.

### **SUPPORT**

California State Association of Counties  
Rural County Representatives of California  
Urban Counties of California

### **OPPOSITION**

ACLU California Action  
Disability Rights California  
Electronic Frontier Foundation

### **RELATED LEGISLATION**

Pending Legislation: SB 43 (Eggman, 2023) expands the definition of “gravely disabled” for purposes of who may be involuntarily detained and treated under the LPS Act. SB 43 is pending on the Assembly Floor.

Prior Legislation: SB 1338 (Umberg, Ch. 319, Stats. 2022) enacted the CARE Act and implements the CARE Court framework in a two-phased rollout, with the first cohort of counties to commence implementation on October 1, 2023, and the second cohort of counties to commence implementation on December 1, 2024.

**PRIOR VOTES:**

Assembly Floor (Ayes 56, Noes 0)  
Assembly Appropriations Committee (Ayes 16, Noes 0)  
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)  
Assembly Appropriations Committee (Ayes 15, Noes 1)  
Assembly Judiciary Committee (Ayes 10, Noes 0)  
Senate Floor (Ayes 37, Noes 0)  
Senate Health Committee (Ayes 11, Noes 0)

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