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

SB 965 (Eggman)
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AWM

SUBJECT

Conservatorships: medical record: hearsay rule

DIGEST

This bill creates, in a proceeding under the Lanterman-Petris-Short (LPS) Act, an exception to the rule against hearsay that allows an expert witness to rely on the out-of-court statements of medical professionals, as defined, who have treated the person who is the subject of the conservatorship petition.

EXECUTIVE SUMMARY

In both criminal and civil law, hearsay evidence—an out-of-court statement offered for the truth of its content—is generally inadmissible, with certain narrow exceptions. Hearsay statements are considered unreliable because they are not made under oath, an adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. Expert witnesses have been given greater latitude to relate opinions and general information within their expertise, even if it technically constitutes hearsay, because it relies on information that has not been independently introduced as evidence such as studies or academic treatises. (*See* Evid. Code §§ 702(a), 720(a), 801(a).) However, the California Supreme Court clarified in *People v. Sanchez* (2016) 63 Cal.4th 665 *(Sanchez*) that this latitude does not extend to case-specific facts about which the expert has no independent knowledge, a longstanding common law distinction that had become "blurred" in case law, allowing experts to become conduits for unreliable out-of-court statements. (*Id.* at 678.) The *Sanchez* opinion relies in part on the Sixth Amendment's Confrontation Clause, which guarantees the right to cross-examine witnesses in a criminal trial, and the United States Supreme Court's holding in *Crawford v. Washington* (2004) 541 U.S. 36 that limited what hearsay statements could be introduced into a criminal trial. Subsequent case law made clear that the *Sanchez* limitation applies in conservatorship proceedings under the LPS Act. (*See Conservatorship of K.W.* (13 Cal.App.5th 1274, 1283-1284.)

This bill would limit the application of *Sanchez* in proceedings under the LPS Act with respect to the proposed conservatee's medical records when relied on by a medical expert witness. Specifically, this bill provides that when a medical expert relies on the proposed conservatee's medical records in a proceeding to appoint or reappoint a conservator under the LPS Act, the statements of other specified health professionals in the medical records are not hearsay; this will allow the medical expert to recount those statements to the trier of fact without a hearsay bar. The author has agreed to an amendment to narrow the categories of health professionals whose testimony may be relied on subject to this exemption. The bill clarifies that the hearsay exception does not prevent any party from calling any of the health professionals cited in the medical record as witnesses, whether or not the medical expert relied on them. Finally, the bill provides that the court may grant a continuance of the proceeding when the medical record(s) relied on by the expert were not timely provided to the parties in advance of the proceeding.

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 the City of San Diego, the Inland Empire Coalition of Mayors, and the Steinberg Institute. This bill is opposed by ACLU California Action, the California Public Defenders Association and Disability Rights California.

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 a danger to self or others. (Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.)
    a) "Grave disability" is defined 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).)
    b) Provides that, when applying the definition of a mental disorder for purposes of, among other things, a conservatorship, 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.)

2) 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.)
d) 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.)

3) 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 or jury decides whether the person is "gravely disabled." (Welf. & Inst. Code, § 5352.1.)

4) Provides that a court may determine whether the person for whom the LPS conservatorship is sought is gravely disabled in a hearing, but that the person may demand a court or jury trial on the issue. (Welf. & Inst. Code, § 5350(d).)

5) Requires the designated county officer to investigate the circumstances of the person for whom the LPS conservatorship is sought and all available alternatives to conservatorship and submit a report to the court prior to the hearing or trial, containing all of the following:
    a) All relevant aspects of the person's medical, psychological, financial, family, vocational, and social condition.
    b) Information about the person obtained from the person's family members, close friends, social worker, or principal therapist.
    c) Information concerning the person's real and personal property.

   d) Records and/or information from the facilities providing intensive treatment to the person.
   e) A recommendation on whether a conservatorship should be established; an investigator may recommend a conservatorship only if they have investigated all available alternatives and found that no suitable alternatives are available. (Welf. & Inst. Code, § 5354(a).)

6) Requires that the investigating officer provide a copy of the report to the individual who originally recommended conservatorship, to the person or agency recommended to serve as conservator, if any, and to the person recommended for conservatorship. If the conservatorship was recommended in the course of a criminal case, the report must also be provided to specified persons involved in the criminal proceeding. (Welf. & Inst. Code, § 5354(a), (b).)

7) Provides that the person seeking the conservatorship must prove that the person is gravely disabled beyond a reasonable doubt and that, if the finding is made by a jury, the verdict must be unanimous. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235; *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at pp. 537-538.)

8) Allows the proposed conservatee to contest the facts presented in support of the conservatorship through confrontation and cross-examination of witnesses and presenting evidence on their own behalf. (*Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, 1029-1030.)

9) Defines "hearsay evidence" as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200(a).)

10) Establishes the hearsay rule, which states that, except as provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200(b), (c).)

11) Provides exceptions to the hearsay rule for specified out-of-court statements. (*E.g.*, Evid. Code, div. 10, ch. 2, §§ 1220 et seq.)

12) Authorizes an expert witness, when so designated by the court, to offer testimony in the form of an opinion that is:
   a) Related to a subject that is sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact; and
   b) Based on matter (including the expert's special knowledge, skill, experience, training, and education) perceived by or personally known to the expert or made known to the expert at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion on that subject matter, unless the expert is precluded by law from using such matter as a basis for the opinion. (Evid. Code, § 801.)

13) Allows an expert witness—including an expert witness in an LPS trial—to rely on hearsay in reaching their opinion, but prohibits the expert from relating in testimony any case-specific hearsay if those facts were not elicited as non-hearsay at trial or fall within a hearsay exception. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685-686; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1283-1284.)

This bill:

1) Provides that, for purposes of an expert witness in any proceeding relating to the appointment or reappointment of a conservatorship under the LPS Act, the statements of a health practitioner described in Penal Code section 11165.7(a)(21)-(28),[1] or a social worker licensed under the Business and Professions Code, included in the medical record are not hearsay.

2) Provides that nothing in 1) prevents a party from calling as a witness the author of any statement contained in the medical record, whether or not the author was relied on by the expert witness.

3) Provides that the court may provide a reasonable continuance if an expert witness in a proceeding in 1) relied on the medical record and the medical record has not been provided to the parties or their counsel upon request within a reasonable time before the proceeding.

COMMENTS

1. Author's statement

According to the author:

> Under current law, a petition for conservatorship can be filed when a person is "gravely disabled." This means that the person is, as a result of a mental health disorder, unable to provide for their basic needs of food, clothing, or shelter. When a petition is made, a temporary conservatorship can be established and a conservatorship investigation commences. This bill would ensure that the court is considering the contents of the medical record and that, during conservatorship proceedings, relevant testimony regarding medical history can be considered in order to provide the most appropriate and timely care.

[1] The author has agreed to amend the bill to omit the health practitioners set forth in Penal Code section 111.65.7(a)(26)-(28), discussed further below.

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.[2] 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."[3]

The LPS Act provides for involuntary commitment for varying lengths of time for the purpose of treatment and evaluation, provided certain requirements are met.[4] 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.[5]

"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."[6] 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.[7] 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.[8]

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

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[2] *See* Welf. & Inst. Code, div. 5, pt. 1, §§ 5000 et seq.
[3] *Id.*, § 5001.
[4] *Id.*, §§ 5150 et seq.
[5] *Id.*, §§ 5350 et seq.
[6] *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541.
[7] Welf. & Inst. Code, § 5008(h).
[8] *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.

determined to be, as a result of a mental health disorder, a threat to themselves or others, or gravely disabled.[9] 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.[10] 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.[11]

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.[12] 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.[13] 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.[14] 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.[15]

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.[16] 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.[17] 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 confinement.[18] 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.[19]

"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

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[9] Welf. & Inst. Code, § 5150.
[10] *People v. Triplett* (1983) 144 Cal.App.3rd 283, pp. 287-288.
[11] Welf. & Inst. Code, § 5150.05; *Heater v. Southwood Psychiatric Center* (1996) 42 Cal.App.4th 1068.
[12] Welf. & Inst. Code, § 5250.
[13] *Id.*, § 5250(c).
[14] *Id.*, § 5250(d).
[15] *Id.*, §§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.
[16] *Id.*, § 5270.15.
[17] *Id.*, § 5270.15(b).
[18] *Id.*, § 5270.15(b)(2).
[19] *Ibid.*

to one year."[20] 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.[21] An LPS conservatorship is intended to provide individualized treatment, supervision, and placement for the gravely disabled individual.[22]

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.[23] 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.[24] A conservatee may twice petition for rehearing during the one-year conservatorship.[25] At a rehearing, a conservatee need only prove by a preponderance of the evidence that they are no longer gravely disabled.[26]

3. <u>The connection between the rule against history and the right to confront witnesses</u>

California's hearsay rule provides: " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. . . . Except as provided by law, hearsay evidence is inadmissible."[27] The general exclusion of hearsay from evidence is premised on the notion that out-of-court statements are inherently more unreliable than live testimony. Specifically, hearsay statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements.[28]

The Legislature has codified exceptions to the hearsay rule because of the perception that certain statements are inherently reliable despite the absence of direct testimony and because the need for certain evidence outweighs the risks.[29] For example, a person's out-of-court statement, made spontaneously and under duress, that purports to narrate or describe the circumstances causing the duress, is admissible to prove those

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[20] *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 541.
[21] Welf. & Inst. Code, § 5350.
[22] *Id.*, § 5350.1.
[23] *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235; *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at pp. 537-538
[24] Welf. & Inst. Code, § 5350, 5365.
[25] *Id.*, § 5364.
[26] *Conservatorship of Everette M.* (1990) 219 Cal. App. 3d 1567, 1573.
[27] Evid. Code, § 1200.
[28] *People v. Duarte* (2000) 24 Cal.4th 603, 610.
[29] *See* Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception* (1993) 27 Golden Gate U. Law Rev. 117.

circumstances;[30] the theory behind the exception is that statements " 'undertaken without deliberation or reflection' " are more reliable than those in a controlled setting where the declarant may craft responses with an eye to their own interests.[31] Existing law also provides hearsay exceptions for certain documents, such as "business records" for which all of the following apply: (1) the writing was made in the ordinary course of business; (2) the writing was made at or near the time of the act, condition, or event memorialized in the writing; (3) a qualified witness testifies to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation were such as to indicate its trustworthiness.[32] The business records exception is intended for only the most routinized writings, such as purchase orders[33] and bank statements.[34] The business records exemption does not apply to documents containing the thoughts or impressions of persons not keeping the records,[35] or to documents prepared in anticipation of a trial, including police reports.[36]

Underlying the hearsay rule and its exemptions is the right to confront witnesses and the value of cross-examination, which is " 'the principal means by which the believability of a witness and the truth of his testimony are tested.' "[37] In 2004, the United States Supreme Court reexamined its approach to the Confrontation Clause of the Sixth Amendment and rejected the prior rule that admitted hearsay statements based on whether they were "reliable."[38] The Court held that relying on an out-of-court statement's "reliability" was contrary to the constitutional guarantee of the right to confront witnesses, and put in place a new rule that a party could not introduce testimonial hearsay unless the declarant was unavailable and the other party had had an opportunity to cross-examine the witness.[39] The Court did not precisely define "testimonial hearsay," but generally identified it as out-of-court statements that are the equivalent of in-court testimony—statements where the declarant is being formally interviewed or interrogated, "such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably be expect to be used prosecutorially."[40]

The California Supreme Court relied on this rule in *Sanchez* to place new limits on an expert's hearsay testimony at trial.[41] Before *Sanchez*, when an expert witness wanted to introduce case-specific out-of-court statements at trial (as opposed to information not

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[30] *See* Evid. Code, § 1240.
[31] *People v. Stanphill* (2009) 170 Cal.App.4th 61, 73.
[32] Evid. Code, § 1271.
[33] *See Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322
[34] *See Estate of O'Connor* (2017) 16 Cal.App.4th 159, 170.
[35] *See Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 191.
[36] *See People v. McVey* (2018) 24 Cal.App.5th 405, 415.
[37] *People v. Sanchez* (2016) 63 Cal.4th 665, 680.
[38] *Crawford v. Washington* (2004) 541 U.S. 36, 67-68.
[39] *Id.*at p. 68.
[40] *Id.*at p. 51.
[41] *Sanchez*, *supra*, 63 Cal.4th at p. 680.

specific to the case, such as background information about a particular scientific field), a court would generally admit the hearsay subject to a limiting instruction to the jury that the hearsay should not be admitted for its truth; but if the court determined that a limiting instruction would not be enough to undo the prejudice from introducing the hearsay, the court could exclude it all together.[42] "[U]nder this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background and case-specific facts. The inquiry instead turned on whether the jury could properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted."[43]

In *Sanchez*, however, the California Supreme Court determined that this approach was no longer viable.[44] *Sanchez* thus established a new two-step analysis for a criminal court to determine whether an expert witness could testify about statements made out of court. First the court must determine if the statement is hearsay, i.e., is it an out-of-court statement offered for the truth of the matter, not within a hearsay exception.[45] If so, the court must determine whether the hearsay is case-specific testimonial hearsay; if it is, admission of that hearsay violates the right to confrontation and therefore must be excluded.[46]

While *Sanchez* was limited to criminal cases, subsequent cases extended its new hearsay rule to civil cases and to LPS Act cases.[47] In applying *Sanchez* in the LPS Act context, the court assumed that *Sanchez* is fully retroactive in any context where liberty interests are at stake, such as a proceeding to establish a conservatorship.[48] Courts have also relied on *Sanchez* to hold that an expert may not testify about case-specific information found in medical records, unless the records otherwise fall within a hearsay exception.[49]

4. <u>This bill creates a limited hearsay exception for medical records relied on by a medical expert in proceedings to appoint or reappoint a conservator under the LPS Act</u>

This bill allows expert witnesses testifying in a proceeding to appoint or reappoint a conservator under the LPS Act to testify about information contained in a medical record without a hearsay bar. This proposal comes from the County of Los Angeles's response to the State Auditor's report on the implementation of the LPS Act, which

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[42] *Id.* at p. 679.
[43] *Ibid.*
[44] *Id.* at p. 680.
[45] *Ibid.*
[46] *Ibid.*
[47] *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 11 (civil cases) *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1284 (LPS Act cases).
[48] *Conservatorship of K.W.*, *supra*, 13 Cal.App.4th at p. 1284.
[49] *E.g.*, *People v. Flint* (2018) 22 Cal.App.5th 983, 1002.

requested a legislative change to the hearsay rule that would allow a medical expert to share the observations of other medical professionals and staff at LPS Act proceedings.[50]

In terms of which medical professionals' statements may be recounted by an expert witness, the bill incorporates existing categories of medical professionals whose records may be treated as non-hearsay. Excluding the categories the author has agreed to amend out of the bill, the health professionals whose testimony may be treated as non-hearsay are:

- A physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, optometrist, marriage and family therapist, clinical social worker, professional clinical counselor, or any other person licensed under division 2 of the Business and Professions Code.[51]
- An emergency medical technician I or II, paramedic, or other person certified pursuant to division 2.5 of the Health and Safety Code.[52]
- A psychological assistant registered pursuant to section 2913 of the Business and Professions Code.[53]
- A marriage and family therapist trainee, as defined in section 4980.03(c) of the Business and Professions Code.[54]
- An unlicensed associate marriage and family therapist registered under 4980.44 of the Business and Professions Code.[55]
- A social worker licensed pursuant to chapter 14 of division 2 of the Business and Professions Code.

Regarding the hearsay exception itself, it appears narrow: the bill is limited to expert witnesses testifying in a proceeding to appoint or reappoint a conservator under the LPS Act and statements made by defined health practitioners contained in the proposed conservatee's record. The bill also makes clear that either party may still call a medical professional whose opinions are set forth in the medical record, whether or not the expert relied on the professional. Finally, the bill authorizes the court to grant a continuance if an expert witness relies on a medical record and the parties did not have timely access to that record.

As a constitutional matter, it does not appear that this bill's hearsay exemption implicates the Confrontation Clause. The Confrontation Clause and the California analogue apply in criminal cases[56] While the California Supreme Court has recognized

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[50] Auditor for the State of California, Report, *Lanterman-Petris-Short Act: California Has Not Ensured That Individuals With Serious Mental Illnesses Receive Adequate Ongoing Care* (Jul. 2020), at p. 84 (response from Los Angeles County Department of Mental Health).
[51] *See* Pen. Code, § 11165.7(a)(21).
[52] *Id.*, § 11165.7(a)(22).
[53] *Id.*, § 11165.7(a)(23).
[54] *Id.*, § 11165.7(a)(24).
[55] *Id.*, § 11165.7(a)(25).
[56] *See* U.S. Const., 6th amend.; Cal. Const., art. I, § 15.

that conservatorship proceedings are comparable to those in criminal proceedings because of the potential loss of liberty,[57] the court has not gone so far as to hold that civil commitment proceedings require all of the constitutional rights granted to criminal defendants.[58] Similarly, although courts have referred to a proposed conservatee's "right" to cross-examine witnesses at an LPS Act conservatorship proceeding,[59] it does not appear that the courts have determined that this is a due process imperative that would limit the Legislature's ability to craft a hearsay exception.

From a policy standpoint, this bill would cover a range of content contained in medical records. Some of the content is likely already admissible under the business records exemption to the hearsay rule.[60] Other portions of the medical record, however—particularly records created by a health professional who was aware of the impending conservatorship proceeding—are likely the type of "testimonial hearsay" that the California Supreme Court addressed in *Sanchez*. The choice presented by this bill is, therefore, whether the stated benefit of expediting conservatorship proceedings by allowing a medical expert to recount other health professionals' statements in the medical record is worth the risk to the accuracy of the testimony in those proceedings and placing the burden on the proposed conservatee to secure the appearance of the health professionals relied on by the expert.

5. Amendments

As currently drafted, the bill includes in the list of health professionals whose statements may be treated as non-hearsay by an expert (1) a state or county public health employee who treats a minor for venereal disease or any other condition;[61] (2) a coroner; and[62] (3) a medical examiner or other person who performs autopsies.[63] Upon further discussion with the author and sponsor, it was determined that these categories of health professional are not so routinely consulted by expert witnesses in LPS Act proceedings so as to warrant inclusion in this bill. The author has, therefore, agreed to amend the bill to remove these categories. The amendment is as follows:

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[57] *Conservatorship of Roulet, supra*, 23 Cal.3d at p. 225 (" '[B]ecause involuntary commitment is incarceration against one's will regardless of whether it is called "civil" or "criminal" [citation], the choice standard of proof implicates due process consideration which must be resolved by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual' ").
[58] *E.g.*, *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 543.
[59] *Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 287, fn. 17; *see also Conservatorship of Tian L.* (2007) 149 Cal.App.4th 1022, 1029-1030.
[60] *E.g.*, *People v. Diaz* (1992) 3 Cal.4th 495, 535.
[61] *Id.*, § 11165.7(a)(26).
[62] *Id.*, § 11165.7(a)(27).
[63] *Id.*, § 11165.7(a)(28).

Amendment

At page 4, in line 2, strike out "(28)," and insert "(25),"

6. Arguments in support

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

> Many community members cycle in and out of hospitalizations, shelters, and jails without getting concrete connections to necessary medication and treatment. SB 965 ensures that relevant history can be considered by a court in a uniform manner cross the state. Tools focused on acute symptoms are not suited for chronic and severe conditions that many suffer from. This bill will ensure that a complete and accurate picture is presented in court when considering the very serious step of conservatorship.

7. Arguments in opposition

According to Disability Rights California, writing in opposition:

> First and foremost, SB 965 is unnecessary. Under existing law including *Sanchez,* the records that the proponents seek to rely on are routinely admitted under the business records exception when they are properly subpoenaed and attested to. In fact, courts have not found the *Conservatorsh*ip *of K.W.* [case] as a bar to conserving individuals when warranted by the law and facts.
>
> Under existing law, the testifying medical expert, many times the medical director, usually meets with the proposed conservatee at least once in order to testify to a diagnosis. Since the current system is working, it is worrisome to contemplate what problem this bill seeks to remedy.
>
> The general bar against the admission of hearsay evidence is intended to guard against imperfect perception, memory, or accounting and to enhance reliability and fairness in trials. *People v. Sanchez* is the law of this State for criminal cases as well as for LPS, SVP, MDO, and NGI civil commitment hearings.
>
> By carving out a hearsay exception to allow experts to testify to evidence included in "the medical record" that is not otherwise admissible, SB 965 lowers well-founded evidentiary standards, provides for an unequal application of the Evidence Code in LPS commitment proceedings, and creates an undue risk that unreliable evidence will be admitted in trials where fundamental liberty interests are at stake.

We can all agree that this State is amidst a crisis to provide appropriate care and housing for those suffering from severe mental illness. However, this State should not respond by trying to fix a problem that isn't a problem, and in doing so, effectively curtailing due process protections and jeopardizing the right to a fair trial for our most vulnerable citizens.

SUPPORT

Big City Mayors (co-sponsor)
California State Association of Psychiatrists (co-sponsor)
City of San Diego
Inland Empire Coalition of Mayors
Steinberg Institute

OPPOSITION

ACLU California Action
California Public Defenders Association
Disability Rights California

RELATED LEGISLATION

Pending Legislation:

SB 1416 (Eggman, 2022) expands the definition of "gravely disabled" within the LPS Act to include persons unable to provide for their basic needs for medical care, and defines a person unable to provide for those needs as a person at risk of substantial bodily harm, dangerous worsening of any concomitant physical illness, or serious psychiatric deterioration. SB 1416 is pending before the Senate Judiciary Committee and is scheduled to be heard on the same date as this bill.

SB 1171 (Caballero, 2022) expands the hearsay exception for specified medical statements made by a minor under 12 relating to any act, or attempted act, of child abuse or neglect to include the same types of medical statements when made by a victim of domestic violence and relating to any act, or attempted act, of domestic violence. SB 1171 is pending before the Senate Public Safety Committee.

SB 340 (Stern, 2021) authorizes a family member, friend, or acquaintance with personal knowledge of the person in a 5150 hold to make a request to testify in a judicial proceeding to review the hold, in writing, to the counsel of a party to the judicial review, and requires the receiving counsel, or their designee, to determine whether the requester's testimony will assist the proceeding and, within a reasonable time, respond to the requester, in writing, with an approval or denial. SB 340 is pending before the Assembly Rules Committee.

AB 2017 (Mathis, 2022) expands the hearsay exception for specified medical statements made by a minor under 12 relating to any act, or attempted act, of child abuse or neglect to include the same types of medical statements when made by a victim over 12 years of age when the court determines that the victim has a mental age of under 12 years as a result of an intellectual or developmental disability. AB 2017 is pending before the Assembly Public Safety Committee.

Prior Legislation:

SB 435 (Moorlach, 2019) would have created exceptions to *Sanchez* that would (1) presumptively allow hearsay in certain business records and expert testimony to establish the character and value of property, and (2) automatically allow hearsay statements contained in a timely-filed child custody report, subject to a right of cross-examination. SB 435 failed passage in the Senate Judiciary Committee.

SB 1276 (Moorlach, 2018) would have created exceptions to *Sanchez* to provide that, in a proceeding under the Family Code, evidence of a statement used to support the opinion of a witness testifying as an expert is not inadmissible as hearsay if the court, in its discretion, determines that the statement is reliable. SB 1276 died in the Senate Judiciary Committee.

AB 1736 (Cunningham, Ch. 64, Stats. 2018) expanded an exception to the hearsay rule for prior inconsistent statements by including conditional examinations in the types of proceedings covered and including an audio tape of the prior statement.

AB 1958 (Maienschein, 2014) would have prohibited a criminal defendant from introducing a hearsay statement or other conduct that is inconsistent with another hearsay statement by the defendant that has been introduced as evidence at trial by the prosecution. AB 1958 died in the Assembly Public Safety Committee.

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