

Case Study: John Smith

Background:

John Smith is a 52-year-old male with significant brain injuries dating back to a 1991 gunshot wound to the head, and a 1997 or 1998 traumatic brain injury, which caused him to manifest aggressive and violent behaviors. Prior to his brain injuries, he was diagnosed with cerebral palsy and mental retardation, complicated by the brain injuries. As a result of the brain injuries, Mr. Smith has a seizure disorder, aphasia, dysarthria, dysphagia, and severe neurocognitive disorder with dementia due to the resultant encephalopathy.

Mr. Smith currently resides in a secured-perimeter neurobehavioral facility in Oakland, California. He requires the use of a wheelchair because of his poor gait and being subject to falls if he walks unassisted. Mr. Smith requires extensive assistance with all activities of daily living, such as grooming, basic hygiene, bathing, medication levels, transfer from his bed, and meal preparation.

Mr. Smith's psychiatrist diagnosed him with psychotic disorder NOS and dementia with behavior disturbance due to head injury. His "behavior remains very problematical" as he becomes "physically aggressive hitting staff" when they try to assist him with his activities of daily living. Similarly, he is "disoriented to time, place and situation" and has been observed "to be responding to internal stimuli, talking and shouting to himself," and injures himself by "using his hands to pound walls, objects and persons within his reach."

Prior to residing at the facility, Mr. Smith was charged with assaulting his 83-year-old mother (a felony) and elder abuse (a misdemeanor). The case was filed March 23, 2012, and Mr. Smith resided in the Monterey County Jail awaiting disposition until December 2014.

Approximately three years before his 2012 incarceration, Mr. Smith lived on the streets of Salinas, California, where extended family members would spot him and drive him back to his elderly mother's home in Watsonville, California, where, due to his mental disorders, would eventually act out violently and would assault her. This pattern occurred many times resulting in multiple misdemeanor charges. Eventually, felony charges were filed against him.

Problem:

Mr. Smith is one of the many victims of a gap in California law. Under former California law, he would not be considered capable of committing a crime as he would not have the capacity to form the requisite intent, given his brain injury. Under present law, the courts have declared that he cannot be tried because he lacks capacity. At the same time, the court, his assigned Public Defender, and the District Attorney determined that it would not be safe for him or others to be returned to the street.

Legal History:

On March 23, 2012, Mr. Smith was charged with Penal Code §368(b)(1) (causing injury to an elder adult), §368(c) (physical/emotional elder abuse), and §1170.12(c)(1) (prior felony

conviction). On April 20, 2012, the Mr. Smith was found incompetent to stand trial. On May 9, 2012, he was sent to Atascadero State Hospital for treatment (not to exceed 3 years) to regain competency. Normally, a defendant would have remained at the state hospital for three years, but the state hospital sent him back almost immediately because he did not have a treatable mental disorder, and because there was no likelihood of successful treatment, the state hospital would not keep him. In the past, State hospitals would keep these defendants but, after the State's budgetary problems, they started exercising their right to return them to their county of origin.

On September 14, 2012, the court referred the matter to the Monterey County Public Guardian ("Public Guardian" or "PG") to determine if a conservatorship should be filed. On October 5, 2012, after an investigation, the PG determined that it could not file for a conservatorship because Mr. Smith did not meet the applicable legal criteria—just as the state hospital had concluded, he did not have a mental disorder falling within the Lanterman Petris Short ("LPS") Act. On April 24, 2013, the Court asked the PG to reevaluate Mr. Smith for conservatorship. After an investigation, on May 1, 2013, the Court was informed that the PG could not file for a conservatorship because the Mr. Smith did not meet the legal criteria.

On June 26, 2013, an internal county meeting was convened by the Deputy District Attorney to discuss possible conservatorship and alternatives for placement for Mr. Smith due to his traumatic brain injury – those in attendance included the Monterey County Sheriff; jail staff familiar with Mr. Smith; Mr. Smith's Deputy Public Defender; staff from County of Monterey Behavioral Health; the Chief Deputy Public Guardian; and, Deputy County Counsels. At the meeting, both legal and placement obstacles to an LPS conservatorship were discussed at length. Behavior Health informed the participants that there are no available placements for brain-injured individuals; in fact, brain-injured individuals are not a population served by Behavioral Health, which serves severely mentally ill individuals. County Counsel explained that the LPS Act was created to end inappropriate, indefinite, and involuntary judicial commitment of persons with specified mental health disorders, not as a mechanism for permanent involuntary commitment for individuals with conditions such as dementia or brain injury that could never be improved with treatment, medication or commitment.

The case was continued to August 15, 2013, for a "hearing whether a Murphy conservatorship is appropriate." Neither the County Counsel nor the Public Guardian were ordered to be present at, or even legally noticed of, the August 15, 2013, hearing. The Court conducted a hearing and took testimony on the issue. The Court found "by preponderance of evidence that defendant is gravely disabled due to mental disorder as defined in W&I 5008(h) both (A) and (B)." While the LPS Act requires two physicians or licensed psychologists with Ph.D. degrees to find the proposed conservatee is gravely disabled, for a petition even to be filed, it does not appear that the hearing encompassed any such testimony. The Court went on to find, "beyond a reasonable doubt," that Mr. Smith "is an ongoing danger to himself and others." As such, the Court "orders the County guardian to initiate proceedings to determine if the defendant is a suitable candidate for an LPS conservatorship."

On October 28, 2013, the Public Guardian notified the Court that Mr. Smith did not meet the criteria for a Murphy Conservatorship since he does not have a mental disorder and had not exhibited any violent tendencies (i.e. no present dangerousness). The County of Monterey noted that Mr. Smith, as an individual with an acquired traumatic brain injury, was specifically excluded from the targeted population serviced under the LPS Act and from the provision of services intended by the legislature, by the Bronzan-McCorgudale Act, which states that, to the extent resources are available, funds must be used primarily to serve specified target populations. (See W&IC §5600.3(b)(3)(A).)

On January 20, 2014, the District Attorney's Office emailed a subpoena to the County Counsel's Office for County Counsel and the Public Guardian to appear in Court on January 24, 2014. On January 24, 2014, the Court issued an order to the Public Guardian to petition to establish a conservatorship on behalf of Mr. Smith and to act as a conservator on his behalf.

Challenges:

1) Lack of Placements

Multiple health facilities turned the County down for placement of Mr. Smith. The facilities argued he did not fit their population and could not be treated because he is not mentally ill; instead, he has an irreversible brain injury.

2) Mr. Smith's Violent History

Unfortunately, this was not Mr. Smith's first assault on his mother. It was difficult to guarantee to the facilities that Mr. Smith would not act out against another resident. Further, given his diagnosis, violent lashing out is sometimes common. The local facilities were simply not equipped to handle a patient like Mr. Smith.

3) Criminal System – Its Philosophy and Purpose

The District Attorney's Office believed Mr. Smith to be a danger to the public if released. The Public Defender, on the other hand, given the lack of placements, believed that Mr. Smith should not be released to the streets. The Sheriff's Office was claiming that housing Mr. Smith in the infirmary at the County Jail was extremely costly and, given Mr. Smith's condition, not appropriate for him. The judge, a former Deputy District Attorney, was very sympathetic to the safety argument.

Over the past year, the Public Guardian Office has had numerous cases referred by the courts for LPS conservatorship investigation without a mental illness as recognized in Title 9 of the California Code of Regulations regarding medical necessity criteria for reimbursement. Conditions have included dementia, language disorder, and traumatic brain injury. These, unfortunately, are conditions not recognized for treatment using county mental health plan resources.

4) Split in the Courts

There is currently a split in the courts regarding conservatorships, their purpose, and whether the courts can order the counties to file them. *People v. Karriker* (2007) 149 Cal.App.4th 763, allows the public guardians discretion to decide whether they file for a conservatorship. Philosophically, *Karriker* takes the sound position that “[t]he point of a conservatorship is to take care of people who can’t take care of themselves.....We just don’t believe it’s appropriate to place someone in an institute for mental disease perhaps....for their lifetime when they can’t be treated there.” (*Id.* at 772.) Thus, mental conditions that cannot be treated, such as dementia or traumatic brain injury are not subject to LPS or *Murphy* conservatorships as they would condemn the person to be placed in an instate for mental disease for their lifetime.

Contrasted with *County of Los Angeles v. Superior Court of Los Angeles (Kennebrew)* (Dec. 19, 2013) 222 Cal.App.4th 434, where the court asked the public guardian to investigate Kennebrew for a conservatorships but it declined to file one because of his diagnosis of Alzheimer’s type dementia, which, by its very nature, is not likely to improve with treatment. (*Id.* at 440.) The criminal court concluded that Kennebrew remained incompetent to stand trial; that he met the requirements for a conservatorship under the LPS Act; that he had been diagnosed by the state hospital as presenting a substantial danger of physical harm to others by reason of his mental disorder; and, that no rational basis or compelling interest outweighed the concerns for public safety and need for conservatorship under the LPS Act or justified the public guardian’s refusal to act as conservator for Kennebrew. (*Id.* at 441.) The court then ordered the public guardian to petition for establishment of a conservatorship under § 5008(h)(1)(A) and (B) (both LPS and *Murphy*), and ordered the public guardian to act as Kennebrew’s conservator. (*Id.* at 441.) In *Kennebrew*, the focus shifts away from the patient and treatment, towards the interests of the criminal justice system and incapacitation.

Many courts around the state, including Monterey County, apply the *Kennebrew* decision and have been ordering public guardian offices to file conservatorships where, arguably, they do not meet the requirements of the LPS Act and are condemning people to indefinite institutionalization.

5) County Jail

Placement in the County Jail was clearly inappropriate. Even though Mr. Smith was placed in the infirmary across from the nurses’ station, given Mr. Smith’s mental condition, lack of mobility, possibility of him being subject to an attack from an inmate, seizure disorder, etc., the jail was not the appropriate placement. The more Mr. Smith remained in legal limbo, the greater the possibility that something catastrophic could happen to him in jail.

6) Lack of Funding – County’s Responsibility

Mr. Smith was not eligible to receive public assistance for his placement while the charges were pending. Further, any State or Federal assistance would probably be insufficient to cover the full cost of an adequate non-local facility, leaving the County to pay the difference.

7) Setting Precedent

The County of Monterey was worried that, if it did not oppose taking Mr. Smith as a conservatee, the floodgates would open and the scant County resources would be quickly exhausted. In other words, it was worried about setting dangerous precedent in Monterey County.

8) Lack of Family Cooperation

Mr. Smith was somewhat estranged from his relatives. The only relative that was engaged with the process was his sister. Although she was willing to take care of Mr. Smith, she was not capable because her spouse opposed Mr. Smith moving in with them. Further, dismissing the charges and allowing Mr. Smith to move in with her sister was probably a solution that the District Attorney was not going to entertain.

Approaches Taken:

1) Legal

The County Counsel's Office filed a motion for reconsideration of the Court's order for the Public Guardian to file a conservatorship. The motion was denied. County Counsel filed a writ with the California Court of Appeal; it was denied. County Counsel then petitioned the California Supreme Court for redress; the California Supreme Court refused to entertain the case.

2) Regional Center

Monterey County researched the possibility to have the California Department of Developmental Centers ("the Regional Center") to take over Mr. Smith's care. The regional centers have many resources to help individuals in Mr. Smith's condition, including the ability to file and act as conservators for the person. However, because Mr. Smith's injury occurred after he turned 18, the Regional Center was not required to care for Mr. Smith.

3) State Hospital

The County of Monterey kept requesting that the State hospital take Mr. Smith, as it was the most appropriate placement for him. The State claimed a lack of resources and an inability to treat individuals with traumatic brain injury. However, the State hospital representative acknowledged that, if the County of Monterey was forced to file for a conservatorship, and if the County was willing to pay in excess of \$100,000 per year, they would be willing and able to house Mr. Smith. Thus, it was clear that the State might have had the technical capacity to care for Mr. Smith, but they lacked the financial capacity to care for him.

4) Educating the Parties

Throughout the legal case, the County Counsel's Office, the Public Guardian's Office, and Mr. Bullick, the Director of the Department of Health and Public Guardian, attempted to educate the District Attorney, Public Defender, and the Court of a) the lack of legal support for

their position but, most importantly, b) the lack of appropriate placements for Mr. Smith. The results were negligible.

5) Practical Solutions

Throughout the process, the Public Guardian attempted to find a solution that would not require the Count to file a conservatorship. It looked for appropriate placements for Mr. Smith and presented his case throughout the county and neighboring counties.

Possible Solutions:

1) Legislative Fixes (Regional Centers, LPS Act and Bronzan-McCorgudale Act)

When the laws that set up the regional centers were enacted, they contained provisions to care for individuals in Mr. Smith's situation. The requirement that the individual be diagnosed with a qualifying mental condition before the age of eighteen only makes sense when one looks at it from the funding perspective. Changing the law to require regional centers to help individuals in Mr. Smith's situation, regardless of when they were diagnosed, would fill in that gap.

Similarly, amending the LPS Act to specifically state that dementia is an illness covered under the Act would provide clarity and, hopefully, funding to place these individuals. The same is true with an amendment to the Bronzon-McCorgudale Act.

2) California Supreme Court

The counties need to work together to bring a favorable case before the California Supreme Court. In hindsight, a writ might not have been the best vehicle to ask the California Supreme Court for redress as it is not obligated to rule on the merits of the case. We would like to think that counties with a higher volume of cases are already looking that test case that will hopefully resolve this split in the courts in the counties' favor.

3) Availability of Placements

The State of California, especially Monterey County, needs more facilities to accommodate the needs of persons with dementia and traumatic brain injuries. Having more facilities would have many benefits, bringing down costs being the main one. The legislature could enact laws that would provide funding to incentivize the public sector to build these types of facilities, or it could allocate funding to run these facilities itself.

4) State Hospitals

It is evident that the main reason why the State hospitals have begun sending defendants back to their counties of origin is funding. Not only did they begin this practice during the State's budgetary crisis, but the very candid discussion that the County of Monterey had with an attorney for the State hospitals that they would take Mr. Smith if the county paid for his stay, shows that they have the technical capacity, but not the financial capacity. Providing more

funding to State hospitals, with the mandate that they care for these individuals, would go a long way to filling in the gap.

Outcomes:

In the end, the County of Monterey filed a probate conservatorship for Mr. Smith. One reason is that we avoided setting precedent in Monterey County that the courts can order the Public Guardian to file an LPS or a *Murphy* conservatorship. The other reason is that a probate conservatorship gives the Public Guardian much more flexibility than an LPS or *Murphy* conservatorship, where the Public Guardian would be beholden to the District Attorney's or the Public Defender's will.

Mr. Smith is in an appropriate facility in Oakland, California. Even though there are some minor violent incidents due to his condition, Mr. Smith's family has reported that he is thriving in Oakland and that they have never seen him doing so well. Granted, his previous placement was in jail, but Mr. Smith now has dedicated and trained staff that can understand his needs and his condition from a therapeutic perspective.