



# Complaint to Sacramento County Superior Court

Per ADA Title II Regulations  
Sections 35.104, 35.107, 35.170(a)

Per Section 504 of the  
Rehabilitation Act of 1973

Per California Government  
Code Section 11135

Exhibit H

Materials on Standing

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**2017 California Code  
Probate Code - PROB  
DIVISION 4 - GUARDIANSHIP,  
CONSERVATORSHIP, AND OTHER  
PROTECTIVE PROCEEDINGS  
PART 3 - CONSERVATORSHIP  
CHAPTER 1 - Establishment of  
Conservatorship  
ARTICLE 3 - Establishment of  
Conservatorship  
Section 1820.**

**Universal Citation:** [CA Prob Code § 1820 \(2017\)](#)

1820.

(a) A petition for the appointment of a conservator may be filed by any of the following:

(1) The proposed conservatee.

(2) The spouse or domestic partner of the proposed conservatee.

(3) A relative of the proposed conservatee.

(4) Any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state.

(5) Any other interested person or friend of the proposed conservatee.

**Subject:** "Next Friend" Standing to Advocate

The American legal system is predicated on the notion that a contest between fully adversarial parties will achieve a just outcome. But when one of the parties lacks the capacity to advocate because of a disability or because his or her attorney is ineffective or has a conflict of interest, then the system is dysfunctional. In such a situation, granting standing to a next friend helps to restore integrity to the legal system.

To qualify as a next friend under federal law, a person “must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action” and the next friend “must be truly dedicated to the best interests of the person on whose behalf [she] seeks to litigate.” (*Ross v. Lantz* (2 Cir. 2005) 396 nd F.2d 512, 514, citing *Whitmore v. Arkansas* (1990) 495 U.S. 149, at 163-164.)

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## 2018 California Rules of Court

### Rule 7.10. Ex parte communications in proceedings under the Probate Code and certain other proceedings

#### (a) Definitions

As used in this rule, the following terms have the meanings stated below:

- (1) "Fiduciary" has the meaning specified in Probate Code section 39, and includes LPS conservators.
- (2) "Person" has the meaning specified in Probate Code section 56.
- (3) "Pleading" has the meaning specified in rule 7.3, but also includes petitions and objections or other opposition filed in LPS conservatorships. The term does not include creditors' claims and requests for special notice.
- (4) A "party" is a fiduciary appointed in a proceeding under the Probate Code or an LPS conservatorship proceeding, and any other person who has filed a pleading in the proceeding concerning a matter then pending in the court.
- (5) A "ward" is a minor subject to a guardianship under division 4 of the Probate Code, including a proposed ward concerning whom a petition for appointment of a guardian has been filed.
- (6) "Ex parte communication" is a communication between any party, attorney, or person in a proceeding under the Probate Code or an LPS conservatorship proceeding and the court outside the presence of all parties and attorneys, including written communications sent to the court without copies having been provided to other interested persons.
- (7) "LPS Act" is the Lanterman-Petris-Short Act, part 1 of division 5 of the Welfare and Institutions Code, commencing with section 5000.
- (8) "LPS Conservatorship" is a conservatorship proceeding under chapter 3 of the LPS Act, commencing with section 5350 of the Welfare and Institutions Code, for persons gravely disabled as the result of a mental disorder or impairment by chronic alcoholism.
- (9) A "conservatee" is a person subject to a conservatorship under division 4 of the Probate Code or chapter 3 of the LPS Act, including a proposed conservatee concerning whom a petition for appointment of a conservator has been filed.
- (10) A "matter then pending in the court" in proceedings under the Probate Code or in an LPS conservatorship proceeding refers to a request for relief or opposition in pleadings filed in the proceeding that has not yet been resolved by a decision of the court or an agreement of the parties.
- (11) Concerning a proceeding under the Probate Code or an LPS conservatorship proceeding, the term "open proceeding" refers to a proceeding that has been commenced and has not been concluded by the final discharge of all fiduciaries or otherwise terminated as provided by law, whether or not there is a matter then pending in the court in the proceeding at any point in time.



**(b) Ex parte communications by parties and attorneys prohibited**

- (1) Except under a stipulation of all parties to the contrary, no ex parte communications may be made by a party or an attorney for a party and the court concerning a matter then pending in the court in proceedings under the Probate Code or in an LPS conservatorship proceeding.
- (2) Except as provided in (c)(1), the court must treat an ex parte communication to the court described in (1) in the same way that an ex parte communication from a party or attorney for a party must be treated in other civil actions or proceedings or in criminal actions.

**(c) Ex parte communications received and considered**

- (1) Notwithstanding (b)(2), a judicial officer or court staff may receive an ex parte communication concerning an open proceeding under the Probate Code or an open LPS conservatorship proceeding for the limited purpose of ascertaining whether it is a communication described in (b) or a communication described in (c)(2).
- (2) Subject to the requirements of (c)(3), a judicial officer may consider an ex parte communication from a person about a fiduciary's performance of his or her duties and responsibilities or regarding a conservatee or ward in an open proceeding under the Probate Code or an open LPS conservatorship proceeding. The court may decline to take further action on the communication, with or without replying to the person or returning any written communication received from the person. The court may also take appropriate action, consistent with due process and California law, including one or any combination of the following:
  - (A) Review the court file and take any action that is supported by the record, including ordering a status report or accounting if it appears that a status report or accounting should have been filed by a fiduciary but is delinquent.
  - (B) Refer the communication to a court investigator for further action, and receive, consider, and respond to any report from the investigator concerning it;
  - (C) If the communication discloses possible criminal activity, refer the matter to the appropriate law enforcement agency or prosecutor's office;
  - (D) If the communication discloses conduct that might subject a person or organization to disciplinary action on a license, refer the matter to the appropriate licensing agency;
  - (E) If the communication discloses possible elder or dependent adult abuse, or child abuse, refer the matter to appropriate state or local governmental agencies, including adult protective or child protective service departments; and
  - (F) Set a hearing regarding the communication, compel the fiduciary's attendance, and require a response from the fiduciary concerning the issues raised by the communication.
- (3) The court must fully disclose communications described in (c)(2) and any response made by the court to the fiduciary and all other parties to any matter then pending in the court, and their attorneys, unless the court finds good cause to dispense with the disclosure if necessary to protect a conservatee or ward from harm. If the court dispenses with disclosure to any party or attorney, it must make written findings in support of its determination of good cause, and preserve the communication received and any response made by the court. The court may place its findings and the preserved communication under seal or otherwise secure their confidentiality.

*Rule 7.10 adopted effective January 1, 2008.*

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**Subject:** Michelle K. v. Superior Court (2013) 221 Cal. App. 4th 409

Indeed, no matter how well intentioned parents and conservators may be, they cannot exert their influence to curtail or deny the due process rights of persons with developmental disabilities.

**Potential conflict requires independent attorney:**

The right to appointed counsel and the other constitutional safeguards it requires are based on the inherent conflict that arises when a parent or conservator seeks developmental center placement for a developmentally disabled person. Because the placement has a significant impact on the developmentally disabled person's fundamental right to personal liberty, constitutional safeguards are required to ensure the developmentally disabled person's disabilities justify the placement. Whether there is an actual conflict between the developmentally disabled person and the parent or conservator seeking the placement cannot be determined until the court determines whether the placement is justified (if the placement is justified, there is no actual conflict). To require an actual conflict before granting a developmentally disabled person the right to independent counsel would render the right illusory.

Incompetence does not cause the loss of a fundamental right from which the incompetent person can still benefit. Indeed, in enacting the Lanterman Developmental Disabilities Services Act, *Welf. & Inst. Code, § 4500 et seq.*, the Legislature declared that persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California. *Welf. & Inst. Code, § 4502.*



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## MICHELLE K. v. SUPERIOR COURT

No. G048018.

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[221 Cal.App.4th 409 \(2013\)](#)

[164 Cal. Rptr. 3d 232](#)

*MICHELLE K., an Incompetent Person, etc., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; HARBOR DEVELOPMENTAL DISABILITIES FOUNDATION et al., Real Parties in Interest.*

Court of Appeals of California, Fourth District, Division Three.

November 8, 2013.



(18) Here, the fair hearing procedures did not provide Michelle the due process and equal protection safeguards *Hop* requires because neither the regional center nor the developmental center changed Michelle's placement or any of her other services, and therefore neither Michelle nor George had the right to request a hearing under the administrative fair hearing procedures.<sup>12</sup>

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Accordingly, the trial court may proceed with the pending *Hop* review hearing to determine whether Michelle's disabilities continue to justify her placement in a developmental center. If the trial court determines Michelle's Fairview placement is no longer warranted because a less restrictive facility can meet her needs, George may request Michelle's transfer to a specific facility of his choosing and urge adoption of the services he believes are necessary. The administrative fair hearing procedures should be used to resolve any challenge George has to the facility the regional center ultimately may select for Michelle and the services to be provided at that facility. The trial court should not resolve any such challenges in the first instance during the *Hop* review, which is limited to deciding whether appropriate efforts have been made to identify a less restrictive facility that satisfies all of Michelle's needs and whether at least one such facility exists. Assuming the trial court concludes Michelle should be transferred, she should not be transferred until all issues regarding her new placement are resolved. (See *Hop, supra*, 29 Cal.3d at p. 94 ["A precipitous release of these [adults] to families and community facilities unprepared to care for them could be both disruptive to the treatment program and potentially harmful to the [patient] and the community."]; see also *Sherry S., supra*, 207 Cal.App.3d at p. 463.)

### ***C. The Right to Independent Appointed Counsel Prevents a Conservator from Selecting the Conservatee's Counsel for the Hop Review***

George contends the trial court erred in refusing to substitute the attorney he hired to represent Michelle on the pending *Hop* petition for the court-appointed Public Defender. We conclude the court did not err because Michelle's right to counsel on the *Hop* petition is a right to independent counsel appointed to protect her fundamental right to personal liberty. Because the Public Defender was appointed as independent counsel for Michelle, George may not replace the Public Defender with counsel of his choice even though he is Michelle's legal representative for most purposes.<sup>13</sup>

(19) *Hop* found a developmental center placement constitutes a substantial deprivation of personal liberty and therefore a section 4825 committee is entitled to many of the same constitutional safeguards as a criminal defendant, including a judicial hearing to test the basis for the placement, a jury trial, application of the beyond a reasonable doubt standard of proof, and appointed counsel. (*Hop, supra*, 29 Cal.3d at pp. 89, 93-94.) Based on the

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fundamental liberty interest at stake, *Hop* requires these safeguards even though only a developmentally disabled person's parent or conservator may request a section 4825 developmental center placement. (§ 4825; *Violet C., supra*, 213 Cal.App.3d at p. 92; *Sherry S., supra*, 207 Cal.App.3d at p. 457.)

Although the *Hop* court presumed parents and conservators "are well motivated and act in what they reasonably perceive to be the best interest of their children [or conservatees]," the court concluded "[t]hat fact cannot... detract in any way from the child [or conservatee's] right to procedures that will protect him from arbitrary curtailment of his liberty interest in such a drastic manner [as developmental center placement] no matter how well motivated." [Citations.] (*Hop, supra*, 29 Cal.3d at p. 93.) Indeed, "[n]o matter how well intentioned parents and conservators may be, they cannot exert their influence to curtail or deny the due process rights of persons with developmental disabilities." (*Capitol People, supra*, 155 Cal.App.4th at p. 699.)

(20) "[U]nder the Lanterman Act it is the individual with a developmental disability — not his or her family, friends, or conservator — who is afforded all the legal rights and responsibilities guaranteed by the United States and California Constitutions." (*Capitol People, supra*, 155 Cal.App.4th at p. 699.) We may not substitute the good intentions of a developmentally disabled person's parent or conservator for the person's right to a hearing, appointed counsel, or any other constitutional safeguard *Hop* requires. (*Hop, supra*, 29 Cal.3d at p. 93.) We therefore conclude the right to appointed counsel under *Hop* is a right to independent counsel.

We find support for our conclusion in other cases that hold a person is entitled to independent counsel when his or her conservator or representative seeks to take an action that would significantly impact the person's fundamental rights. For example, in *Wendland v. Superior Court* (1996) 49 Cal.App.4th 44 [56 Cal.Rptr.2d 595] (*Wendland*), the Court of Appeal found the trial court erred in refusing to appoint independent counsel for a conservatee. The conservatee's wife, acting as temporary conservator, petitioned the trial court to remove the conservatee's feeding tube because he suffered from severe brain injuries, was mostly paralyzed, and could not communicate, although the conservatee was not in a persistent vegetative state. The conservatee's mother and sister opposed the petition and asked the trial court to appoint independent counsel for the



conservatee. (*Id.* at pp. 46-47.) The trial court denied the request because it found the conservatee's mother and sister adequately represented his interests. (*Id.* at p. 48.)

In reversing that decision, the appellate court found the mother's and sister's opposition to the petition to remove the feeding tube did not

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necessarily mean they represented the conservatee's interests, and therefore the conservatee was entitled to an independent representative who would identify and advocate for the conservatee's interests. As the *Wendland* court explained, "[A] person facing the final accounting of death should not be required to rely on the uncertain beneficence of relatives.... [The conservatee's] mother and sister ... do [not] necessarily represent his interests. [¶] ... [¶] Because [the conservatee's] very life is at stake, he is entitled to counsel to represent his interests, whatever those interests might be." (*Wendland, supra*, 49 Cal.App.4th at p. 52; see *Conservatorship of Sides* (1989) 211 Cal.App.3d 1086, 1092-1093 [260 Cal.Rptr. 16] [proposed conservatee entitled to independent appointed counsel in proceeding to appoint conservator]; *In re David C.* (1984) 152 Cal.App.3d 1189, 1208 [200 Cal.Rptr. 115] [child entitled to independent appointed counsel on county's petition to terminate child's parental rights].)

*Conservatorship of Drabick* (1988) 200 Cal.App.3d 185 [245 Cal.Rptr. 840] (*Drabick*) also involved a conservator's petition to remove his conservatee's feeding tube, but the conservatee in *Drabick* was in a persistent vegetative state. (*Id.* at p. 189.) The trial court appointed independent counsel for the conservatee and the question on appeal was not whether independent counsel should have been appointed, but whether appointed counsel was required to oppose the petition. After conducting an independent investigation, the appointed counsel concluded removing the feeding tube was in the conservatee's best interest and therefore did not oppose the conservator's petition. The *Drabick* court held appointed counsel's role was to independently determine and represent the conservatee's best interests regardless of whether those interests were consistent or inconsistent with the actions the conservator sought on the conservatee's behalf: "When an incompetent conservatee is still able to communicate with his attorney it is unclear whether the attorney must advocate the client's stated preferences — however unreasonable — or independently determine and advocate the client's best interests. [Citation.] When the client is permanently unconscious, however, the attorney must be guided by his own understanding of the client's best interests. There is simply nothing else the attorney can do." (*Id.* at pp. 212-213.)

(21) Here, we are concerned with Michelle's fundamental right to personal liberty, which the *Hop* court found "'second only to life itself.'" (*Hop, supra*, 29 Cal.3d at p. 89.) Moreover, although Michelle is not permanently unconscious, the parties agree she is incompetent, cannot communicate her preferences to counsel, and cannot otherwise assist counsel in determining her best interests. Accordingly, we find Michelle's right to independent counsel analogous to the conservatees' rights in *Wendland* and *Drabick*. We acknowledge the rights to appointed counsel in *Wendland* and *Drabick* were statutorily created while the right to appointed counsel under *Hop* was

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judicially created. Nonetheless, the rationale and need for independent appointed counsel exists when a conservator or other representative proposes acts that would significantly affect the person's fundamental rights. (See *Conservatorship of David L.* (2008) 164 Cal.App.4th 701, 710 [79 Cal.Rptr.3d 530] (*David L.*) [regardless of whether right to effective assistance of counsel is constitutional in nature, "once such a right has been conferred, a proposed conservatee has an interest in it which is protected by the due process clause of the federal Constitution"].)

Because we conclude Michelle's right to appointed counsel under *Hop* is the right to independent counsel, we also conclude George may not replace the court-appointed Public Defender with private counsel. Allowing George to select Michelle's counsel for the *Hop* hearing would render her right to independent counsel meaningless because George simply could replace the Public Defender with counsel who would follow George's instructions without independently evaluating whether those instructions are in Michelle's best interest. George assumes his decisions about Michelle's placement are necessarily in her best interest. His position leaves no room for good faith disagreement. As explained above, the purpose of independent counsel under *Hop* is to prevent the arbitrary curtailment of a developmentally disabled person's fundamental right to personal liberty by a parent or conservator pursuing placement on the developmentally disabled person's behalf. We do not suggest George is doing anything other than what he in good faith believes to be in Michelle's best interests, but his good faith and benevolent intentions cannot serve as a substitute for the constitutional safeguard independent appointed counsel provides." (*Hop, supra*, 29 Cal.3d at p. 93.) Accordingly, we conclude the trial court did not err in refusing to substitute the attorney George hired for the Public Defender.

(22) But we emphasize the limited scope and purpose of the *Hop* hearing and the appointment of counsel for that hearing. As Michelle's appointed counsel, the Public Defender does not become her counsel or representative for all purposes. Rather, the Public Defender represents Michelle solely to test whether her disabilities warrant placement in the most restrictive environment available under the Lanterman Act. The Public Defender must independently investigate Michelle's disabilities and her needs to determine whether they continue to require developmental center placement. The Public Defender is not required to oppose



developmental center placement, but rather to identify and advocate for Michelle's best interests regardless of whether those interests require developmental center placement or placement in a less

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restrictive facility. (*Wendland, supra*, 49 Cal.App.4th at p. 52; *Drabick, supra*, 200 Cal.App.3d at pp. 212-214.) The Public Defender does not have authority to make any decisions on Michelle's behalf; he merely evaluates whether her disabilities warrant keeping her at Fairview and presents that determination to the court. Moreover, the appointment of independent counsel does not mean George has no role in the process and may not participate in the *Hop* hearing. To the contrary, George remains Michelle's representative and he may continue to advocate for the placement he believes is best suited for Michelle. George lacks authority to control the Public Defender's actions, but he may voice his opposition to those actions.

George contends an attorney appointed to represent a developmentally disabled person under *Hop* is independent with the power to decide whether to advocate for or against developmental center placement only when (1) the developmentally disabled person has no other legal representative, or (2) a "legal conflict" exists between the developmentally disabled person and his or her legal representative. According to George, Michelle does not require independent counsel, and the Public Defender must follow his instructions, because the court order appointing him as Michelle's limited conservator makes him her legal representative and he has no legal conflict with Michelle. This argument fails for two reasons.

(23) First, Michelle's right to and the authority of her independent counsel under *Hop* do not depend on the absence of any other legal representative for Michelle. The conservatees in *Wendland* and *Drabick* both had an appointed conservator acting as a legal representative, but the conservatees nonetheless had a right to independent appointed counsel who was not required to follow the appointed conservator's directives. (*Wendland, supra*, 49 Cal.App.4th at pp. 47-48, 52; *Drabick, supra*, 200 Cal.App.3d at pp. 189, 212-214.) Moreover, placement in a developmental center under section 4825 may only be sought by a developmentally disabled person's legal representative (§ 4825; *Violet C., supra*, 213 Cal.App.3d at p. 92; *Sherry S., supra*, 207 Cal.App.3d at p. 457), and therefore accepting George's contention would mean a developmentally disabled person would never have a right to independent appointed counsel under *Hop*. Michelle's right to independent counsel, however, arises from the significance of the interest at stake on the *Hop* petition — Michelle's fundamental right to personal liberty — not from the absence of a legal representative for Michelle.

Second, George provides no explanation or authority to support his conclusion he has no legal conflict with Michelle. *Hop* bases the right to appointed counsel and the other constitutional safeguards it requires on the inherent conflict that arises when a parent or conservator seeks developmental center placement for a developmentally disabled person. Because the placement has

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a significant impact on the developmentally disabled person's fundamental right to personal liberty, *Hop* requires constitutional safeguards to ensure the developmentally disabled person's disabilities justify the placement. Whether there is an actual conflict between the developmentally disabled person and the parent or conservator seeking the placement cannot be determined until the court determines whether the placement is justified (if the placement is justified, there is no actual conflict). To require an actual conflict before granting a developmentally disabled person the right to independent counsel would render the right illusory. That is clearly not *Hop*'s intent.

(24) George also argues he may exercise Michelle's absolute right to replace her counsel at any time because he is Michelle's legal representative with the power to fix her residence, give or withhold medical consent, and contract on Michelle's behalf. As a general rule, a client has the right to replace his or her attorney at virtually any time with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 [275 Cal.Rptr. 191, 800 P.2d 547]; *People v. Courts* (1985) 37 Cal.3d 784, 789-790 [210 Cal.Rptr. 193, 693 P.2d 778] [criminal defendant may replace his or her appointed counsel with new, retained counsel at any time]; *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385, 494 P.2d 9].) These rules, however, do not support George's position. Although George is Michelle's legal representative and the holder of her attorney-client privilege (Evid. Code, § 953), Michelle remains the client (Evid. Code, § 951). George does not cite any authority allowing a conservator to replace a conservatee's court-appointed independent counsel with counsel the conservator selected. As explained above, allowing a conservator to do so would render the right to independent appointed counsel meaningless.

(25) Finally, George contends *Drabick* requires the Public Defender to follow his instructions. It does not. In *Drabick*, the Court of Appeal held a conservator must have the power to exercise a comatose conservatee's right to refuse medical treatment and not have his or her life artificially extended because the right would be rendered meaningless if someone could not exercise it on the comatose conservatee's behalf. (*Drabick, supra*, 200 Cal.App.3d at pp. 208-210.) The *Drabick* court, however, did not conclude the conservatee's appointed counsel must follow the conservator's instructions. To the contrary, the court held appointed counsel must independently determine and advocate for the conservatee's best interests regardless of whether those interests coincide with the conservator's course of action on the conservatee's behalf. (*Id.* at pp. 212-214.) As explained above, independent appointed counsel provides an important check and balance against a conservator's efforts to take action on an incompetent



conservatee's behalf that would significantly affect the conservatee's fundamental rights. Appointed counsel does not exercise the right for the conservatee or veto the conservator's exercise of the right for the conservatee; rather, appointed

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counsel provides an independent view of what is in the conservatee's best interest. Here, the trial court ultimately will decide whether Michelle's Fairview placement remains warranted based on all of the information received from George, the Public Defender, the Harbor Regional Center, and any other interested parties.

#### ***D. A Conservator May Seek New Appointed Counsel for the Hop Petition if He Believes the Public Defender Is Not Providing Effective Representation***

Our conclusion George may not replace Michelle's appointed counsel with counsel of his choice does not mean George is powerless to challenge the adequacy of the Public Defender's representation. Michelle's right to appointed counsel is a right to effective counsel, and the trial court must provide George, as Michelle's legal representative, a full opportunity to request new appointed counsel for her if he believes the Public Defender is not providing Michelle effective assistance. (See *David L.*, *supra*, 164 Cal.App.4th at pp. 705-706.)

In *David L.*, the public guardian filed a petition to appoint an LPS conservator for a prospective conservatee and the trial court appointed the public defender to represent the prospective conservatee. On the third day of the trial to determine whether the prospective conservatee was gravely disabled and in need of a conservator, the public defender advised the court the prospective conservatee "was suffering from extreme anxiety, stomach issues, and he can't come to court." (*David L.*, *supra*, 164 Cal.App.4th at p. 712.) The public defender further advised the prospective conservatee wanted another appointed lawyer because he believed the public defender was not adequately representing him, but the public defender could not provide any further explanation. The trial court denied the request, proceeded with the trial in the prospective conservatee's absence, found the prospective conservatee gravely disabled, and appointed an LPS conservator. (*David L.*, *supra*, 164 Cal.App.4th at pp. 706-708.) The Court of Appeal concluded the trial court violated the prospective conservatee's due process rights because he "was not given a full opportunity to state his reasons for requesting substitute counsel, and thus, was not afforded due process in the determination of his request for substitute counsel." (*Id.* at p. 712.)

The *David L.* court explained that the statutory or constitutional right to appointed counsel necessarily includes the right to effective counsel under the Constitution's due process clause. Moreover, because of the significant liberty interest at stake in an LPS conservatorship proceeding and the confinement in a locked treatment facility that may result from the proceeding, a prospective conservatee is entitled to many of the same due process protections as a

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criminal defendant, including the right to seek new appointed counsel under *People v. Marsden* (1970) [2 Cal.3d 118](#) [[84 Cal.Rptr. 156](#), [465 P.2d 44](#)] (*Marsden*), if the prospective conservatee believes her appointed counsel is not providing effective representation. (*David L.*, *supra*, 164 Cal.App.4th at pp. 710-711.)

In *Marsden*, the Supreme Court held trial courts must provide criminal defendants seeking to change appointed counsel an opportunity to state the reasons for their request because "[t]he right of a defendant in a criminal case to have the assistance of counsel for his defense ... may include the right to have counsel appointed by the court ... discharged or other counsel substituted, if it is shown ... that failure to do so would substantially impair or deny the right ...." [Citations.]" (*Marsden*, *supra*, 2 Cal.3d at pp. 123-124; see *David L.*, *supra*, 164 Cal.App.4th at p. 709.) The *Marsden* court explained, "A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom.... A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention `is lacking in all the attributes of a judicial determination.' [Citation.]" (*Marsden*, at pp. 123-124; see *David L.*, at p. 711.)

The *David L.* court found "no meaningful distinction between criminal and LPS proceedings insofar as the procedures required to guard against the erroneous deprivation of the right to effective assistance of counsel," and therefore "conclude[d] that the trial court must afford a prospective conservatee a full opportunity to state the reasons for requesting substitute counsel in accordance with *Marsden*." (*David L.*, *supra*, 164 Cal.App.4th at p. 711.) The trial court erred by failing to do so.

(26) In *Hop*, the Supreme Court found a section 4825 placement of a developmentally disabled person in a state developmental center was analogous to a prospective conservatee under the LPS Act and therefore the developmentally disabled person was "entitled to the same congeries of rights" as a prospective LPS conservatee. (*Hop*, *supra*, 29 Cal.3d at p. 93.) Consequently, we



conclude the trial court in a *Hop* review must afford a developmentally disabled person a full opportunity to request new appointed counsel and to state the reasons for that request under the procedures established in *Marsden*.

Here, the parties agree Michelle is incompetent and unable to personally exercise her right to request new appointed counsel. That inability, however,

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does not mean Michelle is any less entitled to effective representation or any less entitled to request new appointed counsel if the representation she is receiving is ineffective. "[I]ncompetence does not cause the loss of a fundamental right from which the incompetent person can still benefit." (*Drabick, supra*, 200 Cal.App.3d at p. 208.) Indeed, in enacting the Lanterman Act the Legislature declared, "Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California." (§ 4502; see *Hop, supra*, 29 Cal.3d at p. 89 ["persons will not be deprived of due process or equal protection of law on the basis of developmental disability alone"].)

Accordingly, we conclude George, as Michelle's legal representative with the power to fix her residence, provide or withhold medical consent, and contract on her behalf, may exercise Michelle's right to request new appointed counsel if he believes the Public Defender is not providing effective representation. Michelle's right to effective counsel and to request new appointed counsel would be meaningless unless someone is permitted to exercise the right for her. (See *Drabick, supra*, 200 Cal.App.3d at p. 209.) We acknowledge George did not seek to exercise Michelle's right to request new appointed counsel, but rather sought to substitute new, private counsel he retained for Michelle in place of the Public Defender. As explained above, George may not do so. But in connection with the trial court's *Hop* review of Michelle's Fairview placement, the trial court must allow George to request new appointed counsel if he believes the Public Defender is providing Michelle ineffective representation and must provide George a full opportunity to state the reasons for the request under *Marsden*.<sup>15</sup> We express no opinion on whether the Public Defender has adequately represented Michelle.

## IV

### DISPOSITION

The petition is granted in part and denied in part. Let a writ of mandate issue directing the trial court to (1) enter an order dismissing the habeas corpus petition; (2) conduct a hearing on the *Hop* petition; and (3) hear and decide any request to appoint new counsel for Michelle. Our order staying all

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trial court proceedings on the habeas corpus and *Hop* petitions is hereby dissolved. In the interest of justice, all parties shall bear their own costs on this writ proceeding.

Bedsworth, Acting P. J., and Fybel, J., concurred.

### FootNotes

1. We abbreviate the last name of Michelle and her family members, and will use only their first names, to protect Michelle's privacy. (See Welf. & Inst. Code, § 4502, subd. (b); *Conservatorship of Susan T.* (1994) [8 Cal.4th 1005](#), 1008, fn. 1 [[36 Cal.Rptr.2d 40](#), [884 P.2d 988](#)] (*Susan T.*).) No disrespect is intended.

2. All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

3. A conservator appointed under the Probate Code lacks the authority to place the conservatee in a locked facility. (*People v. Karriker* (2007) [149 Cal.App.4th 763](#), 780 [[57 Cal.Rptr.3d 412](#)] ["The primary difference between a Probate Code conservator and an LPS conservator is the LPS conservator's power to place the conservatee in a locked facility, an action that a Probate Code conservator cannot take."].)

4. Section 6500 et seq. addresses not only developmentally disabled persons who are dangerous to themselves or others, but also developmentally disabled persons who have been committed because they are incompetent to stand trial for a crime with which they are charged. (§§ 6500, subds. (b)(1), (c)(1), 6502, 6509, subds. (a) & (b), 7505, subd. (a)(3).) We focus on the statutory

# ADA Title II Regulations

## Applicable to Guardianship and Conservatorship Proceedings

### Summary:

**Complaints.** An ADA complaint may be filed by an individual who believes that a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity. (Section 35.170(a)) Complaints may be filed on behalf of classes by third parties. (Section 35.104)

**Government Services.** The prohibitions against discrimination on the basis of disability apply to all services, programs, or activities of a public entity. (Section 35.102(a)) A public entity includes a state or local government, or any department, agency, or instrumentality of a state or local government. (Section 34.104)

**Notice, Self Evaluation, Complaint Procedure.** A public entity shall make available to the beneficiaries of its services information about the ADA and its applicability to the entity's services. (Section 35.106) A public entity shall conduct a self evaluation of its services and programs to determine if they comply with the requirements of the ADA and if they do not then to modify them in a manner to make them compliant. (Section 35.105) A public entity with 50 or more employees shall adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would violate the ADA. (Section 35.107)

**ADA Duties.** A public entity shall not deny the benefit of its services to someone on the basis of his or her disability. (Section 35.130(a)) The opportunity to benefit from services shall be provided on an equal basis as provided to participants without a disability. (Section 35.130(b)) A public entity shall make reasonable modifications to policies, practices, or procedures in order to avoid discrimination on the basis of disability. (Section 35.130(b)(7)) A public entity shall take appropriate steps to ensure that communications with service recipients with disabilities are as effective as communications with others. (Section 35.160)

### Regulations:

#### **§ 35.101 Purpose and broad coverage.**

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S. C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

#### **§ 35.102 Application.**

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

### **§ 35.104 Definitions.**

For purposes this part, the term—

*Complete complaint* means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

*Public entity* means—

- (1) Any State or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

### **§ 35.105 Self-evaluation.**

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

### **§ 35.106 Notice**

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

### **§ 35.107 Designation of responsible employee and adoption of grievance procedures**

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.



## Comments on Standing to File ADA Complaints

Rules for standing to file administrative complaints under the ADA are broad (Section 35.104 and Section 35.170(a), Title II Regulations); so are rules to bring information to the attention of the superior court regarding the well-being of probate conservatees. (Rule 7.10, California Rules of Court; as is state statutory provisions that confer standing on "any interested person or friend." (Probate Code Section 1820). This is understandable, considering that people with significant cognitive and communication disabilities generally cannot themselves complain due to the nature and extent of their disabilities. Someone must be given permission to complain on their behalf --- otherwise the problem would never be addressed and there would be a right that had no remedy for its breach. (Michelle K. V. Superior Court (2013) 221 Cal.App.4th 409)

We will press forward with this, including on the right of third parties to file administrative complaints. New law is never made when people accept the status quo or read existing law in a conservative or constricted way. We will insist on broad rules for standing to complain.

Even if the court tries to wiggle out of this on the issue of standing, they can't unring this bell. We are exposing this terrible practice of denying counsel to proposed conservatees with developmental and other disabilities -- one that is often triggered by well-intentioned parents who file for a general conservatorship rather than a limited conservatorship to save money or based on bad advice from self-help centers or others, or by courts protecting the county budget.

As the California Supreme Court once said:

"In justifying disparate treatment of the developmentally disabled, we are unable to substitute for constitutional safeguards the admitted good intent both of the state and of those treating the developmentally disabled. Again, in *Roger S.* we stressed 'our assumption that the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children. That fact cannot, however, detract in any way from the child's right to procedures that will protect him from arbitrary curtailment of his liberty interest in such a drastic manner no matter how well motivated.'" (*In Re Hop* (1981) 29 Cal.3d 85, 93)