SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 40	**Hearing Date:**	April 23, 2019
Author:	Wiener		
Version:	April 4, 2019		
Urgency:	Yes	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Conservatorship: Serious Mental Illness and Substance Use Disorders***

HISTORY

Source: City and County of San Francisco

Prior Legislation:
SB 1045 (Wiener), Ch. 845, Stats. 2018
SB 931 (Hertzberg), Ch. 458, Stats. 2018
AB 2442 (Santiago), failed in Assembly Health
AB 2156 (Chen), failed in Assembly Health, 2018
AB 1971 (Santiago), died on Senate inactive file, 2018
AB 59 (Waldron), Ch. 251, Stats. 2016
AB 193 (Maienschein), 2015, vetoed
AB 2266 (Waldron), 2014, failed in Assembly Judiciary
AB 1265 (Conway), 2013, failed in Assembly Judiciary
SB 364 (Steinberg) Ch. 567, Stats. 2013
AB 2357 (Karnette) Ch. 774, Stats. 2006
AB 1421 (Thomson), Ch. 1017, Stats. 2002
SB 677 (Lanterman-Petris, Short) Ch. 1667, Stats. 1967

Support: California Hotel & Lodging Association; California Police Chiefs Association; California Psychiatric Association

Opposition: American Civil Liberties Union of California; California Public Defenders Association; Disability Rights California; Service Employees International Union California; Voluntary Services First Coalition; Western Center on Law and Poverty

PURPOSE

The purpose of this bill is to make various changes to the recently enacted housing conservatorship pilot program.

Existing law states, among other things, that the Legislative intent of the Lanterman-Petris Short (LPS) Act is to end inappropriate, indefinite, and involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism. Existing law also establishes that the LPS Act is intended to eliminate legal disabilities and protect mentally disordered and developmentally disabled persons. (Welf. & Inst. Code, § 5001.)

Existing law defines, as a basis for involuntary commitment under the LPS Act, "grave disability" as a condition in which a person, as a result of a mental disorder, or impairment by chronic alcoholism, is unable to provide for his (or her) basic personal needs for food, clothing, or shelter. (Welf. & Inst. Code, § 5008, subd. (h)(1)(A),(2).)

Existing law provides that "gravely disabled" does not include persons with intellectual disabilities by reason of that disability alone. (Welf. & Inst. Code, § 5008, subd. (h)(3).)

Existing law provides that when applying the definition of mental disorder for the purposes of the LPS Act, the historical course of the person's mental illness, as determined by available relevant information, shall be considered when it has a direct bearing on the determination of whether the person is a danger to others, or to themselves, or is gravely disabled. The relevant information shall include, but is not limited to, 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, subd. (a).)

Existing law provides that 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. (Welf. & Inst. Code, § 5150.)

Existing law provides that a finding of grave disability must be based on the person's present conditions. (*Conservatorship of Benevuto* (1986) 180 Cal.App.3d 1030.)

Existing law provides that a person is not gravely disabled, as a basis for involuntary commitment under the LPS Act, if the person is capable of safely surviving in freedom with the help of willing and responsible family members, friends, or third parties, and there is credible evidence that such help is available. (*Conservatorships of Early* (1983) 35 Cal.App.3d 685.)

Existing law provides that a person who has been detained for 72 hours may be 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. Existing law further provides that a person who has been detained for 14 days of intensive treatment may be detained for up to 30 additional days of intensive treatment if the person remains gravely disabled and is unwilling or unable to voluntarily accept treatment. (Welf. & Inst. Code, §§ 5250, 5270.15.)

Existing law allows the professional person in charge of a facility providing 72-hour, 14-day, or 30-day treatment to recommend an LPS conservatorship to the county conservatorship investigator for a person who is gravely disabled and is unwilling or unable to voluntarily accept treatment, and requires the conservatorship investigator, if he or she concurs with the recommendation, to petition the superior court to establish an LPS conservatorship. (Welf. & Inst. Code, § 5350 et seq.)

Existing law provides that the person for whom the LPS conservatorship is sought shall have the right to demand a court or jury trial on the issue of whether he or she is gravely disabled. (Welf. & Inst. Code, § 5350, subd. (d).)

Existing law allows, under the LPS Act, a court to order an imminently dangerous person to be confined for further inpatient intensive health treatment for an additional 180 days, as provided. (Welf & Inst. Code, § 5300 et seq.)

Existing law, under Laura's Law, authorizes, in participating counties, a court to order a person age 18 or older into assisted outpatient treatment (AOT) if the court finds by clear and convincing evidence that all of the following criteria are met:

- The person is suffering from a serious mental illness, as defined in existing law, and is unlikely to survive safely in the community without supervision, based on a clinical determination;
- The person has a history of a lack of compliance with treatment for mental illness that has:
    - At least twice within the last 36 months been a substantial factor in necessitating hospitalization, treatment in a mental health unit of a correctional facility, or incarceration (not including any hospitalization or incarceration immediately preceding the filing of the petition); or
    - Resulted in one or more acts, attempts, or threats of serious violent behavior toward self or others, within the last 48 months (not including any hospitalization or incarceration immediately preceding the filing of the petition);
- The county mental health director or designee has offered the person an opportunity to participate in a treatment plan, the person continues to fail to engage in treatment and the person's condition is substantially deteriorating;
- In view of the person's treatment history and current behavior, the person is in need of AOT in order to prevent a relapse or deterioration which would be likely to result in grave disability or serious harm to the person or others; and
- AOT would be the least restrictive placement necessary to ensure the person's recovery and stability, and the person is likely to benefit from the treatment. (Welf. & Inst. Code, § 5346, subd. (a).)

Existing law authorizes a request for the filing of a petition for an AOT order to be made to the county mental health department by: (1) an adult living with the person who is subject of the petition; (2) the parent, spouse, sibling, or adult child of that person; or (3) specified mental health and law enforcement personnel. (Welf. & Inst. Code, § 5346, subd. (b)(1)-(2).)

Existing law requires the county mental health director or designee to investigate the request, including conducting an examination of the person who is the subject of the petition, and to file the petition only upon a determination that there is a reasonable likelihood that all the necessary elements to sustain the petition can be proved by clear and convincing evidence. (Welf. & Inst. Code, § 5346, subd. (b)(3).)

Existing law requires the petition to state why the subject of the petition meets the criteria for AOT services, and to include an affidavit by the licensed mental health provider who was directed to examine the person by the mental health director, stating that the provider either (1) after personally examining the person, recommends AOT, and is willing to testify at the hearing, or (2) attempted but failed to persuade the person to submit to an examination, but has "reason to believe" that the person meets the criteria for AOT. (Welf. & Inst. Code, § 5346, subd. (b)(4)-(5).)

Existing law provides that the person who is the subject of the petition shall have the right to be represented by counsel at all stages of an AOT proceeding, and if requested by the person, the court shall immediately appoint a public defender or other attorney to assist the person in all stages of the proceedings. The person shall pay the cost of the legal services if he or she is able. (Welf. & Inst. Code, § 5346, subd. (c).)

Existing law requires the court to dismiss the petition if the court finds that the person who is the subject of the petition does not meet the criteria for AOT. (Welf. & Inst. Code, § 5346, subd. (d)(5)(A).)

Existing law authorizes the court, if it finds that the person meets the AOT criteria, and there is no less restrictive alternative, to order the person to receive AOT services, set forth in a written treatment plan as specified, for an initial period not to exceed six months. (Welf. & Inst. Code, § 5346, subd. (d)(5)(B).)

Existing law provides that AOT services shall not be ordered unless the court finds, in consultation with the mental health director or designee, that the specified services are available in the county. (Welf. & Inst. Code, § 5346, subd. (e).)

Existing law requires counties implementing the AOT procedure to provide specified services, which also would be available on a voluntary basis, and would require persons subject to AOT orders to be provided services by trained mobile mental health teams with no more than 10 clients per team member. Additionally, counties can only implement these AOT services as provided. (Welf. & Inst. Code, §§ 5348; 5349.)

Existing law requires implementing counties to work with other interested parties to develop a training and education program to improve delivery of services to mentally ill individuals affected by this bill, which shall include education as to the legal requirements for commitment, and methods to ensure effective treatment and to encourage individuals' informed consent to assistance. (Welf. & Inst. Code, § 5349.1.)

Existing law required the State Department of Health Care Services to submit a report and evaluation of all counties implementing Laura's Law to the Governor and to the Legislature by July 31, 2011. (Welf. & Inst. Code, § 5349.5.)

Existing law establishes a pilot program, until January 1, 2024, for Los Angeles and San Diego Counties, and the City and County of San Francisco, upon authorization by their respective boards of supervisors, to implement a "housing conservatorship" procedure for a person who is incapable of caring for the person's own health and well-being due to a serious mental illness and substance use disorder, as evidenced by eight or more detentions for evaluation and treatment under section 5150 in the preceding 12 months. (Welf. & Inst. Code, § 5450 et seq.)

Existing law provides that the procedure for establishing, administering, and terminating a housing conservatorship is the same as provided for in the Probate Code (Prob. Code § 1400 et seq.), subject to certain exceptions, including:

1) The court may appoint the public conservator to serve as conservator if the court makes an express finding that it is necessary for the protection of the proposed conservatee and is the least restrictive alternative needed for the protection of the conservatee (Welf. & Inst. Code, § 5451(a));

2) The proposed conservatee has the right to demand a court or jury trial on whether they meet the criteria to be conserved, within specified timeframes, and this right applies to subsequent proceedings to reestablish a conservatorship (Welf. & Inst. Code, § 5451(b));

3) The conservatorship investigation is the same as the investigation for LPS conservatorships (Welf. & Inst. Code, § 5451, subd. (c)); and,

4) A housing conservatorship may not be established if a conservatorship or guardianship exists under the Probate Code or the LPS Act, as specified (Welf. & Inst. Code, § 5451, subd. (f)).

Existing law authorizes recommendations for housing conservatorships to be made by the county sheriff, director of a county mental health department of department of public social services, professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment, or the officer providing the conservatorship investigation. (Welf. & Inst. Code, § 5455.)

Existing law provides that the establishment of a housing conservatorship is subject to a finding by a court that the behavioral health director of the county or the city and county has previously attempted by petition to obtain a court order authorizing AOT pursuant to Laura's Law for the person for whom conservatorship is sought, that the petition was denied or the AOT was insufficient to treat the person's mental illness, and that AOT would be insufficient to treat the person in the instant matter in lieu of a conservatorship. (Welf. & Inst. Code, § 5456.)

Existing law requires the officer providing the conservatorship investigation to investigate all available alternatives to a housing conservatorship, and to recommend the housing conservatorship only if no less restrictive alternatives exist and it appears that the person does not qualify for a Probate Code conservatorship or an LPS conservatorship. The officer's recommendations must be detailed in a comprehensive written report submitted to the court that also sets forth, among other things, all relevant aspects of the person's background, the facilities that will provide the recommended treatment, and the powers of the conservator. (Welf. & Inst. Code, § 5457.)

Existing law requires a conservator under these provisions to provide the least restrictive and most clinically appropriate placement for the conservatee, which must be the conservatee's residence or a community-based residential care setting in supportive community housing that provides wraparound services, such as onsite physical and behavioral health services, unless the court, for good cause, orders otherwise. (Welf. & Inst. Code, § 5460.)

Existing law provides that, at any time, a conservatee or any person on the conservatee's behalf with the consent of the conservatee or the conservatee's counsel, may petition the court for a hearing, which would not include trial by jury, to contest the powers granted to the conservator. Specifies that this requirement for a hearing does not affect the right of a conservatee to petition the court for a rehearing as to the conservatee's status as a conservatee. (Welf. & Inst. Code, § 5461.)

Existing law provides that, at any time, a conservatee may petition the court for a rehearing as their status as a conservatee. (Welf. & Inst. Code, §5464.)

Existing law requires all hearings under these provisions to be held within 30 days of the date of the petition. If the conservatee or proposed conservatee is not represented by counsel, requires the court to appoint the public defender for the conservatee or proposed conservatee, as specified. (Welf. & Inst. Code, § 5465.)

Existing law requires participating counties to establish working groups, comprised of representatives of local agencies and disability rights advocacy groups, among others, to conduct an evaluation of the effectiveness of the implementation of the conservatorship provisions described above in addressing the needs of persons with serious mental illness and substance use disorders. Requires each working group to prepare and submit a preliminary report to the Legislature on its findings and recommendations no later than January 1, 2021, and a final report no later than January 1, 2023. (Welf. & Inst. Code, § 5555.)

Existing law provides that a housing conservatorship automatically terminates one year after the appointment of the conservator unless the court specifies a shorter period. Authorizes the conservator to petition the court for reappointment for a succeeding one-year period or shorter. (Welf. & Inst. Code, § 5462.)

This bill reduces the term of a housing conservatorship from one year to six months after the appointment of the conservator unless a shorter period is ordered by the court, but allows the conservatorship for the succeeding six months upon a petition by the conservatorship and reappointment by the court.

This bill provides that a person may be conserved under a housing conservatorship only if the person is presently incapable of caring for the person's own health and well-being due to a serious mental illness and substance use disorder.

This bill clarifies that a housing conservatorship may be established only if the person has been detained eight times for evaluation and treatment pursuant to 5150 hold in a 12-month period.

This bill clarifies that evidence of the person's current behavior and condition independent of the person's history of detentions must be shown to reestablish or defend a housing conservatorship.

This bill codifies the beyond a reasonable doubt standard as the evidentiary burden that must be met to establish a housing conservatorship.

This bill provides that a petition seeking to establish a housing conservatorship shall be filed with the court no later than 28 days following the eighth 5150 hold in a 12-month period, provided that the county health director or designee has done all of the following:

1) Before the eighth detention of the person in the 12-month period, all of the following:

   a) Made the required finding related to AOT;

   b) Confirmed that there are adequate resources to appropriately serve the person in the least restrictive manner; and,

   c) Designated the public conservator to serve as the potential conservator, and instructed that person to begin preparing for the conservatorship investigation.

2) On the seventh detention of the person in the 12-month period, provided the person with a written notice containing detailed information regarding the possibility that the person may be conserved pursuant to this chapter if they are detained once more in the 12-month period; and,

3) Before the seventh detention of the person in the 12-month period, provided the person with the opportunity to engage in voluntary treatment for mental illness and substance use disorders.

This bill authorizes the county to establish a temporary conservatorship for the 28 days following the eighth detention.

This bill states, except as provided, all temporary conservatorships shall expire automatically at the conclusion of 28 days, unless prior to that date the court conducts a hearing on the issue of whether the proposed conservatee is incapable of caring for the proposed conservatee's own health and well-being due to a serious mental illness and substance use disorder.

This bill provides that the temporary conservatorship may be established on the basis of the comprehensive report of the officer providing conservatorship investigation or on the basis of an affidavit of the professional person who recommended conservatorship stating the reasons for that person's recommendation if the court is satisfied that of the necessity for a temporary conservatorship.

This bill states that if the proposed conservatee demands a court or jury trial on the issue of whether the proposed conservatee is incapable of caring for their own health and well-being due to a serious mental illness and substance use disorder, the court may extend the temporary conservatorship until the date of the disposition of the issue by the court or jury trial. However, the extension shall not exceed a period of six months.

This bill requires a conservator to file a report with the court regarding the conservatee's progress and engagement with treatment every 60 days. The report shall set forth the reasons demonstrating the following:

1) Continuing the conservatorship;

2) The treatment plan for the 60 days; and

3) That the treatment plan is the least restrictive.

This bill states that if the court is not satisfied that the conservatorship continues to be justified, the court may terminate the conservatorship or reduce the length of conservatorship.

This bill declares that it is to take effect immediately as an urgency statute.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> SB 40 is critical follow-up legislation to last year's SB 1045 (also authored by Senator Wiener), which created a five-year pilot program for San Francisco, San Diego, and Los Angeles Counties by creating a conservatorship program focused on providing housing with wraparound services to the most vulnerable Californians living on our streets - people who are deteriorating and dying on our streets and who cannot be reached effectively with voluntary services. SB 40 ensures that SB 1045 can be implemented for the population intended to be covered. Several modifications are needed to ensure that the law can be implemented.
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> Senate Bill 40 (SB 40) makes technical and substantive changes to the housing conservatorship program in order to make it effective, including increasing notice to individuals about potentially being conserved, allowing counties to initiate 28-day temporary conservatorships prior to a full six month housing conservatorship, and clearly defining the standards for admission, renewal, and conclusion of the housing conservatorship. Additionally, the bill will clarifies the process for considering clients for assisted outpatient treatment (AOT) prior to seeking a housing conservatorship through the pilot program.
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> These changes do not change the scope of the conservatorship nor the estimated size of the population to be served in San Francisco—a number estimated to be 50-100 people. These changes are crucial to making sure the authorized counties under SB 1045 are able to use this new conservatorship program to help the Californians who are suffering and even dying on our streets.

2. Conservatorships and Other Treatment for Serious Mental Illness

Generally, a conservatorship involves a determination that an adult is not capable of handling their own affairs. In a conservatorship, a guardian or a protector is appointed by a judge to manage the person's financial affairs and/or activities of daily living.

a. LPS Conservatorships

Under the LPS Act, existing law provides for involuntary commitment for varying lengths of time for the purpose of treatment and evaluation, provided certain requirements are met. Additionally, the LPS Act provides for LPS conservatorships, resulting in involuntary commitment for the purposes of treatment, if an individual is found to meet the "grave disability" standard. (Welf. & Inst. Code Sec. 5001 et seq.)

Typically one first interacts with the LPS Act through what is commonly referred to as a 5150 hold. This allows an approved facility to involuntarily commit a person for 72 hours for evaluation and treatment if they are determined to be, as a result of a mental health disorder, a threat to themselves or others, or gravely disabled. (Welf. & Inst. Code, § 5150.) 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. (*People v. Triplett* (1983) 144 Cal.App.3rd 283, pp. 287-288.) When making this determination, the peace officer, or other authorized person, may consider the individual's past conduct, character, and reputation, so long as the case is decided on facts and circumstances presented to the detaining person at the time of detention. (*Heater v. Southwood Psychiatric Center* (1996) 42 Cal.App.4th 1068.)

Following a 72 hour hold, the individual may be held for an additional 14-days, without court review, if they are found to still be, as a result of a mental health disorder, a threat to themselves or others, or gravely disabled. (Welf. & Inst. Code, § 5250.) When determining whether the individual is eligible for an additional 14 day confinement, the professional staff of the agency or facility providing evaluation services must find that the individual has additionally been advised of the need for, but has not been willing or able to accept, treatment on a voluntary basis. (Welf. & Inst. Code, § 5250, subd. (c).) Additionally, 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. (Welf. & Inst. Code, § 5250, subd. (d).)

If a person is still found to remain 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. (Welf. & Inst. Code, § 5270.15.) This "temporary conservatorship" means that the individual may request judicial review of this involuntary detention, and if judicial review is not requested, the individual must be provided a certification review hearing. Additionally, 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. If the person is found to no longer meet the requirements of the 30 day hold, then their certification should be terminated. (Welf. & Inst. Code, § 5270.15, subd. (b).)

Finally, 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. (Welf. & Inst. Code, § 5350.) The individual for whom such a conservatorship is sought has the right to demand a court or jury trial on the issue of whether they meet the gravely disabled requirement. 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 verdict must be issued by a unanimous jury. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235; *Conservatorship of Ben C.*, *supra*, 40 Cal.4th at p. 537-538.) The purpose of an LPS conservatorship is to provide individualized treatment, supervision and placement for the gravely disabled individual. (Welf. & Inst. Code, § 5350.1.)

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. Currently, a "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. 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. (Welf. & Inst. Code, § 5008, subd. (h)(1)(A),(2); *Conservatorship of Benevuto* (1986) 180 Cal.App.3d 1030; *Conservatorships of Early* (1983) 35 Cal.App.3d 685; *Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453.) The courts have found that this definition of "gravely disabled" is not unconstitutionally vague or overbroad, but rather is sufficiently precise in that it excludes "unusual or nonconformist lifestyles" and turns on an inability or refusal on the part of the individual to care for their basic personal needs. (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277.)

b. Laura's Law

Existing law also provides for court ordered outpatient treatment through Laura's Law, or the Assisted Outpatient Mental Health Treatment Program (AOT) Demonstration Project. In participating counties, the court may order a person into an AOT program if the court finds that the person either meets existing involuntary commitment requirements under the LPS Act or the person meets non-involuntary commitment requirements, including that the person has refused treatment, their mental health condition is substantially deteriorating, and AOT would be the least restrictive level of care necessary to ensure the person's recovery and stability in the community. (Welf. & Inst. Code, § 5446 et seq.) Laura's Law follows the involuntary commitment procedures established by LPS, but is aimed at providing out-patient treatment through community services. The law is only operative in those counties in which the county board of supervisors, by resolution, authorizes its application and makes a finding that no voluntary mental health program serving adults, and no children's mental health program, may be reduced in order to implement the law. (Welf. & Inst. Code, § 5349.) The purpose of this language is to require the county board of supervisors to review their current services available and ensure no reduction to these services will result on account of implementing Laura's Law.

Laura's Law provides participating counties with additional, needed tools for early intervention. It allows for family members, relatives, cohabitants, treatment providers or their supervisors, or peace officers to initiate the AOT process with a petition. Then if the individual is found to meet the AOT eligibility requirements, an individual preliminary care plan is developed to meet that person's needs. If this process results in the person voluntarily engaging with treatment, then the patient is deemed to no longer meet the criteria and the petition is no longer available. However, if the client declines their preliminary plan, then a public defender is assigned and the petition proceeds. Laura's Law requires that the court must be notified within 10 days of the intervention, and a hearing must be set within five days of the filing of the petition. It is then up to the judge to either grant or reject the AOT petition. If an AOT petition is approved by the Court, treatment ordered is valid for up to 180 days. (Welf. & Inst. Code, § 5346.)

The initial sunset provision provided for within Laura's Law has now been extended three times, most recently by AB 59 (Waldron, Ch. 251, Stats. 2016) which extended the sunset

until January 1, 2022. While AB 59 was moving through the legislative process, the Author's office stated, "Laura's Law provides family members with important tools for initiating outpatient treatment

for severely mentally ill adults who are incapable of seeking help on their own. It helps to identify when a patient's condition is significantly worsening and to intervene before the patient becomes too ill and is subject to involuntary civil confinement."

c. Housing Conservatorship

Due to concerns that the existing LPS conservatorship and AOT were insufficient to address a specific population suffering from severe mental illness and substance abuse, SB 1045 (Wiener), Chapter 845, Statutes of 2018, authorized a 5-year pilot program for the counties of San Francisco, Los Angeles, and San Diego to establish a housing conservatorship procedure to appoint a conservator for a person who is incapable of caring for the person's own health and well-being due to a serious mental illness and substance use disorder.

Housing conservatorships terminate one year after the appointment, or sooner if ordered by the court. (Welf. & Inst. Code, § 5462.) The establishment of a housing conservatorship is subject to a finding by the court that the behavioral health director has previously attempted to petition to obtain a court order authorizing AOT under Laura's Law, and that (1) the petition was denied or AOT was insufficient to treat the person's mental illness, and (2) AOT would be insufficient to treat the person in the instant matter in lieu of a conservatorship. (Welf. & Inst. Code, § 5456.) Additionally, a housing conservatorship may not be established if a conservatorship or guardianship exists under the Probate Code or the LPS Act, as specified (Welf. & Inst. Code, § 5451, subd. (f)).

Recommendations for housing conservatorships can be made by the county sheriff, director of a county mental health department or department of public social services, professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment, or the officer providing the conservatorship investigation. (Welf. & Inst. Code, § 5455.) The conservatorship investigation is the same as the investigation for LPS conservatorships. (Welf. & Inst. Code, § 5451, subd. (c).) The officer providing the conservatorship investigation is required to investigate all available alternatives to a housing conservatorship, and to recommend the housing conservatorship only if no less restrictive alternatives exist and it appears that the person does not qualify for a Probate Code conservatorship or an LPS conservatorship. The officer's recommendations must be detailed in a comprehensive written report submitted to the court that also sets forth, among other things, all relevant aspects of the person's background, the facilities that will provide the recommended treatment, and the powers of the conservator. (Welf. & Inst. Code, § 5457.) A conservator under these provisions must provide the least restrictive and most clinically appropriate placement for the conservatee, which must be the conservatee's residence or a community-based residential care setting in supportive community housing that provides wraparound services, such as onsite physical and behavioral health services, unless the court, for good cause, orders otherwise. (Welf. & Inst. Code, § 5460.)

The proposed conservatee has the right to demand a court or jury trial on whether they meet the criteria to be conserved, within specified timeframes, and this right applies to subsequent proceedings to reestablish a conservatorship. (Welf. & Inst. Code, § 5451, subd. (b).) At any time, a conservatee or any person on the conservatee's behalf with the consent of the

conservatee or the conservatee's counsel, may petition the court for a hearing, which would not include trial by jury, to contest the powers granted to the conservator. (Welf. & Inst. Code, § 5461.) Additionally, at any time, a conservatee may petition the court for a rehearing as to their status as a conservatee. (Welf. & Inst. Code, § 5464.) All hearings under these provisions must be held within 30 days of the date of the petition. If the conservatee or proposed conservatee is not represented by counsel, the court is required to appoint the public defender for the conservatee or proposed conservatee, as specified. (Welf. & Inst. Code, § 5465.)

3. Impetus for this Bill

After the housing conservatorship pilot program was signed into law, it has been estimated that the law will impact far fewer people than initially expected by the sponsor. (Hume, *Impact of homeless conservatorship plan more limited than expected*, SF Examiner (Feb. 11, 2019.) Under SB 1045, the establishment of a housing conservatorship is subject to a finding by the court that the behavioral health director has previously attempted to petition to obtain a court order authorizing AOT under Laura's Law, and that (1) the petition was denied or AOT was insufficient to treat the person's mental illness, *and* (2) AOT would be insufficient to treat the person in the instant matter in lieu of a conservatorship. (Welf. & Inst. Code, § 5456.)

The sponsor of this bill has asserted that this provision has made SB 1045 unnecessarily difficult to implement, as potential conservatees will often not be eligible for AOT or AOT will clearly be insufficient to treat them. This bill instead provides that the establishment of a housing conservatorship is subject to *either* a finding that 1) the behavioral health director previously petitioned for AOT for the proposed conservatee and was denied or AOT was insufficient to treat the person's mental illness; *or* that 2) the behavioral health director reasonably finds that the person is ineligible for AOT as a matter of law or that there is clear and convincing evidence that AOT would be insufficient to treat the person.

This bill requires the court to find that either of the two conditions described above has been met in order to establish a housing conservatorship. However, as written, the bill does not require the court to make any independent findings on the substantive question of whether the qualifying conditions have been met.

Additionally, a recent amendment to the bill requires that in order to file a petition for a housing conservatorship, the county health director is required, among other things, to provide the proposed conservatee with the opportunity to engage in voluntary treatment for mental illness and substance use disorders before the seventh detention. However, considering this population at times are incapacitated from their mental illness and substance abuse disorders, it appears that offering this voluntary treatment should be done at the earliest point in time possible in order to avoid a worsening of the person's condition, which may in some cases be at the seventh detention but may be earlier in other cases. Also, any offer of voluntary treatment should be provided at a time where the person is clear-minded enough to make decision to accept or reject the offer.

4. Argument in Support

According to the San Francisco Mayor London N. Breed, the sponsor of this bill:

> For too long, residents experiencing the combined weight of chronic homelessness, serious mental illness, and substance use disorder have suffered because they lack the mental sensibility to care for themselves and because they refuse repeated offers of services. As a result, these people are left to die on our streets. We believe that a Housing Conservatorship can help.
>
> San Francisco does not take lightly the responsibilities that such a program bestows upon us, and we strongly believe that an effort to conserve must always be the absolute last resort. Yet there is a small subset of our population that faces such profound mental and drug use challenges that they cannot comprehend that life on the street is killing them, and as a compassionate city, we must step in and help. Housing Conservatorship will do just that.
>
> SB 40 reflects the intent of SB 1045, will not expand the affected population, better defines the population, removes legal ambiguity, and provides clear criteria for determining if a person is eligible for a housing conservatorship. SB 40 provides a streamlined implementation path and would allow San Francisco, and our partner counties, to advance a program that will give people the wrap-around services they need to step out of crisis, and the long-term housing stability they deserve.
>
> San Francisco is ready to step in and help change the trajectory of the lives of people unable to care for themselves. It is the right thing to do. It is the humane thing to do. It is the progressive thing to do.

5. Argument in Opposition

Disability Rights California, American Civil Liberties Union of California and Western Center on law and Poverty write in opposition:

> AB 40 would amend, before even being implement, the newly added statutory provision to delete the requirement that the county or city first pursue AOT through the court and, instead, would leave the determinations of the appropriateness of AOT solely to the discretion of the local behavioral director or the director's designee. Under this bill, the implementing counties have no judicial check on whether the individual sought to be conserved should be offered voluntary treatment, services and supportive housing as the Legislature required in SB 1045.
>
> Although the bill was significantly amended while in the Senate Judiciary Committee to significantly narrow the housing conservatorship framework and, in our opinion, appropriately corrected several constitutional and related infirmities, several provisions in the prior version of SB 40 that raised concerns have been eliminated, including a 180-day window following the 12 month period in which the detentions occur. Additionally, the length of the conservatorship has been changed from one year to six months, the conservator must file reports with the

court justifying the conservatorship every 60 days. If the court is not satisfied that the conservatorship continues to be justified, the court may shorten or terminate the conservatorship. Compressing timeframes for the establishment and duration of a conservatorship added procedural protections. Additionally, the amendments eliminated a definition of "serious mental illness and substance use disorder" that raised several significant concerns.

However, the amendments did not remedy the retreat from the requirement in SB 1045 that voluntary services be offered to an individual before a conservatorship could be imposed and still enables the county behavioral health director to unilaterally make a determination that AOT does not apply or is insufficient without providing any enforcement mechanism or accountability. SB 40 still leaves the determination of whether an offer of voluntary AOT to a county bureaucrat and not the court despite the fact that the finding must be made "as a matter of law" and "by clear and convincing evidence" which are legal determinations that must be made by a court and not a bureaucrat. In short, the determination lacks judicial review of a fundamental determination before an individual is involuntarily held.

Throughout the debate on SB 1045 and now SB 40, we have raised the fact that this legislation does not provide resources or assurances that adequate resources are available to those who may be conserved pursuant to this new conservatorship. There is no point to more aggressive interventions if there is no place to house and treat people who need help. Like SB 1045, there is nothing in this bill which expands services or creates more housing, or medical or mental health care, which is what the real problem is.

-- END –