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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

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Conservatorship of the Person of DONALD J.

DONALD J.,

Petitioner and Appellant,

v.

DEBBIE MASON, as Public Guardian, etc.

Objector and Respondent.

C075833

(Super. Ct. No. PR07025)

Donald J. (Conservatee) appeals from an order denying his petition for rehearing following reappointment of the Modoc County Public Guardian (Public Guardian) as conservator of his person under the Lanterman-Petris-Short (LPS) Act. (Welf. & Inst. Code, § 5000 et seq.)<sup>1</sup> The Conservatee contends the trial court erred in granting what he characterizes as the Public Guardian’s motion for a directed verdict or nonsuit because

<sup>1</sup> Further undesignated statutory references are to the Welfare and Institutions Code.

the Conservatee established a prima facie case that he was no longer gravely disabled. As we explain, the Public Guardian's motion at the conclusion of the Conservatee's case was not a motion for a directed verdict or nonsuit, but instead was a motion for judgment pursuant to Code of Civil Procedure section 631.8, subject to substantial evidence review. Because substantial evidence supports the trial court's order, we affirm.

## **BACKGROUND**

### *Procedural History*

In May 2007, a temporary conservatorship was established for the Conservatee without notice due to his "current medical condition." Less than a month later, the Public Guardian was appointed as a permanent conservator. The Conservatee did not object. The Public Guardian was reappointed in 2008, 2009, and 2010. In 2011, the Conservatee had a relapse and the court again granted the petition for reappointment.

In 2012, a jury trial was set on the petition for reappointment. The parties stipulated to vacate the jury trial and agreed to continue the conservatorship with the Conservatee's mother as conservator and the Conservatee placed in his mother's home. The Conservatee's father objected to the mother as conservator, but supported the continuation of the conservatorship. The court accepted the stipulation and appointed the mother as conservator.

This arrangement did not work. Less than a month later, the Conservatee harmed himself and was hospitalized. Due to the Conservatee's history, Crestwood Wellness Center was the only facility that would accept him, and Crestwood would do so only if the Public Guardian were the conservator. The court removed the mother as conservator and appointed the Public Guardian. In 2013, the Public Guardian was reappointed without objection. This conservatorship automatically terminated on June 23, 2014.<sup>2</sup>

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<sup>2</sup> Because an LPS conservatorship automatically terminates after one year (§ 5361), it could perpetually evade appellate review, particularly where a petition for rehearing is

On January 13, 2014, the Conservatee petitioned for a rehearing on his status as a conservatee pursuant to section 5364. The petition included a plan of action to show the Conservatee was not “gravely disabled.” In this plan, the Conservatee indicated he had a monthly income of \$886.40. His plan was to rent an apartment, which he would find in the newspaper, and buy food at the grocery store and buy clothes at a clothing store. He expected to spend \$200 on food and \$200 on clothing. He could receive assistance from his grandmother. He would receive treatment at the ER and would call Crestwood to get an order for “the shot.” He would get to his appointments by bus or some other transit system.

The matter was set for a court trial.

*Evidence at Trial*

The Conservatee’s grandmother lived in Dallas, Oregon and had contact with the Conservatee through visits, calls, and letters. She had visited him five times in the last year. She had noticed a considerable change in the Conservatee in the last year; he was more stable and more confident. He was conscious of his need for medication and had stabilized on the medication.

She was confident he could move to a lower level of care or terminate the conservatorship. Her only concern was the use of alcohol or drugs which “would blow the whole scheme of things.” She had spoken with Bob Baker, the Conservatee’s proposed roommate. The two had a good friendship and had discussed their plans, financially, economically, and socially. She thought Baker “may very well be a good roommate,” although she found he talked too much. If the Conservatee were released that day, the plan was to go to Redding, get his things, and find him housing.

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filed during the one-year period. For this reason, and because the appeal raises issues that could recur, we find the appeal is not moot. (*Conservatorship of Forsythe* (1987) 192 Cal.App.3d 1406, 1409; *Conservatorship of Moore* (1986) 185 Cal.App.3d 718, 725.)

Baker testified by telephone. He had known the Conservatee for three years and had met him at Crestwood. Baker had been clean and sober for four and a half years and was aware of the decompensation effects of addictive depressants such as alcohol and illicit drugs. He believed it was better to get stimulation through more mature leisure activities. Baker was aware of the Conservatee's need to be compliant with his medication and intended to coordinate their medication schedules to avoid decompensation.

Baker had \$1,300 set aside for an apartment or house; he thought he had found a suitable two bedroom apartment. He was currently living at a board and care facility and had not yet given his 30 days notice. The board and care facility provided him with payee services, prepared meals, and monitored his medication. Baker, a diagnosed schizophrenic, had been there almost a year. He had not lived on his own for two years.

Baker had seen positive growth in the Conservatee, who had matured and was more content, more at ease, and more spiritual. Baker rambled in describing his conversations with the Conservatee about avoiding remorse and "us" and "them."

The Conservatee testified he had had a quarterly review the day before that had gone well. His previous review, in November 2013, had noted two incidents of physically aggressive behavior. In one, someone had propositioned him sexually and in response he elbowed the person. In the second, he head-butted someone who had been harassing him and "just was really getting under my skin."

The Conservatee took medication through a monthly injection and understood "there's no way I can get off of it." He took the medication willingly and would continue if released. He planned to get involved in Alcoholics Anonymous, attend daily meetings, and to get "plugged in to" the Red Bluff Rancheria to get his medications. He kept busy working on the computer, sending e-mails, listening to music, and watching television. He planned to seek a part-time job; he could make up to \$1,000 and continue to collect Supplemental Security Income. He would get medical and dental care through the

Redding Rancheria--he was a tribal member--and would allow in-home visits. His grandmother was a support person and his father was “sometimes available.”

The Conservatee explained the main reason he was at Crestwood was self harm. He claimed he had had his symptoms under control for 18 months. He requested a full discharge.

On cross-examination, the Conservatee admitted he was not currently attending any substance abuse program. He explained his day was taken up with industrial therapy, core groups, recreational groups, aroma therapy, yoga, courtyard open activities, and games. He kept very busy.

He explained that he had been assessed in November as needing structured placement due to at risk behavior because past incidents “have been so traumatic regarding myself and self harm.” The last time he left the conservatorship his doctor stopped seeing him and he could not get the lab draws necessary for his medication. He believed it would now be harder for him to get off his medication with the shots “as long as I was compliant.”

Three exhibits were admitted into evidence. The first was the November 2013 assessment, which documented his history of making false accusations, his two incidents of aggressive behavior, and his need for structured placement due to at risk behaviors. It noted that the Conservatee had opened up about substance abuse but had not attended any groups for sobriety. The other exhibits were an application to rent a \$700-a-month apartment with Baker and his resume. The resume showed his jobs since 2006; none had lasted more than four months.

The final witness was the Public Guardian, Debbie Mason. She had participated in the quarterly review the day before, at which they discussed the Conservatee leaving the facility. Mason testified that the Conservatee had been doing well, but the severity of his history of self harm was the concern. When his mother assumed the conservatorship, the self harm was “pretty severe.”

Due to these concerns, Mason had mixed feelings about the petition. The Conservatee was doing very well and now had the correct cocktail of drugs. She explained that the usual procedure was a step down from a locked facility to a board and care facility with more responsibilities. If the Conservatee continued to be stable, they would look into a lower level of care.

### *The Order*

At the conclusion of the Conservatee's case, counsel for the Public Guardian asked to make a brief statement. She claimed that since a doctor's finding was necessary for a determination that one was gravely disabled, to terminate a conservatorship a medical provider had to come in and say that was no longer the case. She requested that the court deny the petition because the Conservatee had not met his burden of proof.

The court characterized this request as “[b]asically a directed verdict,” and understood that the Public Guardian was asking the court to find the Conservatee had not met his burden of proof to show he was not gravely disabled. Counsel for the Conservatee argued a medical opinion was not necessary because the court was not bound by that opinion and “the Court has to evaluate that evidence.” The court agreed.

The court, however, was not prepared to make a finding that the Conservatee was no longer gravely disabled. It found the burden had not been met. When counsel objected, the court relented and allowed argument on behalf of the Conservatee. Counsel argued for a termination of the conservatorship or in the alternative for an order directing a lower level of care.

After argument, the court noted there had been significant improvement, but substance abuse resulting in self harm was still a concern. The Public Guardian was willing to explore the option of a step down (to a less restrictive placement). The mental health team had recommended a time frame for that in a few months. The court denied the petition. It found it had insufficient information to order a less restrictive placement, but that “it certainly sounds like to me . . . it's time to have that conversation.”

## DISCUSSION

### I

#### *LPS Conservatorships*

Under the LPS Act, a conservator may be appointed for any person who is gravely disabled as a result of a mental disorder. (§ 5350.) A person is gravely disabled if, as a result of a mental disorder, he or she is unable to provide his or her basic personal needs for food, clothing, or shelter. (§ 5008, subd. (h)(1)(A).) “[A] person is not ‘gravely disabled’ if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.” (§ 5350, subd. (e)(1).)

An LPS conservatorship terminates automatically one year after it is established. (§ 5361.) If the conservator determines conservatorship is still required, he or she may petition for reappointment for additional periods of one year. (*Ibid.*) During the one-year conservatorship, the conservatee may petition for rehearing at six-month intervals. (§ 5364.) The denial of a petition for rehearing under the LPS is an appealable order. (See *Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 298.)

In a proceeding to establish or renew an LPS conservatorship, the burden is on the conservator to prove beyond a reasonable doubt that the conservatee remains gravely disabled. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 230; *Conservatorship of Guerrero* (1999) 69 Cal.App.4th 442, 446.) On a petition for rehearing, however, the burden is on the conservatee to prove he is no longer gravely disabled. (*Baber v. Superior Court* (1980) 113 Cal.App.3d 955, 965-966.) The matter is tried to the court and the conservatee's burden of proof is by a preponderance of the evidence. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541.)

## II

### *The Motion for Judgment*

The Conservatee contends the trial court erred in granting the motion, which he characterizes in his briefing as a motion for a directed verdict or nonsuit. Based on this characterization and the attendant standard of review, the Conservatee argues he established a prima facie case that he can provide for his basic needs of food, shelter, and clothing and the Public Guardian did not provide evidence to rebut his showing.<sup>3</sup>

The Conservatee relies on *Conservatorship of Everett M.* (1990) 219 Cal.App.3d 1567 (*Everett M.*), in which the conservator moved for a nonsuit following the conservatee's presentation of evidence. The court granted the motion, but the appellate court reversed, finding the conservatee made a prima facie case that his condition had changed to the point he was no longer gravely disabled. (*Id.* at p. 1574.) The court explained that nonsuit may be granted only if, disregarding conflicting evidence and giving to the conservatee's evidence all the value to which it is entitled and indulging in every legitimate inference that may be drawn from that evidence, there is no evidence sufficient to support a verdict in favor of the conservatee. (*Id.* at p. 1572.) Although much of the conservatee's testimony could be viewed as irrational, the court concluded he had a made a prima facie case by showing "he had a place to reside upon termination of the conservatorship (his mother's home for several months), an income (assuming Social Security benefits would continue), and a budget which would provide for food, clothing, and other basic necessities. His medical needs would be taken care of by the

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<sup>3</sup> An appellate court reviews both a directed verdict and a judgment of nonsuit de novo, applying the same standards that govern the trial court. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1154 [directed verdict]; *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542 [nonsuit].) This requires that we view the evidence in the light most favorable to appellant, and resolve all conflicts and draw all legitimate inferences in appellant's favor. (*Saunders*, at p. 1541.)

Veterans' Administration, with the assistance of his mother and his fianc[é]e.” (*Id.* at p. 1575.)

We disagree with the Conservatee's characterization of the request or motion before the trial court as a nonsuit or a directed verdict. First, neither of these motions is available after presentation of evidence in a court trial. A directed verdict may be sought “after all parties have completed the presentation of all of their evidence *in a trial by jury . . .*” (Code Civ. Proc., § 630, emphasis added.) A defendant may seek a nonsuit after “the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence *in a trial by jury . . .*” (Code Civ. Proc., § 581c, emphasis added.) In a court trial, on the other hand, after one party has completed the presentation of evidence, “the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment.” (Code Civ. Proc., § 631.8.) “The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party. . . .” (*Ibid.*)

Second, the record shows that the court, despite referring to a directed verdict, understood the motion before it as one for judgment under Code of Civil Procedure section 631.8. The court agreed with the Conservatee that it was required to evaluate the evidence. The court referred to itself as the trier of fact and applied the preponderance of the evidence standard.

As we have touched on *ante*, the significant difference between a nonsuit or directed verdict and a Code of Civil Procedure section 631.8 motion is that in the latter the court weighs the evidence. The purpose of a section 631.8 motion is to enable the court, after weighing the evidence at the close of the plaintiff's case, to find the plaintiff has failed to sustain the burden of proof, without the need for the defendant to produce evidence. (*Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 829.)

Because of this difference, the standard of review also differs. “The standard of review of a judgment and its underlying findings entered pursuant to section 631.8 is the

same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment ‘are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence.’ [Citations.]” (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

### III

#### *Substantial Evidence*

Substantial evidence supports the court’s determination that the Conservatee failed to carry his burden to show he is no longer gravely disabled. He put on no evidence about his ability to provide food and clothing beyond the bare assertion in his plan of action to spend \$200 on each. His plans for housing were uncertain and possibly unstable. He proposed to live with Baker, but Baker had not lived independently for over two years and was currently receiving services to assist with his basic daily needs. Further, Baker’s testimony at times was confusing and disjointed, suggesting he would be unable to provide the type of steady support the Conservatee needed to live on his own. While his grandmother offered to provide support, she lived in another state and her visits were infrequent.

While the Conservatee recognized his need for medication, his plans to obtain it were vague. His plan of action called for medical treatment at the emergency room and calling Crestwood for an order for a shot. He testified he intended to get “plugged in” to either the Red Bluff Rancheria or the Redding Rancheria for medical care. He admitted that the last time he left the conservatorship, he had problems getting his medication.

Moreover, as the Conservatee recognized, the main concern was his history of serious self harm following substance abuse. His grandmother testified that the use of alcohol and drugs “would blow the whole scheme of things.” The Conservatee had *future* plans to address his substance abuse problem through daily AA meetings, but he had taken no *current* steps to ensure his sobriety. The trial court relied on expert

opinions in the record in discussing the potential for self harm. Those opinions are not part of the record on appeal. On appeal, we presume the trial court's order to be correct and indulge all intendments and presumptions to support it regarding matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) It is appellant's burden to show error by an adequate record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102.)

The Conservatee faults the court for focusing on his past substance abuse and violent encounters, rather than on his present ability to provide food, shelter, and clothing. Certainly, however, one who is hospitalized for serious self harm is unable to provide for his basic needs. To the extent the Conservatee has a significant potential for serious self harm, he remains "gravely disabled" and unable to provide for himself. (See § 5350, subd. (e)(1) [person not "gravely disabled" if he can survive *safely* with the help of responsible family, friends, or others]; *Doe v. Gallinot* (C.D.Cal 1979) 486 F.Supp. 983, 991 [California's "gravely disabled" standard implicitly requires a finding of harm to self: an inability to provide for one's basic physical needs].)

**DISPOSITION**

The judgment (order) is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

BUTZ, J.