Study L-750 June 3, 2011

Memorandum 2011-24

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Discussion of Issues)

The Commission is studying whether California should adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), and, if so, in what form. The Commission is working towards preparation of a tentative recommendation, which will be widely circulated for comment.

Among other things, UAGPPJA provides for:

(1) Transfer of a "guardianship" or "conservatorship" from one state to another (UAGPPJA Article 3).
(2) Registration and recognition of a "guardianship order" or "protective order" from another state (UAGPPJA Article 4).

Both of these procedures would, under specified circumstances, require California to accord a certain degree of deference to judicial determinations made in other states. Likewise, the procedures would, under specified circumstances, require other states to accord a certain degree of deference to judicial determinations made in California. This memorandum begins exploring the implications of these procedures.

In this memorandum, the staff had hoped to compare and contrast California's conservatorship law to comparable law in California's three neighbors: Arizona, Nevada, and Oregon. That task proved too ambitious to achieve in the time available.

Instead, this memorandum begins by describing the UAGPPJA provisions relating to (1) transfer of a court proceeding relating to protection of an incapacitated adult, and (2) registration and recognition of another state's order in such a proceeding. We then identify a few differences between California's conservatorship law and comparable law in neighboring states, and try to assess

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

the potential effect of those differences if California were to adopt UAGPPJA's transfer and registration procedures.

The intent is merely to provide a sample of the types of issues and considerations at stake. We will conduct a more thorough review of the law of these states, and the potential consequences of UAGPPJA, for the August meeting. At that point, the Commission can consider how thoroughly to review the law of other jurisdictions. The purpose of this memorandum is to provoke thought about the types of issues that might arise, and stimulate future discussion of such issues.

In considering this memorandum, the Commission should be aware that all three of California's neighbors have already adopted UAGPPJA. In fact, more than half of the states (27 states and the District of Columbia) have now taken that step. In a later memorandum, we will analyze how closely these 28 jurisdictions decided to track the language of the uniform act. For present purposes, it is enough to note that Arizona, Nevada, and Oregon adopted Sections 302(g) and 403(a) of UAGPPJA — the key provisions discussed in this memorandum — with essentially no change.

As explained in the memorandum introducing this study (Memorandum 2011-8), California defines terms such as "guardianship," "conservatorship," and "protective proceeding" differently than UAGPPJA. In addition, states vary in how they use those terms. To prevent confusion, this memorandum tries to avoid use of those terms and instead expressly mention whether a matter involves personal care of an incapacitated adult, handling the financial affairs of an incapacitated adult, or other circumstances. We welcome any suggestions about how to minimize the terminological difficulties going forward.

TRANSFER AND REGISTRATION PROCEDURES UNDER UAGPPJA

UAGPPJA seeks to address three main problems:

- The problem of multiple jurisdiction.
- The problem of transfer.
- The problem of out-of-state recognition.

See UAGPPJA *Prefatory Note*, pp. 1-2. This memorandum focuses on UAGPJJA's treatment of the latter two problems.

Transfer of a Court Proceeding Relating to Protection of an Incapacitated Adult

Suppose a court has determined that a person is incapacitated and has appointed someone to assist with personal care and/or financial matters. For awhile, the court is able to satisfactorily monitor the situation and make adjustments as necessary in response to information submitted to it. Later, circumstances change, such that it would be more convenient for a court in another state to provide supervision. For example, the individual providing assistance may have to move to another state due to a job transfer, and may have to bring the incapacitated person along.

Article 3 of UAGPPJA addresses this situation by providing a streamlined process for transferring the court proceeding from one state to another. This transfer process "responds to numerous problems that have arisen in connection with attempted transfers under the existing law of most states." UAGPPJA Art. 3 Comment. Of those problems, the most serious is "the need to prove the case in the second state from scratch, including proving the respondent's incapacity and the choice of guardian or conservator." *Id.* Relitigation of those issues can be expensive, time-consuming, and stressful.

Article 3 "eliminates this problem." *Id.* It specifies a series of steps to be taken by the court transferring the case (see UAGPPJA § 301), and by the court accepting the case (see UAGPPJA § 302). Upon completion of those steps, the court accepting the transfer "*shall recognize* a guardianship or conservatorship order from the other state, *including* the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator." UAGPPJA § 302(g) (emphasis added). In other words, the court accepting the transfer "*must give deference* to the transferring court's finding of incapacity and selection of the guardian or conservator." UAGPPJA *Prefatory Note,* pp. 4-5 (emphasis added). This "avoid[s] the need to relitigate incapacity and whether the guardian or conservator appointed in the first state was an appropriate selection." *Id.* at 1.

Despite the requirement of deference to those prior determinations, the court in the second state retains some measure of control. In particular, the court is not required to accept a transfer if "the guardian or conservator is ineligible for appointment in this state." UAGPPJA § 302(d)(2). "The drafters specifically did not try to design the procedures in Article 3 for the difficult problems that can arise in connection with transfer when the guardian or conservator is ineligible to

act in the second state, a circumstance that can occur when a financial institution is acting as conservator or a government agency is acting as guardian." UAGPPJA Art. 3 Comment.

Further,

> Not later than [90] days after issuance of a final order accepting a transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

UAGPPJA § 302(f). "The number '90' is placed in brackets to encourage states to coordinate this time limit with the time limits for other required filings such as guardianship or conservatorship plans." UAGPPJA Art. 3 Comment. This initial period "is also *an appropriate time to change the guardian or conservator* if there is a more appropriate person to act as guardian or conservator in the accepting state." *Id.* (emphasis added).

Thus, although Article 3 requires deference to an out-of-state determination of incapacity and who should assist the incapacitated person, those rulings are not cast in stone. It is clearly contemplated that they might later be subject to reevaluation in the state to which the proceeding is transferred, if concerns surface. But under UAGPPJA, as opposed to preexisting law in most states, such reevaluation need not occur in every case, and need not occur immediately upon transferring court supervision to a new state.

Registration and Recognition of a Court Order From Another State

Article 4 of UAGPPJA addresses a different problem, which is referred to as the "problem of out-of-state recognition." As the Uniform Law Commission explains, "[s]ometimes, guardianship or protective proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship or protective order issued in another state." UAGPPJA *Prefatory Note,* p. 2.

Article 4 "is designed to facilitate the enforcement of guardianship and protective orders in other states." UAGPPJA Art. 4 Comment. It creates a registration procedure for an order appointing someone to assist an incapacitated person. UAGPPJA §§ 401, 402.

Following registration of that order in another state, the appointee "may exercise in the second state all powers authorized in the original state's order of appointment *except for powers that cannot be legally exercised in the second state.*" UAGPPJA *Prefatory Note,* p. 2 (emphasis added). The key provision states:

> Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment *except as prohibited under the laws of this state*, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

UAGPPJA § 403(a) (emphasis added).

Here again, the second state is required to give deference to judicial determinations made in the first state, including the determination of incapacity and who should assist the incapacitated person. Under Article 4, however, such deference is close to absolute. The only basis for refusing to recognize the appointee's authority is if the appointee seeks to take action that is illegal in the second state. Unless this exception applies, there does not appear to be any opportunity, at any time, to reevaluate the determination of incapacity or who should assist the incapacitated person.

While Article 4 requires strict deference, the state according such deference is likely to have weaker ties to the incapacitated person than the state in which the court adjudicated the incapacity, appointed someone to assist the incapacitated person, and is supervising the situation. For example, the second state may merely be where the incapacitated person owns a vacation home, or where the incapacitated person's credit card company is headquartered, or where the incapacitated person has a small, dormant bank account. In circumstances such as these, it may be necessary to take action on behalf of the incapacitated person in the second state, and to have that action legally recognized. But it may be unduly burdensome to require relitigation of the entire matter before making that possible. Article 4 would ensure that an individual previously appointed to act on behalf of the incapacitated person can effectively do so in the second state, without having to commence a second court proceeding.

POTENTIAL IMPACT OF UAGPPJA'S TRANSFER AND REGISTRATION PROCEDURES IN CALIFORNIA

The remainder of this memorandum begins to explore the impact that UAGPJJA's transfer procedure (Article 3) and registration procedure (Article 4) could have in California. Specifically, the focus here is on identifying *potential downsides* of giving deference to determinations made by out-of-state courts, as required by Sections 302(g) and 403(a). The *potential benefits* of according such

deference have already been discussed and are both clear and substantial. Eventually, the Commission (and ultimately, the Legislature and the Governor) will need to weigh those benefits against the downsides, and determine whether to adopt these aspects of UAGPPJA, with or without modification.

The analysis that follows is California-centric. The staff has looked for California policies that might be impinged on by giving deference as required under UAGPPJA. We have not looked for potential impacts of UAGPPJA on policies of Arizona, Nevada, or Oregon.

As previously explained, this memorandum merely notes a few of the differences between California law and comparable law in neighboring states, to illustrate the types of points requiring consideration. There are many other differences, which are not covered here. We will try to present a fuller picture in August. Commission members, stakeholders and other interested persons are invited to point out aspects of California's conservatorship law that are of particular concern to them, or that may warrant close attention for any other reason.

Illustration #1. Preference for Appointment of Whoever Is Nominated by the Allegedly Incapacitated Person

For this and each of the following examples, we first describe California law, then describe the comparable law in neighboring states, and finally try to assess the potential impact of UAGPPJA's transfer and registration procedures.

California Law

In determining who should assist an incapacitated person, a California court is required to give strong preference to the wishes of the incapacitated person. Probate Code Section 1810 provides:

> 1810. If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the proposed conservatee may nominate a conservator in the petition or in a writing signed either before or after the petition is filed. The court *shall* appoint the nominee as conservator *unless* the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.

(Emphasis added.) "The only formal requirements for a nomination under this section are that the nomination be in writing and be signed by the proposed conservatee." Prob. Code § 1810 Comment. The nomination need not be made at the time of the conservatorship proceeding. Rather, it "may be made in a writing

made long before conservatorship proceedings are commenced." *Id.* Whenever made, however, "the proposed conservatee must have had at the time the writing was executed sufficient capacity to form an intelligent preference." *Id.*

Comparable Law in Neighboring States

None of California's neighbors have such a strong statutory preference for appointment of whoever is selected by the allegedly incapacitated person. For example, in Nevada the court "shall appoint as guardian for an incompetent person [or] a person of limited capacity … the qualified person who is most suitable and is willing to serve." Nev. Revised Statutes (hereafter, "NRS") § 159.061. In making its selection, the court is required to consider "[a]ny request for the appointment as guardian for an incompetent contained in a written instrument executed by the incompetent while competent." *Id.* But that is merely one of a number of different factors for the court to consider.

The situation is similar in Oregon. There, the court "shall appoint the most suitable person who is willing to serve as fiduciary *after giving consideration to* the specific circumstances of the respondent, *any stated desire of the respondent*, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment." Ore. Revised Statutes (hereafter, "ORS") § 125.200 (emphasis added).

In Arizona, there is a 10-item hierarchy for courts to follow in selecting who should assist an incapacitated person. Ariz. Revised Statutes (hereafter, "ARS") § 14-5311; see also ARS § 14-5410. "For good cause the court may pass over a person who has priority and appoint a person who has lower priority or no priority." ARS § 14-5311. At the top of the list is a "guardian or conservator of the person or a fiduciary appointed or recognized by the appropriate court of any jurisdiction in which the incapacitated person resides." *Id.* Thus, if the incapacitated person resided outside Arizona and already had a court-appointed assistant before the Arizona proceeding commenced, that assistant would have highest priority in the Arizona proceeding. Next in the hierarchy are:

> 2. An individual or corporation nominated by the incapacitated person if the person has, in the opinion of the court, sufficient mental capacity to make an intelligent choice.
>
> 3. The person nominated in the incapacitated person's most recent durable power of attorney.

Id. These items focus on the wishes of the incapacitated person. Unlike California, however, it does not appear possible to rely on a writing made long before the conservatorship proceedings commenced, unless that writing is a durable power of attorney.

Potential Impact of UAGPPJA's Transfer and Registration Procedures

If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on California's policy of giving strong preference to the wishes of the incapacitated person in selecting a conservator?

With regard to the transfer process, a California court might sometimes be required to recognize the authority of, and to compel others to recognize the authority of, a person who would not have been selected to serve as conservator under California law, and who would not have been the incapacitated person's choice. That would be contrary to California's policy of giving strong preference to the wishes of the incapacitated person in selecting a conservator. However, it might be possible to revisit the choice of conservator at some point after the transfer is accomplished.

With regard to the registration process, again UAGPPJA might require Californians to recognize the authority of a person who would not have been selected to serve as conservator under California law, and who would not have been the incapacitated person's choice. As before, that would be contrary to California's policy of giving strong preference to the wishes of the incapacitated person in selecting a conservator. However, the degree of impingement may be limited, because the incapacitated person may have only weak ties to California, requiring little involvement of Californians.

These potential negative impacts must not be viewed in a vacuum. Eventually, the Commission should weigh them against the potential benefits of UAGPJJA's transfer and registration procedures, and attempt to strike an appropriate balance.

Illustration #2. Appointment of a Domestic Partner to Care for an Incapacitated Person

California Law

Subject to the requirement of respecting the wishes of the incapacitated person, and to special rules relating to an impending divorce, annulment, or legal separation, selection of a conservator in California "is solely in the discretion of the court and, in making the selection, the court is to be guided by

what appears to be for the best interests of the proposed conservatee." Prob. Code § 1812(a). Of persons the court considers equally qualified, the court is to give preference in the following order:

> (1) *The spouse or domestic partner of the proposed conservatee* or the person nominated by the spouse or domestic partner ….
> (2) An adult child of the proposed conservatee or the person nominated by the child ….
> (3) A parent of the proposed conservatee or the person nominated by the parent ….
> (4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister ….
> (5) Any other person or entity eligible for appointment as a conservator under this code or, if there is no person or entity willing to act as a conservator, under the Welfare and Institutions Code.
> (c) The preference for any nominee for appointment under paragraphs (2), (3), and (4) of subdivision (b) is subordinate to the preference for any other parent, child, brother, or sister in that class.

Prob. Code § 1812(b), (c) (emphasis added.) In this hierarchy, spouses and domestic partners are treated equally, and ranked at the top of the list. In other words, California has made a policy choice to treat spouses and domestic partners the same way, and to rank them higher than any other equally qualified relatives, in selecting who to appoint to assist an incapacitated person.

Comparable Law in Neighboring States

The situation in Nevada appears to be much the same as in California. Nevada has a domestic partnership process. See Nev. Rev. Stat. §§ 122A.030, 122A.100. Subject to exception not relevant here, domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses." NRS § 122A.200(1)(a). In appointing someone to act for an "incompetent person" or a "person of limited capacity," a court must select "the qualified person who is most suitable and is willing to serve." NRS § 159.061. Among other factors, the court must consider the "relationship by blood, adoption or marriage of the proposed guardian to the proposed ward." NRS § 159.061(3)(d). In particular,

> The court may consider relatives in the following order of preference:

(1) *Spouse.*
(2) Adult child.
(3) Parent.
(4) Adult sibling.
(5) Grandparent or adult grandchild.
(6) Uncle, aunt, adult niece or adult nephew.

Id. (emphasis added). Read in conjunction with the provision that gives domestic partners the same rights as spouses, this hierarchy appears to accord a domestic partner the same status in Nevada as that person would have in California.

The situation seems to be different in Arizona and Oregon. Based on limited research, it appears that neither of those states has a statutory procedure for creating or terminating a domestic partnership. They do, however, have a number of statutes that refer to domestic partners in various different contexts.

Notably, Arizona prohibits same sex marriage (ARS § 25-101), and Arizona's statute on anatomical gifts gives a decedent's domestic partner lower priority than the decedent's spouse, adult children, or parents. ARS § 36-848. Even that level of priority only attaches if the decedent is unmarried and "another person had not assumed financial responsibility for the decedent." *Id.*

Arizona's statute governing appointment of someone to care for an incapacitated person does not refer to a domestic partner at all. Rather, the remaining items in its 10-item hierarchy are:

4. The spouse of the incapacitated person.
5. An adult child of the incapacitated person.
6. A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent.
7. Any relative of the incapacitated person with whom the incapacitated person has resided for more than six months before the filing of the petition.
8. The nominee of a person who is caring for or paying benefits to the incapacitated person.
9. If the incapacitated person is a veteran, the spouse of a veteran or the minor child of a veteran, the department of veterans' services.
10. A fiduciary, guardian or conservator.

ARS § 14-5311; see also ARS § 14-5410. A court may pass over a person who has priority and appoint a person who has a lower priority or no priority, but only for good cause. See ARS § 14-5311(D); see also ARS § 14-5410(B). Thus, even if the court were to consider a domestic partner a "relative of the incapacitated person with whom the incapacitated person has resided for more than six months before the filing of the petition," the domestic partner would rank lower

than a spouse, adult child, or parent of the incapacitated person, and the court could select the domestic partner only upon a showing of good cause.

In Oregon, the selection process is less rigid. There the governing statute merely directs the court to appoint "the most suitable person who is willing to serve as fiduciary" after considering "specific circumstances of the respondent, any stated desire of the respondent, *the relationship by blood or marriage of the person nominated to be fiduciary to the respondent,* any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment." ORS § 125.200 (emphasis added). It is possible that the phrase "blood or marriage" could be read broadly enough to include a domestic partnership; it is also possible that a domestic partner could be regarded as "the most suitable person who is willing to serve as fiduciary" despite lacking a "relationship by blood or marriage" with the incapacitated person. Unlike California and Nevada, however, it is not clear that a domestic partner would stand on the same footing as a spouse, and rank higher than any other equally qualified relatives.

Potential Impact of UAGPPJA's Transfer and Registration Procedures

If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on California's policy of treating spouses and domestic partners the same way, and ranking them higher than any other equally qualified relatives, in selecting who to appoint to assist an incapacitated person?

With regard to the transfer process, a California court might sometimes be required to recognize the authority of, and to compel others to recognize the authority of, a person who was selected over the incapacitated person's domestic partner, and who would not have been selected to serve as conservator under California law. That would be contrary to California's policy of ranking a domestic partner at the top of the list, equivalent to a spouse, in selecting a conservator. However, it might be possible to revisit the choice of conservator at some point after the transfer is accomplished.

With regard to the registration process, again UAGPPJA might require Californians to recognize the authority of a person who was selected over the incapacitated person's domestic partner, and who would not have been selected to serve as conservator under California law. As before, that would be contrary to California's policy of ranking a domestic partner at the top of the list, equivalent to a spouse, in selecting a conservator. However, the degree of

impingement may be limited, because the incapacitated person may have only weak ties to California, requiring little involvement of Californians.

Here again, these potential negative impacts must not be viewed in a vacuum. Eventually, the Commission should weigh them against the potential benefits of UAGPJJA's transfer and registration procedures, and attempt to strike an appropriate balance.

Illustration #3. Use of Isolated Incidents of Negligence or Improvidence to Establish that a Person Is Unable to Handle Financial Matters

California Law

In California, a "conservator of the estate" may be appointed for a person who is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." Prob. Code § 1801(b). The governing statute specifically states that such substantial inability "may *not* be proved *solely by isolated incidents of negligence or improvidence*." *Id.* (emphasis added). The standard of proof for appointment of a conservator "shall be clear and convincing evidence." Prob. Code § 1801(e).

Comparable Law in Neighboring States

As in California, both Nevada and Oregon require "clear and convincing evidence" in assessing whether a person is unable to handle his or her own financial affairs. See NRS § 159.055; ORS § 125.400. The staff suspects the same might be true in Oregon, although this does not appear to be a statutory requirement and we have not yet found a case to this effect.

However, of these four states, California appears to be unique in expressly mandating that a person's incapability "may *not* be proved *solely by isolated incidents of negligence or improvidence*." The staff has found nothing similar in the statutory law of Arizona, Nevada, or Oregon. Nor are we aware of any case law to that effect.

Potential Impact of UAGPPJA's Transfer and Registration Procedures

If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on California's policy that financial incapability must be based on more than "isolated incidents" of negligence or improvidence?

With regard to the transfer process, a California court might sometimes be required to treat a person as financially incapacitated, and to compel others to do the same, even though the evidence of such incapacity might be insufficient

under California law. But that probably would only happen rarely. The staff suspects that in most cases there will have been ample evidence to support another state's determination of financial incapacity. Further, it might be possible to reassess the person's capacity, or lack thereof, at some point after the transfer is accomplished.

With regard to the registration process, again UAGPPJA might sometimes require Californians to treat a person as financially incapacitated, even though the evidence of such incapacity might be insufficient under California law. As with the transfer process, however, that probably would only happen rarely. Moreover, this may just represent a minor inroad on California's policy of requiring strong proof of financial incapacity, because the incapacitated person may have only weak ties to California, requiring little involvement of Californians.

As with the other illustrations, the potential negative impacts described above must not be viewed in a vacuum. Eventually, the Commission should weigh them against the potential benefits of UAGPJJA's transfer and registration procedures, and attempt to strike an appropriate balance.

CONCLUDING THOUGHTS

The above illustrations are just the tip of the iceberg. There are many other differences between California's conservatorship law and comparable law in California's neighbors and in other jurisdictions. We will explore these differences, and their implications under UAGPPJA, in greater depth as this study progresses. We encourage the members of the Commission, stakeholders, and other persons interested in this study to consider the types of issues raised in this memorandum and share their thoughts about these matters.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel