Study L-750 August 4, 2011

Memorandum 2011-31

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Comparison of California Conservatorship Law with Comparable Law in Neighboring States)

Among other things, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("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).

At the June meeting, the Commission began exploring what impact these procedures would have if UAGPPJA were adopted in California. In particular, the Commission considered three examples of issues that might arise due to policy differences between California conservatorship law and comparable law in neighboring states (Arizona, Nevada, and Oregon). See Memorandum 2011-24.

This memorandum continues and expands on that discussion. First, it presents some data on migration between states, which may be relevant in assessing the impact of UAGPPJA's transfer procedure. We also describe another important new resource, which may be of great assistance in conducting this study.

Next, the memorandum reviews UAGPPJA's transfer and registration procedures. In this discussion, the staff reiterates some questions that Commissioners and other participants posed at the June meeting, which we have since relayed to representatives of the Uniform Law Commission ("ULC"). Those questions, and the responses we received from ULC representatives, are attached as follows:

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.

Finally, this memorandum compares and contrasts California's conservatorship law to comparable law in neighboring states, to help assess the potential consequences of UAGPPJA. In considering this analysis, the Commission should bear in mind that Arizona, Nevada, and Oregon have all adopted UAGPPJA, including the key provisions discussed in this memorandum (Sections 302(g) and 403(a)).

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.

The Commission is working towards preparation of a tentative recommendation, which will be widely circulated for comment. The Commission is still examining the legal landscape and has not yet started drafting a legislative proposal. Stakeholders and other interested persons are encouraged to share their views throughout the Commission's study process, by participating in the Commission's meetings and submitting written input in any form.

MIGRATION BETWEEN STATES

On his own initiative, the Commission's summer fellow Louis Wai (UC Davis School of Law) found some U.S. Census Bureau data on state to state migration. As might be expected, the data shows that migration from neighboring states (Arizona, Nevada, and Oregon) into California was substantial, at least in the year for which data is available:

State of origin	No. of persons (1 year or older) who migrated to CA in 2009
Arizona	34,040
Nevada	32,333
Oregon	21,270

Several other states that have adopted UAGPPJA also had emigration of over 10,000 people to California:

State of origin	No. of persons (1 year or older) who migrated to CA in 2009
Washington	33,408
Colorado	16,798
Illinois	16,415
Utah	13,401
Maryland	11,905

In addition, several states that have not adopted UAGPPJA had emigration of over 10,000 people to California:

State of origin	No. of persons (1 year or older) who migrated to CA in 2009
Texas	35,104
New York	26,083
Florida	18,769
Hawaii	13,042
Georgia	10,819
North Carolina	10,802
Michigan	10,741
Massachusetts	10,171
Virginia	14,464

Migration patterns are subject to change, and patterns for incapacitated people might differ from those for the rest of the population. Nonetheless, the

U.S. Census Bureau data suggests that of the incapacitated people who move to California, many will be from the 17 states listed above.

Accordingly, in evaluating the potential impact of adopting UAGPPJA in California, it may be appropriate to focus to some extent on how California law interrelates with the law of those 17 states, particularly the ones that have adopted UAGPPJA. Consistent with that assessment, this memorandum contrasts California conservatorship law with comparable law in California's neighbors (Arizona, Nevada, and Oregon). Further, Mr. Wai has been gathering information about some of the other states listed above, particularly the ones that have adopted UAGPPJA. We will present information about those states as appears appropriate as this study progresses.

ADDITIONAL NEW RESOURCE

On his own initiative, Mr. Wai also found another new resource that may be extremely useful in this study: A Westlaw document that lists, for each section of UAGPPJA, any deviations each adopting state has made from the language recommended by the ULC. The staff has not fully assessed the accuracy of this electronic document, but preliminary checking suggests it is fairly complete. Assuming that assessment is correct, the document will save us much time in determining how other states have modified UAGPPJA, so that the Commission can consider whether to make similar modifications here in California.

TRANSFER AND REGISTRATION PROCEDURES UNDER UAGPPJA

Before comparing California law with that of its neighbors, it may be helpful to review 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.

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 adopting UAGPPJA to accord a certain degree of deference to judicial determinations made in California. This memorandum seeks to explore the implications of these procedures.

(UAGPPJA also includes an article on how to resolve disputes over which state has jurisdiction to determine whether an adult is incapacitated and appoint an assistant if needed. We will examine that article at another time.)

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

We first describe the transfer procedure, and then present some questions relating to it.

Description of the Procedure

The problem of transfer arises when a court has determined that a person is incapacitated and has appointed someone to assist with personal care and/or financial matters. Later, circumstances change and the court is no longer able to satisfactorily monitor the situation. 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). A petition relating to the transfer must be filed in each court. See UAGPPJA §§ 301, 302. In response to the petition, each court must make certain findings and enter a provisional order and later a final order regarding the transfer. See *id.* A hearing is only held if the court deems it necessary, or if it is requested by a person entitled to notice of the petition. See *id.* The transfer process is thus relatively simple, imposing much less of a burden on litigants and judicial resources than initiating an entirely new case.

Upon completion of the transfer process, 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. It thus serves to "expedite the transfer process." *Id.* at 4.

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). Should the original appointee "not be the best person to act in the accepting state, a change of guardian or conservator can be initiated once the transfer has been secured." *Id.*

Questions Regarding the Procedure

Precisely how to interpret UAGPPJA's transfer provisions, particularly Section 302(f), is not entirely clear. A number of questions were raised at the Commission's June meeting:

Question #1

If a proceeding was transferred to California from another state under UAGPPJA, would the proceeding henceforth be subject to California law relating to incapacitated adults? For example, if a Nevada "guardianship of the person" was transferred to California under UAGPPJA, would it become a California "conservatorship of the person," and be subject to all of California's rules relating to that type of conservatorship? Likewise, if a Nevada "guardianship of the estate" was transferred to California under UAGPPJA, would it become a California "conservatorship of the estate," and be subject to all of California's rules relating to that type of conservatorship?

The staff believes that is the intended result under UAGPPJA. In particular, Section 302(f) of UAGPPJA seems to support this interpretation, because it directs the court accepting a transfer to determine "whether the guardianship or conservatorship needs to be modified *to conform to the law of this state*." (Emphasis added.)

Others are concerned, however, that if California adopted UAGPPJA and a proceeding was transferred to California pursuant to that act, California might have to handle the transferred proceeding according to the other state's law. For example, instead of applying California's rules regarding the residence of the incapacitated person, would a California court be expected to apply the other state's rules on this point? Similarly, instead of applying California's rules regarding periodic review of a conservatorship, would a California court be expected to follow the other state's review schedule and procedures?

ULC Response to Question #1

The staff sought guidance on the above matter from two ULC representatives — Prof. David English (the reporter for UAGPPJA) and Eric Fish (ULC Legislative Counsel). See Exhibit p. 1.

They confirmed that once a proceeding relating to an incapacitated adult is transferred to California under UAGPPJA, it is to be handled pursuant to California conservatorship law, not the law of the transferring state. Eric Fish wrote:

> [W]hen the guardianship is transferred into California, *it will become subject to all of California's rules.* One of the most asked questions I have received at CLE presentations relates to bond. State bond requirements vary greatly and meeting the bond is of concern to many of the practitioners with whom I have spoken. *If the new state*

> *requires a bond, the guardian must provide it. Other requirements would be analogous.*

Exhibit p. 4 (emphasis added).

Similarly, Prof. English explained that although UAGPPJA uses the term "transfer," technically that term is incorrect. Rather than actually transferring a proceeding from one state to another, UAGPPJA provides an expeditious way to end a proceeding in one state and replace it with a new proceeding in another state, which is subject to all of the second state's rules. As he put it,

> We refer to Article 3 as a "transfer" procedure because that is a convenient way to describe it. But that is not technically correct. Under Article 3, the former state terminates the guardianship and the new state orders a new guardianship. The advantage of [UAGPPJA] Article 3 is that it offers an expedited method for the former state to terminate the case and for the new state to make a new appointment. The purpose of the 90-[d]ay review under Section 302 is to make certain that the court in the new state has the opportunity to tweak the guardianship/conservatorship *to conform to the new state's law*.

Exhibit p. 3 (emphasis added).

Staff Comments on Question #1

The response from the ULC representatives is reassuring. According to them, UAGPPJA would not force a state to follow another state's rules in handling a proceeding that is "transferred." Rather, the state accepting a "transfer" would be entitled to follow its own rules going forward.

Although the staff expected this interpretation, the language of UAGPPJA is not as clear on this point as it could be. Greater clarity on this matter seems advisable if California is to adopt the uniform act.

For example, California's version of the uniform act could ***expressly state*** **that if a proceeding is transferred to California from another state under the act, the proceeding is thereafter subject to California conservatorship procedures and other applicable California law.** Such a statement would be fully consistent with the intent of UAGPPJA, and thus would not conflict with the goal of uniformity.

The Commission should consider whether to pursue this approach. If so, the staff will attempt to draft appropriate statutory language, and present it to the Commission later in this study.

Question #2

At the June meeting, questions were also raised about the extent to which, and conditions under which, the issue of capacity or the choice of appointee could be relitigated after transfer of a proceeding under UAGPPJA.

On the one hand, it is clear that UAGPPJA is intended to prevent such relitigation to some extent, at least at the time of transfer. That is the whole point of the transfer procedure — to smooth and expedite the process of moving a proceeding from one state to another, so the transfer can be made without having to incur all of the expense and emotional trauma necessarily associated with redetermining from scratch whether a person is incapacitated and, if so, who should be appointed to provide assistance.

On the other hand, the Comment to UAGPPJA Article 3 makes clear that in some cases, it may be appropriate to replace the original appointee with someone else after a transfer occurs. But it does not spell out the necessary conditions. Would it be necessary to show a significant change in circumstances before the choice of appointee could be relitigated? Would it be sufficient for someone to object to the choice of appointee, without having to show a significant change in circumstances? Would some other standard be used to decide when the matter could be revisited? Assuming that the matter is relitigated, would California law apply in determining who to appoint to assist the incapacitated person?

Similarly, UAGPPJA probably is not intended to completely preclude relitigation of capacity after a transfer occurs. Surely there are circumstances under which the matter could be revisited, such as when a person regains health after a serious injury or illness. Again, UAGPPJA does not spell out the necessary conditions for relitigation of the issue. Would it be necessary to show a significant change in circumstances before capacity could be relitigated? Would it be sufficient for someone to request that capacity be relitigated? Would some other standard apply?

Assuming that capacity is relitigated, would California law apply in determining the issue? If so, what burden of proof would apply? Would the allegedly incapacitated person be treated as if his or her capacity had never been litigated before, such that incapacity would have to be proved by clear and convincing evidence, in accordance with California's rules for an initial determination of incapacity? Or would the allegedly incapacitated person be presumed incapacitated (like a California conservatee), and bear the burden of showing that he or she has capacity?

ULC Response to Question #2

Again, the staff sought guidance on this set of issues from ULC representatives. See Exhibit pp. 1-2.

As with Question #1, the response from the ULC representatives was encouraging. Eric Fish wrote:

> As for re-litigation, the act is designed to facilitate transfer only. If issues are raised after the transfer occurs, they would be reviewed under the accepting state procedures.

Similarly, Prof. English said:

> Following the new appointment under [UAGPPJA] Article 3, the protected person or any other person with standing may file an action to contest a finding of incapacity or choice of a guardian or conservator. The burdens of proof would presumably be whatever is provided under local law.

Exhibit p. 3.

Staff Comments on Question #2

According to the ULC representatives, UAGPPJA's transfer procedure is not intended to totally preclude relitigation of capacity, nor is it intended to totally preclude relitigation of who is selected to assist an incapacitated person. If California were to adopt UAGPPJA, it appears that both issues could be reopened after a transfer, and redecided pursuant to California law, if need be.

However, the language of UAGPPJA is not as clear on these points as it could be. **Greater clarity on this matter seems advisable if California is to adopt UAGPPJA.**

For example, with respect to relitigation of capacity, it may be helpful to:

- Expressly state that in some circumstances capacity can be relitigated after a case is transferred to California under UAGPPJA.
- Specify the circumstances in which such relitigation can occur — e.g., whether it is necessary to show a significant change in circumstances; whether it is sufficient if someone simply requests that capacity be relitigated; whether the court could raise the matter on its own motion; whether some type of investigation has to be completed before deciding whether to permit relitigation.
- Expressly state that if capacity is relitigated after a case is transferred to California under UAGPPJA, the issue shall be decided pursuant to California law.

- Specify who bears the burden of proof when capacity is relitigated after a case is transferred to California under UAGPPJA.
- Specify the appropriate procedure for such a relitigation of capacity.

It might be sufficient simply to expressly state that existing California law on relitigation of the capacity of a conservatee applies (except perhaps regarding the burden of proof) after a transfer to California has been completed.

Similarly, with respect to relitigation of the selection of an appointee, it may be helpful to:

- Expressly state that in some circumstances the selection of who is to assist an incapacitated person can be relitigated after a case is transferred to California under UAGPPJA.
- Specify the circumstances in which such relitigation can occur — e.g., whether it is necessary to show a significant change in circumstances; whether it is sufficient if someone simply requests that the selection be relitigated; whether the court could raise the matter on its own motion; whether some type of investigation has to be completed before deciding whether to permit relitigation.
- Expressly state that if the selection of an appointee is relitigated after a case is transferred to California under UAGPPJA, the issue shall be decided pursuant to California law.
- Specify the appropriate procedure for such relitigation.

Again, it might be sufficient simply to expressly state that existing California law on relitigation of the choice of conservator applies after a transfer to California has been completed.

The members of the Commission and other interested persons should consider these ideas as they read the remainder of this memorandum. It is not necessary for the Commission to resolve all of the issues at the upcoming August meeting, but it would be helpful if the Commission could at least give some preliminary guidance.

Registration and Recognition of a Court Order From Another State

Article 4 of UAGPPJA addresses what is sometimes 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. To address this problem, Article 4

establishes a registration procedure. We first describe that procedure, and then present a set of questions relating to it.

Description of the Procedure

Article 4 of UAGPPJA "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.

Questions Regarding the Procedure

The following issue relating to UAGPPJA's registration provisions was raised at the Commission's June meeting:

Question #3

Could UAGPPJA's registration procedure be used as a means of avoiding the transfer procedure?

For example, suppose a Minnesota guardian would like to move the ward from Minnesota to a nursing home located in California, but the guardian does not want to run the risk that it might sometime be necessary to relitigate the ward's incapacity in accordance with California's strict standards. Would it be possible for the guardian to use the registration procedure to achieve the desired result (moving the ward to a California nursing home), and thereby preclude California from implementing its policies regarding who should be treated as incapacitated within its own borders?

Pursuant to Section 401 of UAGPPJA, the guardian would have to give notice to the Minnesota court of intent to register the guardianship in California. In theory, this requirement might afford the Minnesota court an opportunity to prevent abuse of the registration process. But the Minnesota court might be unaware of the guardian's intention to use registration as a means of moving the ward to California. If that is the case, then the registration request might appear to be a routine matter, not requiring any special scrutiny. Under UAGPPJA, is there any other means of protecting California's policy interests?

ULC Response to Question #3

As before, the staff sought guidance on this set of issues from ULC representatives. See Exhibit p. 2.

In response, Prof. English commented:

> I am a little surprised by your last question. With legal fees in some states approaching or exceeding $300/per hour, even the expedited procedure in Article 3 will entail significant expense. I doubt that many families would choose Article 4 registration vs. Article 3 "transfer" because of concern that the new state will

> reverse the finding of incapacity. The usual concern is expense and the conservation of dwindling resources.
>
> The Act is built on the concept that a state of the US should respect the law of its sister states. Consequently, under the Act, if the nursing home in California in your example is willing to accept an Article 4 registration, an Article 3 procedure would not be necessary.
>
> Although the ULC encourages uniformity, it recognizes that local variations are sometimes necessary. In Missouri, we made a number of such changes in order to fit the uniform act into our local law. I could certainly understand that you might make similar changes.

Exhibit p. 3.

Like Prof. English, Eric Fish seemed to acknowledge the possibility of modifying the ULC version of UAGPPJA to protect California's interests. He explained that a pending Connecticut bill would modify UAGPPJA extensively to protect Connecticut's interests:

> Suzy Walsh, a CT Commissioner and member [of] the drafting committee … has been heavily involved in the process of enactment in CT. She has faced exactly the same concerns from our legal services community in CT. If you look at the bill, it is amended in many places to refer to CT procedures: http://www.cga.ct.gov/2011/FC/2011SB-01053-R000253-FC.htm
>
> For example, even in the ubiquitous section on uniformity found in every act, CT inserted language referencing civil rights and due process:
>
> Ex) Sec. 22. (NEW) (Effective October 1, 2011) In applying and construing the provisions of sections 1 to 23, inclusive, of this act, section 45a-644 of the general statutes, as amended by this act, section 45a-648 of the general statutes, as amended by this act, and section 45a-649 of the general statutes, as amended by this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact such uniform provisions, *consistent with the need to protect individual civil rights and in accordance with due process*.

Exhibit p. 4 (emphasis added). In making these comments, Mr. Fish did not refer specifically to the registration procedure; that is understandable because the comments have relevance to both the registration procedure and the transfer procedure.

Staff Comments on Question #3

Prof. English points out that if a family prefers the registration procedure to the transfer procedure, in most cases that will be because the registration

procedure is simpler and thus less expensive to use, not because the family is trying to avoid complying with some legal requirement of the new state. That is probably true, but it does not address the Commission's concern that in some instances the motivation might be less pure.

Further, even if the family's motivation is purely economic, there is still a problem. Any time a family is able to take action in California without having a court proceeding in California, the family can escape complying with California's policy preferences. That might be appropriate when a case has only a tenuous connection to California, such as a small bank account. But when the connection to California is more significant, such as when the incapacitated person is relocated to a California nursing home, California should have more ability to enforce its policies. Because the registration procedure would prevent California from doing so, use of that procedure may be inappropriate in such a situation, regardless of why the family prefers it to the transfer procedure.

For this reason, **the Commission might want to consider putting some constraints on the availability of the registration procedure.** For example, the Commission could craft language making the registration procedure unavailable when the circumstances would support transfer of the case to California in conformity with UAGPPJA's guidelines on jurisdiction.

Any such constraint would have to be very carefully drafted. It would have to provide clear guidance on when the registration procedure is and is not available. Further, whatever rule the Commission develops would have to be easy to apply, so as not to impede the administrative efficiency of the registration process, making it unduly expensive for families and burdensome on the courts. In addition, the Commission should keep in mind the ULC's goal of uniformity, and try to minimize the extent to which California's version of UAGPPJA deviates from the intended operation of the uniform act. If too many states deviate too much from the intended operation of the uniform act, the act may not function as intended and national legislation might become necessary, as in the child custody context (see Memorandum 2011-18, pp. 7-9).

The Commission should bear these matters in mind as we proceed. The staff has not yet attempted to draft any statutory language along the above lines. We will do so later, if the Commission expresses interest in this type of approach. **At this time, it would be helpful just to hear the Commissioners' preliminary reactions and advice on the points discussed.**

COMPARISON OF CALIFORNIA CONSERVATORSHIP LAW TO CORRESPONDING LAW IN NEIGHBORING STATES

The remainder of this memorandum compares and contrasts California conservatorship law to corresponding law in its neighboring states: Arizona, Nevada, and Oregon. The purpose of the analysis is to help assess what impact UAGPPJA's transfer procedure (Article 3) and registration procedure (Article 4) would have in California.

Specifically, the focus 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) of UAGPPJA. 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 by giving deference as required under UAGPPJA. We have not looked for potential impacts of UAGPPJA on policies of Arizona, Nevada, or Oregon.

The analysis examines the following aspects of conservatorship law, in the order listed:

(1) Determination of capacity.
(2) Selection of the person to provide assistance.
(3) Procedural protections.

For each topic, we begin by describing California law, and then describe the law of each of its neighbors. Finally, we attempt to assess the potential impact of UAGPPJA with regard to that area of law.

Due to time limitations, this memorandum does not cover the rules relating to the residence of the incapacitated person or periodic review of the appointment. In addition, this memorandum does not cover the rules relating to medical decisions and other special types of decisions, such as marriage, divorce, or making a will. We plan to address those matters in the future, when time permits.

In preparing this analysis, the staff has focused on the main body of California conservatorship law. We have not attempted to cover or assess the impact of UAGPPJA on the special rules governing limited conservatorships for

developmentally disabled adults (see B. Witkin, Summary of California Law *Wills & Probate* §§ 1054-1061, pp. 1172-83 & Supp. p. 174 (10th ed. 2005 & 2011 Supp.)). Nor have we attempted to assess how UAGPPJA would interrelate with the special rules governing conservatorship of a gravely disabled person under the Lanterman-Petris-Short Act (see *People v. Karriker*, 149 Cal. App. 4th 703, 774-79, 57 Cal. Rptr. 3d 412 (2007); B. Witkin, California Procedure *Actions* §§ 97-122 & Supp. pp. 13-15 (5th ed. 2008 & 2011 Supp.)), or other such special rules (see California Procedure, *supra*, at *Actions* §§ 79-89, 91-94, 96, 113-17, pp. 152-70, 191-97 & Supp. pp. 11-13).

Those are important matters, which the Commission should examine later in this study. In doing so, it might be helpful to examine New York's efforts to adapt UAGPPJA to its bifurcated guardianship system, which Eric Fish mentions in his comments. See Exhibit p. 4.

I. DETERMINATION OF CAPACITY

How is a court to assess whether a person is incapable of caring for himself or herself, or managing his or her own financial affairs? The standards used in California, Arizona, Nevada, and Oregon are described below. Procedural protections that apply, such as the right to counsel or notice requirements, will be discussed separately, later in this memorandum. Capacity to make medical decisions, and other specialized rules for determination of capacity in specific situations (e.g., capacity to marry or to dissolve a marriage), are also discussed separately, later in this memorandum.

California Law

California has detailed statutory requirements for determining whether a person is incapacitated. The Due Process in Competence Determinations Act ("DPCDA") was enacted in 1995, and co-sponsored by the California Medical Association and the State Bar Estate Planning, Trust, and Probate Law Section (now known as the State Bar Trusts and Estates Section). See Cal. Prob. Code §§ 810-813, 1801, 1881, 3201, 3204, 3208. Before the DPCDA was enacted, there were "no statutory standards instructing a court as to whether to consider the degree of impairment in various mental functions, nor how those impairments may affect the ability of a person to contract …." Assembly Committee on Judiciary Analysis of SB 730 (July 12, 1995), pp. 1-2. Consequently, "standards for 'capacity' var[ied] from judge to judge and from county to county." *Id.* at 2.

Under the DPCDA, there is "a rebuttable presumption affecting the burden of proof that *all persons have the capacity to make decisions* and to be responsible for their acts or decisions." Cal. Prob. Code § 810(a) (emphasis added). This presumption of capacity cannot be overcome merely by showing that a person has a mental or physical disorder. "A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions." Cal. Prob. Code § 810(b). Thus, "[a] judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, *should be based on evidence of a deficit in one or more of the person's mental functions* rather than on a diagnosis of a person's mental or physical disorder." Cal. Prob. Code § 810(c) (emphasis added).

This point was clearly explained in the bill analyses pertaining to the DPCDA:

> Is it sound public policy for a person with a specific mental or physical disorder to still be capable of contracting, conveying, marrying, making medical decisions, and executing wills, among other things? The fact that a patient falls into a particular diagnostic category may not be a sufficient basis for determining the patient is incompetent to make decisions regarding particular acts. For example, patients who have been diagnosed with Alzheimer's Disease have varying capabilities for managing their lives. Each person's capacity may change with time, and individual patients may be quite able to make a wide variety of decisions regardless of the diagnosis. It is unclear how many people currently, on the basis of diagnosis only, are deprived of their rights to contract or make medical decisions, regardless of whether the disease has actually progressed to the point where removing the ability to make decisions is a necessity.

Assembly Committee on Judiciary Analysis of SB 730 (July 12, 1995), p. 7; see also Senate Committee on Judiciary Analysis of SB 730 (May 16, 1995), pp. 13-14.

Consequently, in California a determination that a person is "of unsound mind or lacks the capacity to make a decision or do a certain act" must be supported by evidence of a deficit in at least one of the following mental functions:

(1) *Alertness and attention.* This includes, without limitation, level of arousal or consciousness, ability to attend and concentrate, and orientation to time, place, person, and situation.

(2) *Information processing.* This includes, without limitation, short- and long-term memory (including immediate recall), ability to understand or communicate with others (either verbally or otherwise), recognition of familiar objects and familiar persons, ability to understand and appreciate quantities, ability to reason using abstract concepts, ability to reason logically, and ability to plan, organize, and carry out actions in one's own rational self-interest.

(3) *Thought processes.* Deficits in these functions may be shown by the presence of severely disorganized thinking, hallucinations, delusions, or uncontrollable, repetitive, or intrusive thoughts.

(4) *Ability to modulate mood and affect.* Deficits in this ability may be shown by the presence of "a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances."

Cal. Prob. Code § 811(a). A deficit in these mental functions "may be considered only if the deficit, by itself, or in combination with one or more other mental function deficits, *significantly impairs the person's ability to understand and appreciate the consequences* of his or her actions …." Cal. Prob. Code § 811(b) (emphasis added).

Further, such impairment must exist "with regard to the type of act or decision in question." *Id.* In other words, "there must be evidence of a correlation between the deficit or deficits and the decision or acts in question." Cal. Prob. Code § 811(a). For example, suppose an elderly woman wants to sell her home. If she has a long-term memory deficit such that she cannot remember when World War II was fought, that has no bearing on whether she should be able to sell her home. "With respect to her ability to sell, this gap in her memory in and of itself would not cause incapacity." Fitzsimmons, *Legal Mental Capacity — A Psychiatrist's Perspective,* 2009 S.F. Att'y 34, 34 (Winter 2009). But if the woman could not remember that she owned a home, "that would be a different matter." *Id.*

Put differently, California Probate Code Sections 810 to 812

> do not set out a single standard for contractual capacity, but rather provide that capacity to do a variety of acts … must be evaluated by a person's ability to appreciate the consequences of *the particular act he or she wishes to take.* More complicated decisions and

> transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function.

Anderson v. Hunt, 196 Cal. App. 4th 722, 730, __ Cal. Rptr. 3d __ (2011) (emphasis in original).

As a general rule, a person has capacity to make a decision when two requirements are met. First, the person must have the ability to communicate the decision verbally, or by other means. Cal. Prob. Code § 812. Second, the person must have the ability to

> understand and appreciate, to the extent relevant, all of the following:
>
> (a) The rights, duties, and responsibilities created by, or affected by the decision.
>
> (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.
>
> (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

Id. Special rules apply in certain situations, such as determining whether a person has capacity to make a will (Cal. Prob. Code §§ 6100, 6105) or consent to medical treatment (Cal. Prob. Code § 813).

"No conservatorship of the person or of the estate shall be granted by the court unless the court makes an *express finding* that the granting of the conservatorship is the *least restrictive alternative* needed for the protection of the conservatee." Cal. Prob. Code § 1800.3(b) (emphasis added). The objective is to "allow the conservatee to remain as independent and in the least restrictive setting possible." Cal. Prob. Code § 1800(d).

Subject to the above-described rule,

- "A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter …." Cal. Prob. Code § 1801(a).
- "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." Cal. Prob. Code § 1801(b). "Substantial inability may not be proved solely by isolated incidents of negligence or improvidence." *Id.*
- A conservator of the person and estate may be appointed for a person who meets both sets of requirements. Cal. Prob. Code § 1801(c).

To justify appointment of a conservator, the statutory requirements — including the lack of capacity — must be proved by clear and convincing evidence. Cal. Prob. Code § 1801(e). A lower standard of proof "cannot be tolerated" in a situation where "many of the rights and privileges of everyday life [may] be stripped from an individual." *In re Sanderson,* 106 Cal. App. 3d 611, 620, 165 Cal. Rptr. 217 (1980).

However, once a conservatorship is established, the burden switches. Capacity is no longer presumed, except in certain specified situations (e.g., capacity to make a will). Rather, a person seeking to terminate a conservatorship must convince the court that "the conservatorship is no longer required or that grounds for establishment of a conservatorship of the person or estate, or both no longer exist …." Cal. Prob. Code § 1863(b). This means there must be affirmative proof that the respondent has capacity; otherwise the respondent will continue to be regarded as incapacitated. *See id.*; Cal. Evid. Code § 500.

To summarize,

(1) California has detailed statutory requirements for determining whether a person is incapacitated.

(2) There is a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions.

(3) To establish incapacity, it is not enough to show that a person has a mental or physical disorder. There must be evidence of a deficit in one or more specified mental functions. There must also be evidence of a correlation between that deficit and the activity the person is alleged to be incapable of undertaking.

(4) A person has capacity to make a decision when the person has the ability to communicate the decision, as well as the ability to understand and appreciate (a) the rights, duties, and responsibilities created by, or affected by the decision, (b) the probable consequences of the decision, and (c) the significant risks, benefits, and reasonable alternatives involved in the decision.

(5) To establish a "conservatorship of the person" or a "conservatorship of the estate," the court must find that conservatorship is the least restrictive alternative that will protect the person.

(6) A "conservator of the person" may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.

(7) A "conservator of the estate" may be appointed for a person who is "substantially unable" to handle his or her own financial matters or resist fraud or undue influence. Such inability may not be

proved solely through "isolated incidents of negligence or improvidence."

(8) The standard of proof for appointment of a conservator (any kind) is clear and convincing evidence.

(9) Once a conservatorship is established, the conservatee is presumed to lack capacity and bears the burden of showing that it has been restored.

Law in Neighboring States

As might be expected, the comparable statutory schemes in Arizona, Nevada, and Oregon differ in some ways from the California scheme described above. None of them provide as much statutory guidance as California on how to determine whether a person is incapacitated. The rules we found are described below.

Arizona

In Arizona, the applicable standards differ considerably depending on whether an individual is alleged to be incapable of personal care, or incapable of handling financial matters.

The term "incapacitated person" is used only for someone who is incapable of personal care:

> "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions *concerning his person*.

Ariz. Revised Statutes (hereafter, "ARS") § 14-5101(1) (emphasis added). The courts have construed that standard as follows:

> Determination that an adult cannot make "responsible decisions concerning his person" and is therefore incompetent, may be made *only if* the putative ward's decisionmaking process is *so impaired* that he is *unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care,* without which physical injury or illness may occur.

In re Kelly, 184 Ariz. 514, 910 P.2d 665, 668 (1996), *quoting In re Boyer*, 636 P.2d 1085, 1089 (Utah 1981) (emphasis added).

A person appointed to assist an "incapacitated person" is known as a guardian. Among other things, a petition for appointment of a guardian must

state "[t]he reason why appointment of a guardian … is necessary." ARS § 14-5303(B)(7). "If a general guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate." ARS § 14-5303(B)(8).

On the filing of such a petition, the court is to set a hearing date on the issue of incapacity. ARS § 14-5303(C). The court must also appoint a physician, psychologist, or registered nurse to conduct an examination, and an investigator to interview the alleged incapacitated person and visit that person's current and proposed places of residence. *Id.* Each of these appointees must prepare a report for the court. Among other things, the report prepared by the medical professional shall include:

> 1. A specific description of the physical, psychiatric or psychological diagnosis of the person.
> 2. A comprehensive assessment listing *any functional impairments* of the alleged incapacitated person and *an explanation of how and to what extent these functional impairments may prevent that person* from receiving or evaluating information in making decisions or in communicating informed decisions regarding that person.
> 3. An analysis of the tasks of daily living the alleged incapacitated person is capable of performing without direction or with minimal direction.

ARS § 14-5303(D) (emphasis added).

The court may appoint a general or limited guardian as requested if the following three requirements are met:

> 1. The person for whom a guardian is sought is incapacitated.
> 2. The appointment is *necessary* to provide for the *demonstrated needs* of the incapacitated person.
> 3. The person's needs *cannot be met by less restrictive means*, including the use of appropriate technological assistance.

ARS § 14-5304(B) (emphasis added). These requirements must be shown by clear and convincing evidence. *Id.*; *see also In re Guardianship of Reyes*, 152 Ariz. 235, 731 P.2d 130 (1986). "In exercising its appointment authority …, the court shall encourage the development of maximum self-reliance and independence of the incapacitated person." ARS § 14-5304(A).

Likewise, in appropriate circumstances "a guardian shall encourage the ward to develop maximum self-reliance and independence and shall actively work toward limiting or terminating the guardianship and seeking alternatives to guardianship." ARS § 14-5312(A)(7) (emphasis added). "A guardian *shall* find the

most appropriate and least restrictive setting for the ward consistent with the ward's needs, capabilities and financial ability." ARS § 14-5312(A)(8) (emphasis added).

Although these statutory requirements are not as detailed as California's, they reflect an intent to ensure that a *guardian* (i.e., someone to assist with personal care) is appointed only where (1) there is clear and convincing proof that an individual's decisionmaking process is impaired in a way that puts his or her safety in jeopardy, (2) appointment of a guardian is necessary to address that problem, and (3) there is no less restrictive way to resolve the problem. In contrast, Arizona's standard for appointment of a *conservator* (i.e., someone to assist with financial matters) is not as strict.

Rather, the governing statute merely states:

> 2. Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines both of the following:
>
> (a) The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.
>
> (b) The person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

ARS § 14-5401(2); *see also* ARS § 14-5101(5).

The standard of proof is not stated, and it does not appear to have been resolved by case law. There is no assurance that the court will require evidence of a specific functional deficit, as opposed to a bald assertion that the individual suffers from a mental disorder and thus is unable to handle financial matters. Further, there is no express requirement that a conservatorship be necessary; apparently it need only be "desirable." Similarly, there is no express requirement to use the least restrictive means of addressing the situation. Rather, the Arizona code merely says:

> To encourage the self-reliance and independence of a protected person, the court may grant the protected person the ability to handle part of the protected person's money or other property without the consent or supervision of the conservator. This may

include allowing the protected person to maintain appropriate accounts in any bank or other financial institution.

ARS § 15-5408(C).

In one respect, however, the Arizona provisions relating to financial matters appear to be more protective of an individual's autonomy than those relating to personal care. With regard to personal care, "[a]n order adjudicating incapacity *may specify a minimum period, not exceeding one year,* during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave." ARS § 14-5307 (emphasis added). There does not appear to be any similar provision authorizing a court to restrict readjudication of a determination that a person is unable to handle financial matters.

To summarize,

(1) Arizona's rules regarding determination of capacity are not as detailed as California's rules.
(2) Nonetheless, Arizona's rules reflect an intent to ensure that a guardian is appointed to assist an individual with *personal care* only if the individual's decisionmaking process is impaired in a way that puts his or her safety in jeopardy, appointment of a guardian is necessary to address that problem, and there is no less restrictive way to resolve the problem.
(3) As in California, the standard of proof for these matters is clear and convincing evidence.
(4) Arizona's rules on appointing someone to assist an individual with *financial matters* are not nearly as strict as California's rules on that point. The standard of proof for such a determination is not specified by statute.
(5) With regard to personal care, a court has statutory authority to bar readjudication of incapacity for a period of up to one year. With regard to financial matters, there does not seem to be any comparable provision.

Nevada

In Nevada, "incompetent" means "an adult person who, by reason of mental illness, mental deficiency, disease, weakness of mind or any other cause, is unable, without assistance, properly to manage and take care of himself or herself or his or her property, or both." Nevada Revised Statutes (hereafter, "NRS") § 159.019. The term "includes a person who is mentally incapacitated." *Id.* Nevada also defines a person of "limited capacity" as an adult who "is able to

make independently some but not all of the decisions necessary for the person's own care and the management of the person's property." NRS § 159.022.

A person appointed to take care of an incompetent person is known as a general guardian. See NRS § 159.054. A person appointed to take care of a person of limited capacity is known as a special guardian. *Id.*

Among other things, a petition for appointment of a guardian must include:

> (j) A summary of the reasons *why a guardian is needed* and recent documentation *demonstrating the need* for a guardianship. The documentation must include, without limitation:
>
> (1) A certificate *signed by a physician* who is licensed to practice medicine in this State or who is employed by the Department of Veterans Affairs stating:
>
> (I) The *need* for a guardian;
>
> (II) Whether the proposed ward *presents a danger* to himself or herself or others;
>
> ….; and
>
> (V) Whether the proposed ward is *capable of living independently with or without assistance*;
>
> (2) A letter signed by *any governmental agency in this State which conducts investigations* stating:
>
> (I) The *need* for a guardian;
>
> (II) Whether the proposed ward *presents a danger* to himself or herself or others;
>
> ….; and
>
> (V) Whether the proposed ward is *capable of living independently with or without assistance*; *or*
>
> (3) a certificate signed by *any other person whom the court finds qualified* to execute a certificate stating:
>
> (I) The *need* for a guardian;
>
> (II) Whether the proposed ward *presents a danger* to himself or herself or others;
>
> ….; and
>
> (V) Whether the proposed ward is *capable of living independently with or without assistance*.

NRS § 159.044(2)(j) (emphasis added).

"The petitioner has the burden of proving *by clear and convincing evidence* that the appointment of a guardian of the person, of the estate, or of the person and estate *is necessary*." NRS § 159.055 (emphasis added). Upon hearing the petition, the court is to take the following steps:

> 1. If the court finds the proposed ward competent and not in need of a guardian, the court shall dismiss the petition.
>
> 2. If the court finds the proposed ward to be of limited capacity and in need of a special guardian, the court shall enter an order

> accordingly and specify the powers and duties of the special guardian.
>
> 3. If the court finds that appointment of a general guardian is required, the court shall appoint a general guardian of the ward's person, estate, or person and estate.

NRS § 159.054. Before the court makes a finding pursuant to this provision, the petitioner "must provide the court with *an assessment of the needs* of the proposed adult ward completed by a licensed physician which *identifies the limitations of capacity* of the proposed adult ward *and how such limitations affect the ability of the proposed adult ward to maintain his or her safety and basic needs.*" NRS § 159.044(3).

The staff was unable to find any case law that sheds much light on the above requirements. In one case, the Nevada Supreme Court concluded that "a strong showing of mental infirmity" was established through the following evidence:

> Dr. Dapra testified that, in lay terms, Giacomo suffered from diabetes which caused the closure of blood vessels, hemorrhaging of the arteries behind the eyes, and difficulty with the hands and feet. He noted that Giacomo did not know the day, month, or year, could not repeat a test phrase three minutes after it was given him, and could not think properly because his brain was being destroyed by lack of oxygen. Dr. Dapra concluded his testimony by diagnosing Giacomo as "incompetent" within the meaning of NRS 159.019.

Ross v. Giacomo, 97 Nev. 550, 635 P.2d 298 (1981). Because these circumstances are quite compelling, this case is not very instructive; it does not provide insight as to how the Nevada courts would handle a more borderline situation.

To summarize,

(1) Nevada's rules regarding determination of capacity are not as detailed as California's rules.

(2) Nonetheless, Nevada's rules reflect an intent to ensure that someone is appointed to assist an individual with personal care and/or financial matters only if such an appointment is necessary.

(3) As in California, the standard of proof for this matter is clear and convincing evidence.

(4) As in California, medical evidence must be presented before an appointment is made, including evidence of the individual's limitations of capacity and how those limitations affect the individual's ability to live independently.

(5) By distinguishing between general guardians and special guardians, and permitting such appointments only to the extent necessary, Nevada appears to follow the practice of using the least

> restrictive means available to meet the needs of an incapacitated or partially incapacitated individual. But this is not as clearly stated and demanded as in California law.

Oregon

In Oregon, the term "guardian" refers to an individual who is appointed to assist someone with personal care; the term "conservator" refers to an individual who is appointed to assist someone with his or her own financial matters. In both situations, Oregon has strong standards, although some protections in California law do not seem to exist in Oregon.

The Oregon courts have recognized that "[i]mposing a guardianship deprives a person of 'precious individual rights.'" *In re Schaefer,* 183 Ore. App. 513, 516, 52 P.3d 1125 (2002), *quoting Van v. Van,* 14 Ore. App. 757, 581, 513 P.2d 1205 (1973). "To protect those rights, the [Oregon] legislature has created a statutory process that surrounds the creation of guardianships with extensive procedural safeguards and substantive requirements." *Schaefer,* 183 Ore. App. at 516.

In Oregon,

> "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is *impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety.* "Meeting the *essential* requirements for physical health and safety" means those actions *necessary* to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur."

Or. Rev. Stat. § 125.005 (emphasis added).

That statutory definition "requires a petitioner to prove three things: (1) the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be life- or health-threatening; and (3) the impaired perception or communication skills *cause* the life-threatening disability." *Schaefer,* 183 Ore. App. at 517 (emphasis in original). The third requirement means that "a person who is unable to care for herself because of physical deterioration cannot for that reason be subjected to a guardianship, nor can a person who has trouble processing information if she can still take care of herself." *Id.* Rather, there must be a "*nexus* between the inability to process and communicate information, on the one hand, and the inability to perform essential functions, on the other." *Id.* (emphasis added).

Further, a guardian may be appointed for an adult "only as is *necessary* to promote and protect the well-being of the protected person." ORS § 125.300(1) (emphasis added). Such a guardianship "must be designed to *encourage the development of maximum self-reliance and independence* of the protected person and may be ordered *only to the extent necessitated* by the person's actual mental and physical limitations." *Id.* (emphasis added). In other words, the guardianship order can be "no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person." ORS § 125.305(2).

Consistent with the foregoing rules, the respondent in an Oregon guardianship proceeding is presumed competent, just as in California. *Schaefer*, 183 Ore. App. at 517. That presumption can only be overcome by "clear and convincing evidence," which is evidence of "extraordinary persuasiveness." *Id.* That standard applies not only in proving incapacity, but also in proving that appointment of a guardian "is necessary as a means of providing continuing care and supervision of the respondent," and that the nominee is "both qualified and suitable, and is willing to serve." ORS § 125.305(1)(b)-(c).

Moreover, the presumption of competency continues to apply even after a guardianship has been established. Unlike California, Oregon has a statute expressly stating that "[a]n adult protected person for whom a guardian has been appointed is *not* presumed to be incompetent." ORS § 125.300(2) (emphasis added); *see also* ORS § 125.090(1).

Different rules apply to the appointment of a conservator to assist someone with financial matters. In Oregon, the term "financially incapable" means:

> a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

Or. Rev. Stat. § 125.005.

"Upon the filing of a petition seeking the appointment of a conservator, the court may appoint a conservator and make other appropriate protective orders if the court finds by *clear and convincing evidence* that the respondent is … financially incapable, and that the respondent has money or property that

requires management or protection." ORS § 125.400 (emphasis added). An example of a recent case applying this standard is *Grimmett v. Brooks,* 193 Ore. App. 427, 89 P.3d 1238 (2004). In that case, the court provided an exhaustive recitation of the facts, and a detailed explanation of why those facts constituted "clear and convincing evidence … of Grimmett's inability to manage her financial resources." *See id.* at 429-37, 440-42. The court clearly took the matter very seriously, and made sure there was a solid factual basis for depriving Grimmett of the ability to control her own finances.

Another case is also instructive, although it was decided under a predecessor statute defining "incompetent" (former ORS § 126.006), not the present provision defining "incapacitated" and "financially incapable" (ORS § 125.005). In *Van v. Van,* 14 Ore. App. 575, 513 P.2d 1205 (1973), the court considered whether a showing of chronic alcoholism would be sufficient to justify appointment of someone to provide assistance with personal care and financial matters. The court decided that such a showing, by itself, would not be sufficient; there would also have to be evidence of an adverse impact on the individual's ability to function without assistance. The court explained:

> Assuming, *arguendo,* that the record supports a finding of chronic alcoholism, it does not support a finding of incompetence. *While experience indicates that chronic alcoholics as a group may be less likely to properly manage their own affairs than those who are not, it does not follow that every chronic alcoholic is per se incompetent. Each case must be individually evaluated to determine the effect this disease has on the victim's abilities.* In the case at bar, there is no evidence that the overindulgence, even if it does amount to chronic alcoholism, so significantly interferes with Mrs. Van's ability to manage her property or take care of herself as to justify the appointment of a guardian.

Id. at 580 (emphasis added). Because the former statute was similar to (but not the same as) the existing definition of "financially incapable," it seems likely that the existing definition would also be interpreted to require evidence of a functional deficit, not just evidence of a mental disorder such as alcoholism.

Oregon law is thus similar to California law in this respect, as well as in its use of the "clear and convincing" standard of proof for appointing someone to assist with financial matters. Unlike California, however, Oregon does not appear to have an express statutory requirement that such an appointment be "necessary," however, or that it be the "least restrictive means" of addressing the situation. But at least the governing statute does not say it is enough for the

appointment to be "desirable," as in Arizona. And *Grimmett* suggests by example that any such appointment must have solid factual support.

Further, Oregon law is more protective than California law once a person has been appointed to assist an individual with financial matters. If someone moves to terminate that arrangement and the appointee opposes that motion, the appointee "has the burden of proving *by clear and convincing evidence* that [the] protected person *continues to be incapacitated or financially incapable* …." ORS § 125.090 (emphasis added). In other words, under Oregon law the protected person is presumed to have capacity, and the appointee bears the burden of proving otherwise.

To summarize,

(1) Oregon's rules regarding determination of capacity are not as detailed as California's rules.

(2) As in California, persons in Oregon are rebuttably presumed to have the capacity to make decisions for themselves.

(3) To establish "incapacity" or "financial incapability" in Oregon, it does not appear to be enough to show that a person has a mental or physical disorder such as chronic alcoholism. It is also necessary to show the existence of a functional deficit, and a correlation between that deficit and the activity the person is alleged to be incapable of undertaking.

(4) Although Oregon's rules on capacity are not as detailed as California's, they reflect an intent to ensure that someone is appointed to assist an individual with *personal care* only if the individual's decisionmaking process is impaired in a way that puts his or her safety in jeopardy, appointment of someone is necessary to address that problem, and there is no less restrictive way to resolve the problem.

(5) Unlike California, Oregon's rules on appointing of someone to assist an individual with *financial matters* do not expressly require that such an appointment be "necessary," or that it be the "least restrictive means" of protecting the individual. But case law suggests that solid factual evidence is required.

(6) In Oregon, a person is considered "financially incapable" if the person is unable to manage the person's financial resources effectively. In California, it is necessary to show that the person is "substantially unable" to manage the person's financial resources or to resist fraud or undue influence.

(7) As in California, the standard of proof for appointment of someone in Oregon to assist with *either personal care or financial matters* is clear and convincing evidence.

(8) Once an appointment is made, the protected person is still presumed to have capacity. In this respect, Oregon law is more protective of the person's liberties than California law.

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 the policy determinations underlying California's rules for determination of capacity?

The clear intent of California's detailed rules for determination of capacity is to protect a person's liberties — i.e., to ensure that the person is not deprived of the ability to make his or her own decisions regarding personal care and/or financial matters unless strong justification for that step exists.

None of California's neighbors have rules that are as detailed as California's on this point. Although most of those rules seem to be reasonably protective of a person's liberties, they may not be as quite as demanding as California's rules. In particular, Arizona's standard for appointing someone to assist an individual with financial matters seems weak as compared to California's corresponding standard. It is perhaps also troubling that Arizona expressly permits a court to bar relitigation of an individual's capacity for up to one year (absent special leave of court).

With these facts in mind, we look first at UAGPPJA's transfer procedure, and then at the registration procedure.

Potential Impact of the Transfer Procedure

Under UAGPPJA's transfer process, a case from another state could be "transferred" to California, and California would be expected to defer to the other state's determination of incapacity, at least temporarily so as to expedite the transfer process. As a result, a California court might sometimes be required to treat an individual as incapacitated even though the individual would not be considered incapacitated under California law. That would to some extent conflict with California's policy of providing strong protection for personal liberties, imposing conservatorships only where the facts clearly demand that result.

The degree of conflict would depend on the extent to which the other state's capacity standard differs from California's standard. For example, Arizona's standard for appointing someone to assist with personal care seems almost as strong as California's corresponding standard. If a case involving that type of

appointment was transferred to California from Arizona, there would be relatively little impingement on California's policy interests. In contrast, Arizona's standard for appointing someone to assist with financial matters appears to be much weaker than California's corresponding standard. If a case involving that type of appointment was transferred to California from Arizona, there would be significant impingement on California's policy interests.

In either situation, however, the impingement does not have to be permanent. Based on the information we obtained from the ULC representatives, it would not be inconsistent with UAGPPJA to permit relitigation of capacity, pursuant to California law, in some circumstances after a transfer is accomplished. As we previously suggested, **the Commission might consider doing the following:**

- Expressly state that in some circumstances capacity can be relitigated after a case is transferred to California under UAGPPJA.
- Specify the circumstances in which such relitigation can occur — e.g., whether it is necessary to show a significant change in circumstances; whether it is sufficient if someone simply requests that capacity be relitigated; whether the court could raise the matter on its own motion; whether some type of investigation has to be completed before deciding whether to permit relitigation; whether another state's bar on relitigation will be honored in California.
- Expressly state that if capacity is relitigated after a case is transferred to California under UAGPPJA, the issue shall be decided pursuant to California law.
- Specify who bears the burden of proof when capacity is relitigated after a case is transferred to California under UAGPPJA. It may be best to presume that the respondent has capacity unless shown otherwise, because the proceeding would be the respondent's first opportunity to have his or her capacity determined pursuant to California law.
- Specify the appropriate procedure for such a relitigation of capacity.

As previously stated, it might be sufficient simply to expressly state that existing California law on relitigation of the capacity of a conservatee applies (except perhaps regarding the burden of proof) after a transfer to California has been completed.

The question remains, however, whether UAGPPJA's potential for temporary impingements on California's policy of protecting personal liberties would be acceptable. **Answering that question requires weighing those costs (and any**

other potential costs) against the important benefits of UAGPPJA's transfer procedure: Facilitating portability of court proceedings involving adults who are unable to care for themselves or handle their finances. In particular, the transfer procedure provides a streamlined means of moving such a proceeding from one state to another, instead of requiring families to commence a new court proceeding in California from scratch, which is expensive, stressful, slow, time-consuming, and generally burdensome on both courts and families. The detriments of commencing a new court proceeding may be especially acute in situations where there is a degree of urgency to the relocation, where the protected person has very limited financial resources, or where the parties are in agreement and there is no dispute over the proper outcome.

These considerations may be triggered not only by a transfer from another state to California, but also by a transfer from California to another state. By adopting UAGPPJA, California would ease the latter process as well as the former, so long as the accepting state has also adopted UAGPPJA.

The Commission should give careful thought to this matter. Suggestions and other comments would be helpful. Possible approaches include:

(1) Reject the transfer procedure altogether because of the potential costs, such as temporarily providing less protection for an individual's personal liberties than under California's standards for determining capacity. This approach would do nothing to alleviate the problems associated with commencing a new court proceeding.
(2) Adopt the transfer procedure in California, as proposed in UAGPPJA (with or without the refinements described above).
(3) Adopt the transfer procedure in California (with or without the refinements described above), but impose some limitations. For example, perhaps a court-appointed assistant for an individual should not be permitted to take any drastic or irreversible action relating to that individual without court approval until there has been an opportunity to resolve, pursuant to California law, any dispute that might exist relating to that individual's capacity.

The staff leans towards either Approach #2 or Approach #3, but this is just a preliminary assessment. Further input, research, or analysis may shed additional light on the situation. **Commissioners should review the remainder of this memorandum, and then assess whether they are ready to make a tentative decision on this matter, or require further information.**

Potential Impact of the Registration Procedure

If California adopted UAGPPJA, an order in which a court from another state appoints someone to assist an incapacitated person could be registered in California. Upon registration, the appointee would have the same powers in California as in the other state, except powers that cannot legally be exercised in California. In other words, people and institutions in California would be required to recognize the authority of the appointee to act on behalf of the incapacitated person, and California courts would be available to enforce such authority, so long as the appointee's actions are legal here.

This would mean that on some occasions, Californians and California courts might be required to accept an appointee's authority to take action on behalf of an individual, even though that individual would not be considered incapacitated if evaluated under California's strict standards for determining capacity. The likelihood of such a situation would vary from state to state, depending on how similar the state's standards are to California's standards.

Under the registration procedure, unlike the transfer procedure, such a situation would not be temporary. The court in the other state would remain in control of the appointment, and California courts would not have any opportunity to reevaluate the protected person's capacity pursuant to California law.

In many instances, this might not be problematic. For example, it might mean only that a magazine company headquartered in California has to recognize an appointee's authority to submit a change of address form for a protected individual who lives in another state and has no significant connections to California. Or it might mean that a California bank has to recognize an appointee's authority to close a small account that a protected individual opened long ago and forgot about before moving out of California. Or it might mean that an appointee is entitled to contract for sale of produce grown on a parcel of California land owned by a protected individual who lives in another state. In all of these situations, the protected individual has only weak ties to California, so it is more appropriate that the individual's capacity be assessed under the standards of the individual's home state than under California's standards. Any harm to California's interests would appear minor as compared to the benefits afforded by the registration procedure: making it easy for appointees to help incapacitated individuals in an increasingly mobile and interconnected country.

As previously discussed, however, UAGPPJA does not seem to preclude use of the registration procedure in situations where the protected individual has close ties to California, such as when that individual is relocated to a California nursing home or other type of residence. Under such circumstances, California has a strong interest in enforcing its policies regarding determination of capacity, yet UAGPPJA does not appear to provide a means of doing so. True, the registration procedure requires notice to the out-of-state court, which could refuse to allow registration on the ground that a transfer to California would be more appropriate. But that court may not realize that the registration procedure is being used to facilitate a move to California, or be sensitive to the strength of California's interest in using strict standards of capacity so as to protect the personal liberty of persons within its borders. Consequently, **some constraint on UAGPPJA's registration procedure might be necessary to ensure that California's policy interest is adequately protected.**

As previously discussed, any such constraint would need to be very carefully drafted, to provide clear guidance, be administratively efficient to apply, and avoid undue inroads on the goal of nationwide uniformity. Possible ideas include:

- Make the registration procedure unavailable when the circumstances would support transfer of the case to California in conformity with UAGPPJA's guidelines on jurisdiction. This idea would need to be fleshed out.
- Make the registration procedure unavailable if the protected person is domiciled in California. This is a variant on the first idea, but more specific. It could be implemented by requiring the registration documents to include an attestation that the protected person is not a California resident. A potential problem with both this approach and the preceding approach concerns third party reliance on a UAGPPJA registration. How would third parties be able to determine whether a protected individual is domiciled in California or has other ties to California that would support jurisdiction under UAGPPJA? Under what circumstances would they be entitled to rely on such a registration? This problem may not be insurmountable, but it illustrates the care with which any constraint on the registration procedure would have to be drafted.

We encourage other suggestions about how to ensure that the UAGPPJA registration procedure is used only when an incapacitated person has relatively weak ties to California, not closer ties that more strongly implicate California's policy interests. In attempting to develop such a constraint,

Commissioners and other interested persons should bear in mind the potential benefits of the registration procedure, easing the burden of providing assistance to an incapacitated individual in a world in which transactions and other business often span state lines. Any constraint on that procedure may reduce those benefits. That downside must be weighed against the potential value of the proposed constraint in protecting California's policy interests. In the end, it might be best not to impose any constraint at all. **Commissioners should review the remainder of this memorandum, and then assess whether they are ready to make a tentative decision on this matter, or require further information.**

II. SELECTION OF THE PERSON TO PROVIDE ASSISTANCE

As with determination of capacity, states have differing rules on how a court should select a person to assist an incapacitated individual. The following discussion compares California's rules on this point to those of Arizona, Nevada, and Oregon, with a focus on matters that are relevant to adoption of UAGPPJA.

This matter has already been discussed to some extent in Memorandum 2011-24, which described differences relating to (1) the degree of preference given to the wishes of the incapacitated person (pp. 6-8), and (2) appointment of a domestic partner to assist an incapacitated person (pp. 8-12). For ease of reference, some of that discussion is reiterated here.

The discussion below does not cover the rules relating to emergency appointments. We will address that matter later, when we examine UAGPPJA's treatment of such appointments.

Further, the discussion below does not cover the special rules relating to appointment of various entities to act on behalf of an incapacitated person. See, e.g., Bus. & Prof. Code §§ 6500-6592 (private professional fiduciary); Cal. Prob. Code §§ 2104 (nonprofit charitable corporation), 2340 (private professional fiduciary), 2920 (public guardian); Cal. R. Ct. 7.1060 (qualifications of private professional conservator). We will provide such information later, if the Commission considers it necessary.

For present purposes, we simply note that under UAGPPJA Section 302, an appointment made by another state *could not be transferred* to California if the appointee were *ineligible* for appointment in California. Further, under UAGPPJA § 403(a), if an order of appointment was *registered* in California, the appointee *would not be authorized to do anything prohibited under California law*. This could be

interpreted to mean that an entity appointed in another state would not be allowed to take action in California unless it complied with California's requirements for serving as a conservator. **The Commission should assess whether this interpretation is desirable, and expressly address the point in any version of UAGPPJA it recommends.**

The staff tentatively thinks that when an incapacitated person has *only weak ties* to California, an entity appointed in another state *should* be allowed to take action here, without having to comply with California's requirements for serving as a conservator. It would be unduly burdensome to require otherwise. When an incapacitated person has *relatively strong ties* to California, however, an entity appointed to take action on behalf of the incapacitated person *should not* be allowed to do so without complying with California's requirements for serving as a conservator.

If the Commission agrees with this reasoning, then its proposal should (1) put some constraints on the availability of the registration procedure, as previously discussed, and (2) expressly state that subject to those constraints, an entity appointed in another state can take action here, without having to comply with California's requirements for serving as a conservator. If the Commission instead concludes that an entity should not ever be allowed to take action here without complying with California's requirements for serving as a conservator, then its proposal should expressly state as much.

At this point, **the Commission should consider whether it can choose between these two alternatives based on the information it currently has,** or whether it needs to know more about the special rules in California and elsewhere relating to appointment of various entities to act on behalf of an incapacitated person. If the latter, the staff will provide additional information as time permits.

Having explained this much, we next describe California's rules on how a court should select a person to assist an incapacitated individual.

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." Cal. 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.*

Certain other people may also nominate a conservator. A spouse, domestic partner, or parent of a proposed conservatee "may nominate a conservator in a writing signed *either before or after* the petition [for conservatorship] is filed …." Cal. Prob. Code § 1811(b) (emphasis added). Such a nomination "remains effective notwithstanding the subsequent legal incapacity or death of the spouse, domestic partner, or parent." *Id.* In addition, a spouse, domestic partner, or an adult child, parent, brother, or sister of the proposed conservatee may nominate a conservator *in the petition or at the hearing on the petition*." Cal. Prob. Code § 1811(a) (emphasis added). "Unlike … the nominee of the proposed conservatee which the court must appoint unless it is not in the best interests of the proposed conservatee (Section 1810), a nomination made under Section 1811 *merely entitles the nominee to some preference* for appointment." Cal. Prob. Code § 1811 Comment (emphasis added).

Further, some restrictions apply with regard to nomination of a spouse or domestic partner. "The spouse of a proposed conservatee may not petition for the appointment of a conservator for a spouse or be appointed as conservator … unless the petitioner alleges in the petition …, and the court finds, that the spouse is not a party to any action or proceeding against the proposed conservatee for legal separation of the parties, dissolution of marriage, or adjudication of nullity of their marriage." Cal. Prob. Code § 1813(a). The court may make an exception, however, if it

> finds by clear and convincing evidence that the appointment of the spouse, who is a party to an action or proceeding against the proposed conservatee for legal separation of the parties, dissolution of marriage, or adjudication of nullity of their marriage, or has

> obtained a judgment in any of these proceedings, is in the best interests of the proposed conservatee ….

Id. Before making such an appointment, the court "shall appoint counsel to consult with and advise the conservatee, and to report to the court his or her findings concerning the suitability of appointing the spouse as conservator." *Id.* Similar rules apply with respect to a domestic partner. See Cal. Prob. Code § 1813.1(a).

Moreover, both a spouse and a domestic partner of a conservatee are required to promptly disclose the filing of any suit against the conservatee for legal separation, dissolution, or annulment. Cal. Prob. Code §§ 1813(b), 1813.1(b). If the spouse or domestic partner is serving as conservator, a court receiving such a notice may issue an order to show cause why that arrangement "should not be terminated and a new conservator appointed by the court." Cal. Prob. Code §§ 1813(b), 1813.1(b).

Subject to the requirement of respecting the wishes of the incapacitated person, and to the special rules relating to 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." Cal. 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.

Cal. Prob. Code § 1812(b), (c) (emphasis added).

In this hierarchy, spouses and domestic partners are treated equally, and rank 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 (subject to the special rules for an impending legal separation, dissolution, or annulment), in selecting who to appoint to assist an incapacitated person.

The remainder of the hierarchy favors appointment of a natural person who is related to the proposed conservatee, but it does not preclude appointment of a non-relative or an entity. Some limitations, however, might be inferred from California's provision on grounds for *removal* of a conservator (Cal. Prob. Code § 2650). Most of those grounds are closely linked to poor performance as conservator, such as failure to use ordinary care and diligence in management of the estate. However, the provision also states:

> 2650. A … conservator may be removed for any of the following causes:
>
> ….
>
> (d) Conviction of a felony, whether before or after appointment as … conservator.
>
> (e) Gross immorality.
>
> ….
>
> (h) In the case of a … conservator of the estate, insolvency or bankruptcy of the … conservator.
>
> ….

Arguably, this provision means that a convicted felon, insolvent or bankrupt person, or someone who has engaged in "gross immorality" may not only be removed from serving, but is not permitted to serve as a conservator in the first place. *See, e.g.*, Jorgensen, *The Convicted Felon as a Guardian: Considering the Alternatives of Potential Guardians with Less-Than-Perfect Records*, 15 Elder L.J. 51, 56 & n.24 (2007) (describing Cal. Prob. Code § 2650 as a provision requiring "complete disqualification of the felon"). However, a recent unpublished opinion construes the provision differently; the court said that a felony conviction may be considered in selecting a conservator, but "by itself, does not disqualify a proposed conservator." *In re Johnson*, 2005 Cal. App. Unpub. Lexis 2653, at *5. The staff was unable to find any published opinion addressing this matter. As best we can tell, the courts do not seem to have definitively resolved the extent to which a convicted felon, insolvent or bankrupt person, or someone who has engaged in "gross immorality" is eligible to serve as a conservator in California.

This point might initially seem unimportant, because the court must act in the best interests of the conservatee, and that standard may be difficult for a convicted felon, insolvent or bankrupt person, or someone who has engaged in "gross immorality" to satisfy. But what if the convicted felon is the incapacitated person's husband, and the conviction was for driving under the influence 20 years earlier? What if the person who declares bankruptcy is the incapacitated person's twin brother and only living relative, who has always been extremely close to his sibling? What if the person who engaged in "gross immorality" is a former prostitute who is now the incapacitated person's wife of 30 years? It is not clear to the staff how California law would apply in situations such as these.

To summarize,

(1) California law gives strong preference to the wishes of the incapacitated person regarding the choice of conservator.
(2) California provides protections against appointment of a spouse or domestic partner as conservator when the marriage or partnership is in the process of breaking up. A court can still make such an appointment, but only if certain conditions are satisfied.
(3) Subject to the preceding rules, selection of a conservator in California is solely in the discretion of the court, and the court is to be guided by the best interests of the conservatee.
(4) California Probate Code Section 1812 specifies a hierarchy for a court to use in deciding between persons the court considers equally qualified to serve as conservator. In that hierarchy, spouses and domestic partners are treated equally, and rank at the top of the list.
(5) There is uncertainty regarding the extent to which a convicted felon, bankrupt or insolvent person, or someone who has engaged in "gross immorality" is eligible to serve as a conservator in California.

Law in Neighboring States

The rules governing selection of appointees to assist incapacitated persons in Arizona, Nevada, and Oregon are described below.

Arizona

In Arizona, courts are not the sole source of such appointments. Rather, a parent of an incapacitated person may appoint a guardian for that person in the parent's will. ARS § 14-5401(A). Similarly, the spouse of an incapacitated person may appoint a guardian for that person in the spouse's will. ARS § 14-5301(B).

Aside from these testamentary appointments, there is a 10-item hierarchy for courts to follow in selecting someone to provide personal care for an incapacitated person:

> A. Any qualified person may be appointed guardian of an incapacitated person, subject to the requirements of section 14-5106.
>
> B. The court may consider the following persons for appointment as guardian in the following order:
>
> 1. 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.
>
> 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.
>
> 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.
>
> C. A person listed in subsection B, paragraph 4, 5, 6, 7 or 8 may nominate in writing a person to serve in that person's place. With respect to persons who have equal priority, the court shall select the one the court determines is best qualified to serve.
>
> D. For good cause the court may pass over a person who has priority and appoint a person who has a lower priority or no priority.

ARS § 14-5411. A similar statute governs the selection of someone to assist an incapacitated individual with financial matters. See ARS § 14-5410.

These provisions permit any qualified person to serve as a guardian or conservator, "subject to the requirements of section 14-5106," which specifies certain background information that persons must provide to the court under oath. Among other things, a proposed appointee must disclose:

> Whether or not the proposed appointee has been convicted of a felony in any jurisdiction and, if so, the nature of the offense, the name and address of the sentencing court, the case number, the

> date of conviction, the terms of the sentence, the name and telephone number of any current probation or parole officer and the reasons why the conviction should not disqualify the proposed appointee.

ARS § 14-5106(A)(1). Although a convicted felon must disclose this information, there does not appear to be any provision barring such a person from serving as a guardian or conservator.

In considering whom to select, a court is to follow the statutory hierarchy. 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." ARS §§ 14-5410(A)(1), 14-5411(A). 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. For "good cause," however, "the court may pass over a person who has priority and appoint a person who has lower priority or no priority." ARS §§ 14-5410(B), 14-5311(D); *see also In re Kelly*, 184 Ariz. 514, 520, 910 P.2d 665 (1996) ("The best interest of the ward is served by appointing a non-family member as guardian where the family members are unable to get along with each other or are taking advantage of the ward.").

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.

The remaining items in Arizona's 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.

Notably, there is no mention of a domestic partner, only a "spouse." Based on limited research, it appears that Arizona does not have a statutory procedure for creating or terminating a domestic partnership. It does, however, have a number of statutes that refer or relate to domestic partners in various different contexts.

In particular, 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 on surrogate decisionmaking for an adult patient is similar. See ARS § 36-3231. Further, the Arizona code does not include any provision that says statutory references to a "spouse" encompass a domestic partner.

Thus, it appears that a domestic partner could not be considered a "spouse" within the meaning of the Arizona provisions governing selection of a guardian or conservator. At best, a domestic partner might be deemed a "relative of the incapacitated person with whom the incapacitated person has resided for more than six months before the filing of the petition." Even in this case, however, 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. Arizona thus treats a domestic partner much less favorably than California does in this context.

Another potential cause of concern is Arizona's statute regarding delegation of a guardian's authority to care for the incapacitated person. That statute says that by a "properly executed power of attorney," a guardian "may delegate to another person, for a period not exceeding six months, any powers he may have regarding care, custody or property of the … ward, except power to consent to marriage …." ARS § 14-5104. In other words, a guardian may in effect select another person to serve in the guardian's place for up to six months, *without having to obtain court approval.*

To summarize,

(1) Arizona gives preference to the wishes of the incapacitated person regarding the choice of appointee, but not as much preference as

California. A fiduciary appointed in another jurisdiction has highest priority, regardless of whether that fiduciary is the incapacitated person's choice.

(2) Arizona does not have protections comparable to California's protections against appointment of a spouse or domestic partner as conservator when the marriage or partnership is in the process of breaking up.

(3) In selecting who is to assist an incapacitated person, an Arizona court has less discretion than a California court. An Arizona court must follow the 10-item statutory hierarchy, unless good cause exists for deviating from that hierarchy. In California, the statutory hierarchy only provides guidance on who to select when the court deems two or more candidates equally well qualified.

(4) Unlike California, Arizona treats domestic partners less favorably than spouses in the process of selecting someone to assist an incapacitated person.

(5) Arizona requires disclosure of information about a felony conviction, but does not disqualify a convicted felon from serving as a guardian or conservator. Apparently, a bankrupt or insolvent person, or a person who engaged in "gross immorality," could also be considered for appointment.

(6) Arizona permits a parent or spouse of an incapacitated person to appoint a guardian for the incapacitated person in the will of the parent or spouse.

(7) By a properly executed power of attorney, an Arizona guardian may select another person to serve in the guardian's place for up to six months.

Nevada

In Nevada, certain categories of people are disqualified from being appointed to assist an incapacitated person:

> 159.059. Except as otherwise provided in NRS 159.0595 [re private professional guardians], any qualified person or entity that the court finds suitable may serve as a guardian. A person is not qualified to serve as a guardian who:
>
> 1. Is an incompetent.
>
> 2. Is a minor.
>
> 3. Has been convicted of a felony unless the court determines that such conviction should not disqualify the person from serving as the guardian of the ward.
>
> 4. Has been suspended for misconduct or disbarred from:
>
> (a) The practice of law;
>
> (b) The practice of accounting; or
>
> (c) Any other profession which:

(1) Involves or may involve the management or sale of money, investments, securities or real property; and

(2) Requires licensure in this State or any other state, during the period of suspension or disbarment.

5. Is a nonresident of this State and:

(a) Has not associated as a coguardian, a resident of this State or a banking corporation whose principal place of business is in this State; and

(b) Is not a petitioner in the guardianship proceeding.

6. Has been judicially determined, by clear and convincing evidence, to have committed abuse, neglect or exploitation of a child, spouse, parent or other adult, unless the court finds that it is in the best interests of the ward to appoint the person as the guardian of the ward.

NRS § 159.059.

Several aspects of this provision are notable. First, a felon is disqualified from being a guardian unless the court affirmatively finds that the conviction should not disqualify that person. To assist the court in making that determination, a petition for appointment must state "[w]hether the proposed guardian has ever been convicted of a felony and, if so, information concerning the crime for which the proposed guardian was convicted and whether the proposed guardian was placed on probation or parole." NRS § 159.044(2)(i).

Second, the provision disqualifies anyone who has been judicially determined, by clear and convincing evidence, to have committed abuse, neglect or exploitation of a person. Like the rule regarding felons, a court can make an exception to this rule if the court finds that it is in the best interests of the incapacitated person to make such an appointment.

Third, and perhaps most importantly, the provision disqualifies a person who has been suspended or disbarred from the practice of law or accounting, or a similar profession, during the period of suspension or disbarment. No exceptions to this rule are stated; it appears to apply in all circumstances. There is no counterpart to this rule in California.

Finally, the qualification provision says nothing about a bankrupt or insolvent person, or a person who has engaged in "gross immorality." Bankruptcy is, however, a permissible (not mandatory) ground for removal of a guardian, if it occurred in the previous five years. See NRS § 159.185.

Subject to the qualification requirements, a Nevada court is to select the person "who is most suitable and is willing to serve." NRS § 159.061(2). In determining who is most suitable, the court is to consider, among other factors:

> (a) Any request for the appointment as guardian for an incompetent contained in a written instrument executed by the incompetent while competent.
>
> (b) Any nomination of a guardian for an incompetent … or person of limited capacity contained in a will or other written instrument executed by a parent or spouse of the proposed ward.
>
> ….
>
> (d) The relationship by blood, adoption or marriage of the proposed guardian to the proposed ward. In considering preferences of appointment, the court may consider relatives of the half blood equally with those of the whole blood. 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.
>
> (e) Any recommendation made by a master of the court or special master pursuant to NRS 159.0615.
>
> (f) Any request for the appointment of any other interested person that the court deems appropriate.

NRS § 159.061(3); see also NRS § 159.061(4) (directing court to appoint public guardian, private fiduciary, or private professional guardian if there is no suitable person to appoint under NRS § 159.061(3)).

Under this provision, the wishes of an incapacitated person are not as well protected as in California. In making its selection, a Nevada 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; there is no requirement that the court rank it in any particular manner.

In contrast, a domestic partner seeking a guardianship appointment in Nevada appears to stand on equal footing with a spouse, just as in California. Subject to an exception not relevant here, domestic partners in Nevada "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). Thus, a domestic partner would be treated the same way as a

spouse under Section 159.061, and would rank higher than any other kind of relative.

One final noteworthy feature is Nevada's use of special masters and masters of the court in the process of selecting a guardian. If a Nevada court determines that an individual might need a guardian, "the court may order the appointment of a master of the court or a special master from among the members of the State Bar of Nevada *to conduct a hearing to identify the person most qualified and suitable to serve as guardian for the proposed ward*." NRS § 159.0615 (emphasis added). After that hearing, the master or special master must "submit to the court a *recommendation* regarding which person is most qualified and suitable to serve as guardian for the proposed ward." *Id.* (emphasis added). When the court rules on the guardianship petition, it must consider that recommendation as a factor in deciding who to select as guardian. See NRS § 159.061(2)(e). The court thus retains ultimate authority regarding who to appoint, but there might be a danger that the court will just rubberstamp the recommendation of the master or special master.

To summarize,

(1) In appointing someone to assist an incapacitated person, a Nevada court takes the incapacitated person's preference into account, but is not required to give that preference as much weight as in California.

(2) Nevada does not have protections comparable to California's protections against appointment of a spouse or domestic partner as conservator when the marriage or partnership is in the process of breaking up.

(3) In appointing someone to assist an incapacitated person, a Nevada court must focus on "who is most suitable and willing to serve." That is similar to California's focus on the best interests of the incapacitated person.

(4) Nevada has a hierarchy for courts to use in selecting a guardian from among relatives. In that hierarchy, spouses rank highest. As in California, a domestic partner is to be treated the same way as a spouse.

(5) In Nevada, a felon is disqualified from being a guardian unless the court affirmatively finds that the conviction should not disqualify the person. A similar rule applies to anyone who has committed abuse, neglect, or exploitation of a person.

(6) In Nevada, a person who has been suspended or disbarred from the practice of law or accounting, or a similar profession, is

disqualified from being a guardian during the period of suspension or disbarment.

(7) Bankruptcy, insolvency, and "gross immorality" are not listed as grounds for disqualification, but bankruptcy within the previous five years is a permissible ground for removal of a guardian in Nevada.

(8) A Nevada court may appoint a special master or master of the court to conduct a hearing on who to select as guardian. The master makes a recommendation, which the court must take into account in deciding who to select.

Oregon

In Oregon, a 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." ORS § 125.200 (emphasis added). "A person is *not qualified* to serve as a fiduciary if the person is incapacitated, financially incapable, a minor or is acting as a health care provider, as defined in ORS 127.505, for the protected person." ORS 125.205 (emphasis added).

This is a flexible standard, which gives an Oregon court considerable discretion in selecting "the most suitable person who is willing to serve." In making that selection, the court is required to consider a number of factors, including "any stated desire of the respondent." Unlike California, however, an Oregon court need not ascribe any particular weight to the respondent's desire. It is enough simply to give consideration to that desire. *See, e.g., Grimmett v. Brooks*, 193 Ore. App. 427, 442-48, 89 P.3d 1238 (2004).

In selecting an appointee, an Oregon court must also consider "the relationship by blood or marriage of the person nominated to be fiduciary to the respondent." It is not clear what this means with regard to a domestic partner. Oregon does not appear to have a statutory procedure for creating or terminating a domestic partnership. 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, there is no

assurance that a domestic partner would stand on the same footing as a spouse, and rank higher than any other equally qualified relatives.

As for felons, bankrupt persons, and persons who have had a professional or occupational license revoked or cancelled, Oregon law is similar (but not identical) to Nevada law. A petition for appointment must include a statement "as to whether the person nominated to be fiduciary has been convicted of a crime, has filed for or received protection under the bankruptcy laws or has had a license revoked or canceled that was required by the laws of any state for the practice of a profession or occupation." ORS § 125.055(2)(d). If the nominee has been convicted of a crime, filed for or received protection under bankruptcy laws, or had a professional or occupational license revoked or canceled, "the petition shall contain a statement of the circumstances surrounding those events." *Id.* Further, any such person is required to inform the court of the circumstances of the events. ORS § 125.210. Failure to do so may be grounds for declining to appoint the person as fiduciary, or for removing the person as fiduciary. *Id.*

To summarize,

(1) In appointing someone to assist an incapacitated person, an Oregon court must take the incapacitated person's preference into account, but is not required to give that preference as much weight as in California.

(2) Oregon does not have protections comparable to California's protections against appointment of a spouse or domestic partner as conservator when the marriage or partnership is in the process of breaking up.

(3) In appointing someone to assist an incapacitated person, an Oregon court must identify "the most suitable person who is willing to serve." That is similar to California's focus on the best interests of the incapacitated person.

(4) Oregon does not have a hierarchy for courts to use in selecting a guardian from among relatives. An Oregon court must take into account "the relationship by blood or marriage of the person nominated to be fiduciary to the respondent." It is not clear how this rule applies to a domestic partner; there is no assurance that a domestic partner would rank equally with a spouse.

(5) In Oregon, a felon is not automatically disqualified from being appointed to assist an incapacitated person, but information about the felony conviction must be disclosed to the court. A similar rule applies to a person who has declared bankruptcy, or who has had a professional or occupational license revoked or cancelled.

Impact of UAGPPJA

From the preceding discussion, it is clear that California's rules for selecting someone to assist an incapacitated person differ from those of its three neighbors. The states vary with respect to such matters as:

- How much weight a court must give to the preference of an incapacitated person.
- Whether there are any protections against appointment of a spouse or domestic partner to assist an incapacitated person when the marriage or partnership is in the process of breaking up.
- How much flexibility and discretion a court has in the selection process.
- How a court is to treat a domestic partner in the selection process.
- Whether, and, if so, under what conditions, a court may appoint a felon to assist an incapacitated person.
- Whether, and, if so, under what conditions, a court may appoint a person who is or has been bankrupt or insolvent.
- Whether, and, if so, under what conditions a court may appoint a person who has abused, neglected, or exploited someone else.
- Whether, and, if so, under what conditions a court may appoint a person who has engaged in "gross immorality."
- Whether, and, if so, under what conditions a court may appoint a person who has had a professional or occupational license revoked, canceled, or the equivalent.
- Whether a parent or spouse of an incapacitated person may make an appointment by will.
- Whether a special master or master of the court is used in the selection process.
- The extent to which an appointee can delegate authority to another person without court approval.

If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on the policies underlying California's rules for selecting a conservator? We examine the transfer procedure first, then the registration procedure.

Potential Impact of the Transfer Procedure

Under UAGPPJA Section 302, an appointment made by another state *could not be transferred* to California if the appointee were *ineligible* for appointment in California. Hence, there is no danger that a transfer to California could compel

Californians to accept the authority of someone who could not legally serve as a conservator under California law.

However, transfer of a case to California could mean that Californians would have to accept, at least temporarily, the authority of a person who would not have been selected to serve as conservator under California law. For example, suppose a court in another state appointed an incapacitated person's sister to provide assistance, instead of the incapacitated person's domestic partner, because that state's rules do not treat a domestic partner as a family member. Under UAGPPJA's transfer procedure, the sister would remain in charge upon transfer of the proceeding to California, despite California's policy of treating a domestic partner as equivalent to a spouse and higher in priority than any other relative in the selection process.

As previously explained, however, the Comment to Article 3 of UAGPPJA makes clear that in some circumstances the choice of appointee could be reevaluated following a transfer. Accordingly, any temporary impingement on California's policy interests might be outweighed by the benefits of providing a streamlined transfer process.

The Commission should consider whether it agrees with this assessment. Is it acceptable that someone who would not have been chosen in California could temporarily act on behalf of an incapacitated person who moves here? Should any restrictions be imposed, such as precluding the appointee from taking any drastic or irreversible action without approval from a California court? Based on our current information, **the staff is inclined to answer both of these questions in the affirmative,** but we are eager to hear what others think about this matter.

As previously discussed, **the staff also thinks it may be helpful to:**

- Expressly state that in some circumstances the selection of who is to assist an incapacitated person can be relitigated after a case is transferred to California under UAGPPJA.
- Specify the circumstances in which such relitigation can occur — e.g., whether it is necessary to show a significant change in circumstances; whether it is sufficient if someone simply requests that the selection be relitigated; whether the court could raise the matter on its own motion; whether some type of investigation has to be completed before deciding whether to permit relitigation.
- Expressly state that if the selection of an appointee is relitigated after a case is transferred to California under UAGPPJA, the issue shall be decided pursuant to California law.
- Specify the appropriate procedure for such relitigation.

As previously stated, it might be sufficient simply to expressly state that existing California law on relitigation of the choice of conservator applies after a transfer to California has been completed.

What are the Commissioners' tentative views on these matters?

Potential Impact of the Registration Procedure

With regard to UAGPPJA's registration procedure, again UAGPPJA might on occasion require Californians to recognize the authority of a person who would not have been selected to serve as conservator under California law. As before, that would be contrary to the policies underlying California's rules for selecting a conservator, such as the policy of giving strong preference to the wishes of an incapacitated person.

However, the appointee would have to abide by California law. See UAGPPJA § 403(a).

Moreover, the degree of impingement on California's policy interests might be limited, because the incapacitated person may have only weak ties to California, requiring little involvement of Californians. In such circumstances, the benefits of providing an administratively efficient registration procedure in today's mobile world would seem to outweigh the detriments.

When an incapacitated person has relatively strong ties to California, however, that may change the analysis. For example, if an incapacitated person were going to reside in California, it would not be appropriate to allow an appointee selected by an out-of-state court to use UAGPPJA's registration procedure, rather than its transfer procedure, to preclude the incapacitated person's domestic partner from seeking appointment as conservator pursuant to California law.

This is another reason why the Commission might want to consider putting some constraints on the availability of the registration procedure, designed to restrict that procedure to situations in which an incapacitated person has weak ties to California. As previously discussed, **any such constraints will have to be very carefully drafted.** For now, it may be best for Commissioners simply to provide some general guidance on the matter, which could be fleshed out and refined as this study progresses.

III. PROCEDURAL PROTECTIONS

The next section of this memorandum compares the procedural protections provided in a California conservatorship proceeding to those provided in a comparable proceeding in each of its neighboring states. Although there is some variation from state to state, there is much similarity, as all of the states appear intent on ensuring that individuals receive due process before being adjudged incapacitated and losing certain freedoms.

For each state, we briefly describe the rules regarding:

(1) Notice and manner of service.
(2) Right to counsel.
(3) Prehearing investigations and reports.
(4) Right to be present and be heard.
(5) Jury trial.
(6) Other procedural protections.

California Law

Notice and Manner of Service. California Probate Code Section 1821 specifies the information that must be included in a petition for a conservatorship, including, among other things:

> (1) The inability of the proposed conservatee to properly provide for his or her needs for physical health, food, clothing, and shelter.
>
> (2) The location of the proposed conservatee's residence and the ability of the proposed conservatee to live in the residence while under conservatorship.
>
> (3) Alternatives to conservatorship considered by the petitioner and reasons why those alternatives are not available.
>
> (4) Health and social services provided to the proposed conservatee during the year preceding the filing of the petition, when the petitioner has information as to those services.
>
> (5) The inability of the proposed conservatee to substantially manage his or her own financial resources, or to resist fraud or undue influence.

Cal. Prob. Code § 1821(a). "If the petition is filed by a person other than the proposed conservatee, the clerk shall issue a citation directed to the proposed conservatee setting forth the time and place of hearing." Cal. Prob. Code § 1823(a). The citation must explain some basic rules applicable to a conservatorship proceeding, and some of the potential consequences of such a

proceeding. Cal. Prob. Code § 1823(b). It must also inform the proposed conservatee of certain rights. *Id.*

The citation and a copy of the petition must be served on the proposed conservatee at least 15 days before the hearing. Cal. Prob. Code § 1824. Such service must be made by personal delivery or by notice and acknowledgment of receipt. *Id.*; see Cal. Code Civ. Proc. §§ 415.10, 415.30.

Notice of the time and place of hearing, together with a copy of the petition, must also be given by mail to certain other persons at least 15 days before the hearing, including the spouse or domestic partner of the proposed conservatee, the "relatives named in the petition at their addresses stated in the petition," and, under certain circumstances, the Director of Mental Health, Director of Developmental Services, Office of Veterans Administration, a regional center for persons with developmental disabilities, or the public guardian. Cal. Prob. Code § 1822.

Right to Counsel. A proposed conservatee has the right to choose and be represented by legal counsel. Cal. Prob. Code §§ 1471, 1823(b)(6). If a proposed conservatee is unable to obtain counsel and requests that the court appoint counsel, the court must appoint the public defender or private counsel to represent the proposed conservatee. Cal. Prob. Code § 1471(a). If the proposed conservatee does not have counsel and does not request that the court appoint counsel, the court may nonetheless appoint the public defender or private legal counsel if the court determines "that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the … proposed conservatee." Cal. Prob. Code § 1471(b); see also Cal. Prob. Code § 1470(a). Both the court and the court investigator must take steps to ensure that the proposed conservatee is aware of the right to counsel. See Cal. Prob. Code §§ 1826(b), (g), (i), (j), (k)(1), 1828(a)(6). The cost of counsel is to be paid from the estate of the proposed conservatee. Cal. Prob. Code § 1470(c)(1).

Prehearing Investigations and Reports. Unless the proposed conservatee attends the hearing on the petition for a conservatorship, and has personally executed the petition or has nominated the conservator, a court investigator must make an investigation and report. Cal. Prob. Code § 1826(*o*). The court investigator must be "an officer or special appointee of the court with no personal or other beneficial interest in the proceeding," and must meet other qualifications. See Cal. Prob. Code §§ 1454, 1456.

It is the intent of the Legislature to "[p]rovide that an assessment of the needs of [a proposed conservatee] is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible." Cal. Prob. Code § 1800(b). Consistent with these objectives, the court investigator is required to undertake a thorough investigation of a proposed conservatorship. See Cal. Prob. Code § 1826. Among other things, the investigator must interview the proposed conservatee, all petitioners and proposed conservators, the proposed conservatee's spouse or domestic partner and other relatives within the first degree, and, "to the greatest extent practical and taking into account the proposed conservatee's wishes, the proposed conservatee's relatives within the second degree …, neighbors, and, if known, close friends." *Id.* The investigator must also inform the proposed conservatee of certain rights, explain basic rules and potential consequences of the conservatorship proceeding to the proposed conservatee, and attempt to ascertain the conservatee's wishes on certain matters. *Id.* The investigator must prepare a confidential report regarding all of these matters, and provide it to the court, the proposed conservatee, and various other persons. *Id.*

Right to Be Present and Be Heard. The proposed conservatee must attend the hearing on the petition for appointment of a conservator. Cal. Prob. Code § 1825. The only exceptions are:

> (1) Where the proposed conservatee is out of the state when served and is not the petitioner.
>
> (2) Where the proposed conservatee is unable to attend the hearing by reason of medical inability.
>
> (3) Where the court investigator has reported to the court that the proposed conservatee has expressly communicated that the proposed conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the establishment of the conservatorship, and (iii) does not object to the proposed conservator, and the court makes an order that the proposed conservatee need not attend the hearing.

Id. Medical inability to attend must be established by affidavit. *Id.* "Emotional or psychological instability is not good cause for the absence of the proposed conservatee from the hearing unless, by reason of such instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the proposed conservatee." *Id.*

"The proposed conservatee has the right to … oppose the petition …." Cal. Prob. Code § 1823(b)(5); see also Cal. Prob. Code § 1828(a)(6). The court investigator is to inform the proposed conservatee of this right. Cal. Prob. Code § 1826(b). The court investigator is also required to "[d]etermine whether it appears that the proposed conservatee is unable to attend the hearing and, if able to attend, whether the proposed conservatee is willing to attend the hearing." Cal. Prob. Code § 1826(c).

Jury Trial. "The proposed conservatee has the right to a jury trial if desired." Cal. Prob. Code § 1823(b)(7); see Cal. Prob. Code § 1827. But that right applies only to certain aspects of the conservatorship proceeding:

> Under Section 1827, the proposed conservatee is entitled to a jury trial on the question of the establishment of the conservatorship. However, the question of who is to be appointed as conservator is a matter to be determined by the court. Likewise, there is no right to a jury trial in connection with an order relating to the legal capacity of the conservatee.

Cal. Prob. Code § 1827 Comment (citations omitted); see also Cal. Prob. Code § 1452.

Both the court and the court investigator are required to inform the proposed conservatee of the right to have the question of the establishment of the conservatorship tried by jury. See Cal. Prob. Code §§ 1826(b), 1828(a)(6).

Other Procedural Protections. We will not attempt to describe all of the procedural protections applicable in California conservatorship proceedings here. We do note, however, that "[a]ny interested person or friend of the proposed conservatee" may attend the hearing on the petition for appointment of a conservator. Cal. Prob. Code § 1829.

Law in Neighboring States

The procedural protections provided to an allegedly incapacitated person in neighboring states are described below. As before, we start with Arizona, then turn to Nevada, and finally to Oregon.

Arizona

Notice and Manner of Service. In a guardianship proceeding (i.e., a proceeding to appoint someone to assist an incapacitated individual with personal care), notice of a hearing shall be given to all of the following:

> 1. The … alleged incapacitated person and that person's spouse, parents and adult children.
> 2. Any person who … who has the care and custody of … the alleged incapacitated person.
> 3. In case no other person is notified under paragraph 1 of this subsection, at least one of that person's closest adult relatives, if any can be found.
> 4. Any person who has filed a demand for notice.

ARS § 14-5309. Such notice shall be personally served, at least fourteen days before the hearing, on the alleged incapacitated person, "and that person's spouse and parents if they can be found within the state." ARS § 14-5309(B). Personal service is not required for other persons. *Id.* Essentially the same rules apply in a conservatorship proceeding (i.e., a proceeding to appoint someone to assist an incapacitated individual with financial matters).

Notably, these provisions do not mention a domestic partner, but do refer to "[a]ny person who has filed a demand for notice." Another provision makes clear that "[o]n payment of any required fee, any interested person who desires to be notified before any order is made in a guardianship or conservatorship proceeding … may file a demand for notice …." ARS § 14-5406. Such a demand "is not effective unless it contains a statement showing the interest of the person making it and the person's address, or that of the person's attorney …." ARS § 14-5406.

Right to Counsel. The respondent in a guardianship or conservatorship proceeding is entitled to be represented by counsel. ARS §§ 14-5303(C) (guardianship), 14-5407(D) (conservatorship). Unless the respondent is represented by independent counsel, the court is required to appoint an attorney to represent the respondent. ARS §§ 14-5303(C) (guardianship), 14-5407(B) (conservatorship).

Prehearing Investigations and Reports. In an Arizona guardianship proceeding, the alleged incapacitated person "shall be interviewed by an investigator appointed by the court and shall be examined by a physician, psychologist or registered nurse appointed by the court." ARS § 14-5303(C). The investigator "shall have a background in law, nursing or social work and shall have no personal interest in the proceedings." ARS § 14-5308. The investigator is to interview the alleged incapacitated person and any nursing home or care home caregivers and the home's manager or administrator. *Id.* In addition, the investigator "shall interview the person seeking appointment as guardian, visit

the present place of abode of the alleged incapacitated person and the place where it is proposed that the person will be detained or reside if the requested appointment is made and submit a report in writing to the court." ARS § 14-5303(C).

The physician, psychologist, or registered nurse appointed by the court must also submit a written report. ARS § 14-5303(D). That report must include specified information, including the information mentioned in the preceding discussion of "Determination of Capacity," and

> 4. A list of all medications the alleged incapacitated person is receiving, the dosage of the medications and a description of the effects each medication has on the person's behavior to the best of the declarant's knowledge.
>
> 5. A prognosis for improvement in the alleged incapacitated person's condition and a recommendation for the most appropriate rehabilitation plan or care plan.

Id.

In an Arizona conservatorship proceeding, the requirements are less rigorous. Appointment of an investigator is mandatory only in some circumstances, and appointment of a medical expert is permissive. Specifically, "[i]f the alleged disability is mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, or chronic intoxication, the court *shall* appoint an investigator to interview the person to be protected." ARS § 14-5407(B) (emphasis added). In addition, on petition by an interested person or on the court's own motion, "the court *may* direct that an appropriate medical or psychological evaluation of the person be conducted." *Id.* (emphasis added). Both an investigator and a person conducting a medical or psychological evaluation are required to submit a written report to the court, but the contents of that report are not specified by statute. *Id.*

Right to Be Present and Be Heard. In an Arizona guardianship proceeding, the alleged incapacitated person

> is entitled to be present at the hearing and to see or hear all evidence bearing on that person's condition. The alleged incapacitated person is entitled to … present evidence [and] to cross-examine witnesses, including the court-appointed examiner and investigator ….

ARS § 14-5303(C).

Similarly, in an Arizona conservatorship proceeding, the person allegedly in need of protection

> is entitled to be present at the hearing, … to present evidence and to cross-examine witnesses, including any court appointed examiner and investigator. The issue may be determined at a closed hearing if the person allegedly in need of protection or that person's counsel so requests.

ARS § 14-5303(D).

Jury Trial. In a guardianship proceeding, the alleged incapacitated person is entitled to … trial by jury. ARS § 14-5303(C). In a conservatorship proceeding, there does not appear to be a statutory right to trial by jury. See ARS § 14-5303(D). However, a conservatorship petition may be determined at a closed hearing if the person allegedly in need of protection or that person's counsel so requests. ARS § 14-5303(D).

Other Procedural Protections. A guardianship petition in Arizona must contain "a statement that the authority granted to the guardian may include the authority to withhold or withdraw life sustaining treatment, including artificial food and fluid …." ARS § 14-5303(B). Arizona also has extensive disclosure requirements for proposed guardians and conservators. See ARS § 14-5106. California does not have as extensive statutory disclosure requirements.

Nevada

Notice and Manner of Service. In Nevada, a petition for appointment of a guardian of the person, a guardian of the estate, or a guardian of the person and estate must contain detailed information. See NRS § 159.044. Upon the filing of such a petition,

> the clerk shall issue a citation setting forth a time and place for the hearing and directing the persons or care provider referred to in subsection 2 to appear and show cause why a guardian should not be appointed for the proposed ward.
>
> 2. A citation issued under subsection 1 must be served:
>
> (a) Upon a proposed ward who is 14 years of age or older;
>
> (b) Upon the spouse of the proposed ward and all other known relatives of the proposed ward who are:
>
> (1) Fourteen years of age or older; and
>
> (2) Within the second degree of consanguinity;
>
> (c) Upon the parent or legal guardian of all known relatives of the proposed ward who are:
>
> (1) Less than 14 years of age; and
>
> (2) Within the second degree of consanguinity;

> (d) If there is no spouse of the proposed ward and there are no known relatives of the proposed ward who are within the second degree of consanguinity to the proposed ward, upon the office of the public guardian of the county where the proposed ward resides; and
>
> (e) Upon any person or office of a care provider having the care, custody, or control of the proposed ward.

NRS § 159.047. The citation must be served on each of the above-identified persons by certified mail, return receipt requested, at least 20 days before hearing, or by personal service at least 10 days before hearing. NRS § 159.0475. This would include service on a domestic partner of the proposed ward, because spouses and domestic partners are treated the same way under Nevada law. See NRS § 122A.200(1)(a).

Right to Counsel. The citation must inform the proposed ward of the right to be represented by an attorney, who "may be appointed for the proposed ward by the court if the proposed ward is unable to retain one." NRS § 159.048.

In addition, at the first hearing for the appointment of a guardian, a Nevada court is required to notify the proposed adult ward of the right to counsel and "determine whether the proposed adult ward wishes to be represented by counsel in the guardianship proceeding." NRS § 159.0485. If the proposed adult ward does not attend that hearing in person or by videoconference, then the individual who signed the certificate excusing such attendance must advise the proposed adult ward of the right to counsel and determine whether the proposed adult ward wishes to be represented. *Id.*

If a proposed adult ward is unable to retain legal counsel and requests appointment of counsel, the court shall appoint a private attorney or an attorney who works for legal aid services. *Id.* "Subject to the discretion and approval of the court, the attorney for the … proposed adult ward is entitled to reasonable compensation which must be paid from the estate of the … proposed adult ward." *Id.*

Prehearing Investigations and Reports. In Nevada, a petition for appointment of a guardian must include (1) a certificate signed by a physician licensed to practice in Nevada or employed by the Department of Veterans Affairs, and (2) *either* a letter signed by any governmental agency in Nevada that conducts investigations *or* a certificate signed "by any other person whom the court finds qualified to execute a certificate." NRS § 159.044(2)(j). Each such certificate or letter must state:

(I) The need for a guardian;
(II) Whether the proposed ward presents a danger to himself or herself or others;
(III) Whether the proposed ward's attendance at a hearing would be detrimental to the proposed ward;
(IV) Whether the proposed ward would comprehend the reason for a hearing or contribute to the proceeding;
and
(V) Whether the proposed ward is capable of living independently with or without assistance.

Id. A petitioner seeking a guardian for a proposed adult ward must also "provide the court with an assessment of the needs of the proposed adult ward completed by a licensed physician which identifies the limitations of capacity of the proposed adult ward and how such limitations affect the ability of the proposed adult ward to maintain his or her safety and basic needs." *Id.*

In addition, the court may appoint one or more investigators to:

(a) Locate persons who perform services needed by the proposed ward and other public and private resources available to the proposed ward.
(b) Determine any competing interests in the appointment of a guardian.
(c) Investigate allegations or claims which affect a ward or proposed ward.

NRS § 159.046(1). An investigator "shall file with the court and parties a report concerning the scope of the appointment of the guardian and any special powers which a guardian would need to assist the proposed ward." NRS § 159.046(3).

Right to Be Present and Be Heard. The citation must inform the proposed ward of the right to appear at the hearing on the guardianship petition and to oppose the petition. NRS § 159.048. A proposed ward who is located in Nevada must attend the hearing unless a certificate signed by a physician licensed to practice in Nevada, or by "any other person the court finds qualified to execute a certificate," is submitted to the court, stating "the condition of the proposed ward, the reasons why the proposed ward is unable to appear in court and whether the proposed ward's attendance at the hearing would be detrimental to the physical health of the proposed ward." NRS § 159.0535.

A proposed ward who cannot attend the hearing in person may attend by videoconference. *Id.* If the proposed ward cannot attend the hearing in person or by videoconference, then the person who signs the certificate excusing the proposed ward's attendance must:

> (a) Inform the proposed adult ward that the petitioner is requesting that the court appoint a guardian for the proposed adult ward;
>
> (b) Ask the proposed adult ward for a response to the guardianship petition;
>
> (c) Inform the proposed adult ward of his or her right to counsel and ask whether the proposed adult ward wishes to be represented by counsel in the guardianship proceeding; and
>
> (d) Ask the preferences of the proposed adult ward for the appointment of a particular person as the guardian of the proposed adult ward.

NRS § 159.0535(2). The person who signs the certificate must report on these matters in the certificate. NRS § 159.0535(3).

Jury Trial. The staff could not find any statutory guidance on whether a proposed adult ward is entitled to a jury trial on a guardianship petition in Nevada. If the Commission considers this matter important, we will have to conduct further research.

Other Procedural Protections. The staff did not find any unusual Nevada procedural protections.

Oregon

Notice and Manner of Service. In Oregon, a petition to appoint a guardian (to assist an individual with personal care) or a conservator (to assist an individual with financial matters) must include certain basic information, including the "factual information that supports the request for the appointment of a fiduciary …, and the names and addresses of all persons who have information that would support a finding that an adult respondent is incapacitated or financially incapable." ORS § 125.055. Extensive additional information must be provided in the notice of the filing of the petition, including notice of certain rights belonging to the respondent. See ORS § 125.070.

The notice of the filing of the petition must be given to the respondent, the spouse, parents, and adult children of the respondent, and various other persons and entities. ORS § 125.060(2). The statute does not refer to a domestic partner, but it does require notice to "[a]ny person who is cohabitating with the respondent and who is interested in the affairs or welfare of the respondent." *Id.* Notice must be personally served on the respondent, but notice by mail is sufficient for others. See ORS § 125.065. "The notice shall be written in language reasonably understandable by the respondent." *Id.*

Right to Counsel. In a conservatorship proceeding, the notice must state that the respondent has the right to be represented by counsel. ORS § 125.070(2)(e)(A). It must also include information on any free or low-cost legal services in the area. ORS § 125.070(2)(c).

In a guardianship proceeding, the notice must say:

> You can call a lawyer if you don't want someone else making decisions for you. If you don't have a lawyer, you can ask the judge whether a lawyer can be appointed for you. There may be free or low-cost legal service or other relevant services in your local area that may be helpful to you in the guardianship proceeding. For information about these services, you can call the following telephone numbers _____ and ask to talk to people who can help you find legal services or other types of services.

ORS § 125.070(3).

The court-appointed "visitor" is responsible for checking the respondent's wishes regarding counsel, and other circumstances regarding appointment of counsel, and for conveying that information to the court. ORS §§ 125.150(10)-(12), 125.155(f). The court may appoint counsel for the respondent in a guardianship or conservatorship proceeding. ORS § 125.025(b). This does not appear to be mandatory, but the staff has not thoroughly researched this point as yet.

Prehearing Investigations and Reports. A "visitor" is a person appointed by the court "for the purpose of interviewing and evaluating" a respondent in a guardianship or conservatorship proceeding. ORS § 125.005(11). Appointment of a visitor is mandatory in a guardianship proceeding, but permissive in a conservatorship proceeding. ORS § 125.150(1).

A visitor "may not have any personal interest in the proceedings." ORS § 125.150(2). The visitor must also satisfy other qualifications, including a requirement that the visitor "have training or expertise adequate to allow the person to appropriately evaluate the functional capacity and needs of a respondent …." *Id.*; see also ORS § 125.165.

A visitor has numerous duties. See ORS §§ 125.150,125.155. Among other things, the visitor must interview the respondent and the proposed guardian or conservator. ORS § 125.150(3). Subject to any law relating to confidentiality, the visitor may also "interview any physician or psychologist who has examined the respondent, … the person or officer of the institution having the care, custody or control of the respondent, … and any other person who may have relevant

information." ORS § 125.150(4). The visitor must investigate the following matters:

> (a) The inability of the respondent to provide for the needs of the respondent with respect to physical health, food, clothing and shelter;
>
> (b) The location of the respondent's residence and the ability of the respondent to live in the residence while under guardianship;
>
> (c) Alternatives to guardianship considered by the petitioner and reasons why those alternatives are not available.
>
> (d) Health or social services provided to the respondent during the year preceding the filing of the petition, when the petitioner has information as to those services;
>
> (e) The inability of the respondent to resist fraud or undue influence; and
>
> (f) Whether the respondent's inability to provide for the needs of the respondent is an isolated incident of negligence or improvidence, or whether a pattern exists.

ORS § 125.150(7). The visitor must submit a report to the court, and must attend any hearing on objections to a guardianship or conservatorship petition. ORS § 125.155(1), (5).

The notice of a conservatorship petition must include "[i]nformation on any appointment of a visitor and the role of the visitor." The notice of a guardianship petition must say:

> The judge will appoint someone to investigate whether you need a guardian to make decisions for you. This person is called a "visitor." The visitor works for the judge and does not work for the person who filed the petition asking the judge to appoint a guardian for you, for you or for any other party. The visitor will come and talk to you about the guardianship process, about whether you think that you need a guardian and about who you would want to be your guardian if the judge decides that you need a guardian. The visitor will talk to other people who have information about whether you need a guardian. The visitor will make a report to the judge about whether what the petition says is true, whether the visitor thinks that you need a guardian, whether the person proposed as your guardian is able and willing to be your guardian, who would be the best guardian for you and what decisions the guardian should make for you. If there is a hearing about whether to appoint a guardian for you, the visitor will be in court to testify. You can tell the visitor if you don't want someone else making decisions for you when the visitor comes to talk with you about this matter.

ORS § 125.150(3).

In addition to appointing a visitor, a court may appoint an "investigator" or "expert" to aid the court in its investigation of a guardianship or conservatorship proceeding. ORS § 125.025(c). A court may also require a respondent to submit to a physical or mental examination. ORS § 125.025(j).

Right to Be Present and Be Heard. In a conservatorship proceeding, the notice must include notice of the right to request a hearing, the right to file a written or oral objection, and the right to present evidence and cross-examine witnesses. ORS § 125.070(2). In a guardianship proceeding, the notice must include comparable information, but the language to be used is prescribed by statute. See ORS § 125.070(3). The statutorily prescribed language is clear and readily understandable. See *id.*

A visitor is required to determine whether the respondent is able to attend the hearing on the petition, and, if able to attend, whether the respondent is willing to attend. ORS § 125.150(6).

The court is not required to hold a hearing on the petition unless objections are made or a hearing is requested. See ORS §§ 125.075, 125.080. "*Any person* who is interested in the affairs or welfare of a respondent … may present objections to a petition …." ORS § 125.075 (emphasis added).

Jury Trial. The staff could not find any statutory guidance on whether a respondent is entitled to a jury trial on a guardianship petition or conservatorship petition in Oregon. If the Commission considers this matter important, we will have to conduct further research.

Other Procedural Protections. Oregon has a detailed restrictions designed t prevent conflicts of interest by guardians and conservators. See ORS § 125.221.

Impact of UAGPPJA

The procedural protections provided in a California conservatorship proceeding differ in some respects from those provided in comparable proceedings in neighboring states. Yet there is also considerable similarity, and the staff suspects that all of the proceedings would be deemed consistent with due process.

Whether that would be true of every state in the country is not clear based on the research we have done so far. During the course of the summer, Mr. Wai has been researching this area of law, examining a number of different states. As yet, he has not found anything that the staff considers procedurally egregious. We will provide further information about his work later in this study.

With the foregoing information in mind, we consider the potential impact of UAGPPJA's transfer procedure and registration procedure on the policies underlying the procedural protections provided in California conservatorship proceedings.

Potential Impact of the Transfer Procedure

Under UAGPPJA's transfer process, a case involving an allegedly incapacitated person could be "transferred" to California from another state, and California would be expected to defer to the other state's determinations on such matters as capacity and choice of appointee, at least temporarily so as to expedite the transfer process. If the other state followed procedures closely similar to California's in reaching those determinations, temporarily deferring to its determinations would not seriously offend the policies underlying the procedural protections provided in California. If the other state's procedures sharply differed from California's, however, the situation would be more troubling.

In considering UAGPPJA, we are not alone in identifying this as a potential concern. As Eric Fish pointed out, for example, "even in the ubiquitous section on uniformity found in every act, [a pending Connecticut bill] inserted language referencing civil rights and due process…." Exhibit p. 4. Specifically, the bill would revise the standard ULC provision to say that in applying and construing Connecticut's version of UAGPPJA, "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact such uniform provisions, *consistent with the need to protect individual civil rights and in accordance with due process.*" See *id.* (emphasis added).

The staff does not believe the italicized language is necessary, because every provision in the California codes must be construed in accordance with constitutional requirements, including the right of due process. We also fear that including such language in this uniform act might raise questions about the lack of such language in the many other uniform acts that have been enacted in California.

However, the Commission might consider **making UAGPPJA's transfer procedure available only if the proceeding to be transferred to California complied with due process.** Alternatively, or perhaps in addition, the Commission might want to **make the transfer procedure available only if the proceeding to be transferred to California complied with specified procedural**

requirements, such as the right to counsel or presentation of medical evidence of incapacity. California Advocates for Nursing Home Reform has already suggested such an approach. See First Supplement to Memorandum 2011-24.

The staff suspects that limitations of this type would not have a serious negative impact on the operation of UAGPPJA, because adequate procedural protections probably exist in most states. Care would have to be taken, however, to ensure that any such limitations are easy to administer.

Potential Impact of the Registration Procedure

Similar considerations apply to UAGPPJA's registration procedure, under which a person appointed by a court in another state could take action in California on behalf of an allegedly incapacitated person. Should that be possible if the out-of-state proceeding failed to comply with due process, or to accord certain procedural protections to the respondent?

Again, the Commission may want to consider **imposing some limitations relating to the procedural protections provided in the out-of-state proceeding, or lack thereof.** As before, care would have to be taken to ensure that any such limitations are easy to administer.

Further, this is another context in which the degree of concern would vary depending on whether the allegedly incapacitated person has only weak ties to California, or relatively strong ties. **It is another reason to consider possible means of limiting UAGPPJA's registration procedure to the former situation.**

CONCLUSION

The law is constantly changing, both here and in other jurisdictions. Thus, the Commission cannot look at what states are doing now and assume that is what they will be doing in the future. It is simply impossible to precisely assess the potential impact of adopting UAGPPJA here in California, because that impact may change as the law evolves.

The Commission can, however, try to get a general read on the situation, and seek to identify policy interests that may be negatively affected by adopting UAGPPJA in California. By comparing California's rules on determination of capacity, selection of the person to provide assistance, and procedural protections to those of its neighbors, this memorandum attempts to provide some insight into that matter. **It may be helpful to continue this effort by looking at other aspects of California conservatorship law,** such as the rules

relating to the residence of the incapacitated person, periodic review of a conservatorship, and special types of decisions (healthcare decisions, testamentary decisions, etc.).

Once it completes such analysis, the Commission will need to weigh whatever downsides it identifies against the potential benefits of adopting UAGPPJA, such as protecting families from the emotional trauma and financial burdens of relitigating a loved one's incapacity and redetermining who should be chosen to act on behalf of that person. In deciding where the balance lies, it is unrealistic to think that other states will provide precisely the same types of substantive and procedural protections that California provides. There is inevitably going to be variation among the states. The question is whether the degree of deviation from California's approach is tolerable in light of the countervailing advantages of UAGPPJA.

If that balance tips in favor of enactment, then UAGPPJA should be enacted here. Some modifications from the ULC language may be useful to protect California's policy choices. But such modifications should be kept to a minimum if possible, to avoid undermining the objectives of the uniform act, as occurred with the similar act relating to child custody. See Memorandum 2011-24, pp. 7-9.

If the law in other states changes dramatically after enactment of UAGPPJA, such that important California policies are being overridden, California could always repeal or adjust UAGPPJA in response.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM BARBARA GAAL TO DAVID ENGLISH AND ERIC FISH (JULY 12, 2011)

Re: UAGPPJA - California Study

Dear David and Eric:

As you know, the California Law Revision Commission is conducting a study to determine whether UAGPPJA should be adopted in California and, if so, in what form.

At it most recent meeting, the Commission considered the attached staff memorandum, which focuses on the transfer procedure (Article 3) and the registration procedure (Article 4). Representatives from AARP, the State Bar Trusts and Estates Section, the Alzheimer's Ass'n, and the State Long-Term Care Ombudsman participated in the discussion. California Advocates for Nursing Home Reform (CANHR) was unable to participate, but submitted written comments (attached).

During that discussion, a number of questions were raised about the transfer procedure and the registration procedure.

In particular, the State Bar representative expressed concern that if California adopted UAGPPJA and a guardianship was transferred to California from another state (e.g., Nevada), California might have to handle the transferred guardianship according to the other state's law. For example, he worried that California might have to follow Nevada's rules about changing or selling the residence of the incapacitated person, instead of California's rules.

Others (including me) believe that if California adopted UAGPPJA and a guardianship was transferred to California from another state, the guardianship would become a California "conservatorship of the person" upon completion of the transfer process, and would henceforth be subject to all the requirements of California law governing such conservatorships. For example, the conservatorship would be subject to California's requirements regarding periodic review of such conservatorships. Section 302(f) of UAGPPJA (directing the court accepting a transfer to determine "whether the guardianship or conservatorship needs to be modified to conform to the law of this state") seems to support this interpretation.

Could you please share your thoughts on which interpretation of UAGPPJA is intended?

Questions were also raised about the extent to which, and conditions under which, capacity or the choice of guardian could be relitigated after such a transfer. My sense is that (1) UAGPPJA is designed to streamline the transfer process, so that a transfer can be completed expeditiously, without relitigation of capacity or the choice of guardian, but (2) UAGPPJA is not intended to cast those determinations in stone -- if conditions change, new objections are raised, or review is requested for other reasons, the determination of capacity and choice of guardian can eventually be relitigated in accordance with the procedures of the accepting state. Am I understanding this correctly?

If so, what burden of proof would apply to a relitigation of capacity? Would the allegedly incapacitated person be treated as if his or her capacity had never been litigated

before, such that incapacity would have to be proved by clear and convincing evidence, in accordance with California's rules for an initial determination of incapacity? Or would the allegedly incapacitated person be presumed incapacitated (like a California conservatee), and bear the burden of showing that he or she has capacity? This is an important point, because California has strict rules on determination of capacity, and people have strong sentiments about them.

Finally, concerns were raised about whether the registration procedure could be used as a means of avoiding the transfer procedure. For example, suppose a Minnesota guardian would like to move the ward from Minnesota to a nursing home located in California, but the guardian does not want to run the risk that it might sometime be necessary to relitigate the ward's incapacity in accordance with California law. Would it be possible for the guardian to use the registration procedure to achieve the desired result, and thereby preclude California from implementing its policies regarding who should be treated as incapacitated within its jurisdiction? I realize that the guardian would have to give notice to the Minnesota court of intent to register the guardianship in California, and that this requirement might afford the Minnesota court an opportunity to prevent abuse of the registration process. But the Minnesota court might be unaware of California's policies and see no problem with the request. Does UAGPPJA provide any other means of protecting California's policy interests?

The Commission's next meeting is scheduled for Thursday, August 11, 2011, at the State Capitol in Sacramento. It would be very helpful if you could provide input on the above points at that meeting, or in writing before that meeting, or both.

Thank you very much for considering these issues. I look forward to hearing from you.

Barbara

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EMAIL FROM DAVID ENGLISH TO BARBARA GAAL (JULY 22, 2011)

Re: UAGPPJA - California Study

Barbara:

Thank you for your note. I am not available to attend your August 11 meeting. With limited time and an even more limited travel budget, I hope that we can deal with many of these questions by email or telephone.

Let me respond to your questions in order:

1. We refer to Article 3 as a "transfer" procedure because that it is a convenient way to describe it. But that is not technically correct. Under Article 3, the former state terminates the guardianship and the new state orders a new guardianship. The advantage of Article 3 is that it offers an expedited method for the former state to terminate the case and for the new state to make a new appointment. The purpose of the 90-say review under Section 302 is to make certain that the court in the new state has the opportunity to tweak the guardianship/conservatorship to conform to the new state's law.

2. Following the new appointment under Article 3, the protected person or any other person with standing may file an action to contest a finding of incapacity or choice of a guardian or conservator. The burdens of proof would presumably be whatever is provided under local law.

3. I am a little surprised by your last question. With legal fees in some states approaching or exceeding $300/per hour, even the expedited procedure in Article 3 will entail significant expense. I doubt that many families would choose Article 4 registration vs. Article 3 "transfer" because of concern that the new state will reverse the finding of incapacity. The usual concern is expense and the conservation of dwindling resources.

The Act is built on the concept that a state of the US should respect the law of its sister states. Consequently, under the Act, if the nursing home in California in your example is willing to accept an Article 4 registration, an Article 3 procedure would not be necessary.

Although the ULC encourages uniformity, it recognizes that local variations are sometimes necessary. In Missouri, we made a number of such changes in order to fit the uniform act into our local law. I could certainly understand that you might make similar changes. Instead of trying to suggest possible modifications by email, perhaps we might speak by phone prior to August 11.

David English

EMAIL FROM ERIC FISH TO BARBARA GAAL
(JULY 22, 2011)

Re: UAGPPJA - California Study

Barbara -

In response to the issues raised in your message.

First, when the guardianship is transferred into California, it will become subject to all of California's rules. One of the most asked questions I have received at CLE presentations relates to bond. State bond requirements vary greatly and meeting the bond is of concern to many of the practitioners with whom I have spoken. If the new state requires a bond, the guardian must provide it. Other requirements would be analogous.

Suzy Walsh, a CT Commissioner and member and the drafting committee discussed some of the other issues you raised. Suzy has been heavily involved in the process of enactment in CT. She has faced exactly the same concerns from our legal services community in CT. If you look at the bill, it is amended in many places to refer to CT procedures: http://www.cga.ct.gov/2011/FC/2011SB-01053-R000253-FC.htm

For example, even in the ubiquitous section on uniformity found in every act, CT inserted language referencing civil rights and due process:

Ex) Sec. 22. (NEW) (Effective October 1, 2011) In applying and construing the provisions of sections 1 to 23, inclusive, of this act, section 45a-644 of the general statutes, as amended by this act, section 45a-648 of the general statutes, as amended by this act, and section 45a-649 of the general statutes, as amended by this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact such uniform provisions, consistent with the need to protect individual civil rights and in accordance with due process.

As for re-litigation, the act is designed to facilitate transfer only. If issues are raised after the transfer occurs, they would be reviewed under the accepting state procedures. New York is currently dealing with these issues because they have a bifurcated guardianship system that separates guardianships into mental health/disability guardianships and more general property guardianships.

Please let me know if this answers some of your questions. I believe David is currently abroad teaching, so his response may be delayed.

Eric