Study L-750 October 5, 2011

# Second Supplement to Memorandum 2011-31

## Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Comparison of California Law on Periodic Review of a Conservatorship with Comparable Law in Neighboring States

To help assess the potential consequences of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), Memorandum 2011-31 compares and contrasts some aspects of California's conservatorship law to comparable law in neighboring states (Arizona, Nevada, and Oregon). This supplement provides a similar comparison for another aspect of conservatorship law: the requirements for periodic review of a conservatorship.

The Commission is working towards preparation of a tentative recommendation, which will be widely circulated for comment. The Commission is at an early stage in this process, and has not yet started drafting a legislative proposal. Thus far, it has been focusing on (1) UAGPPJA's transfer procedure (Article 3) and (2) UAGPPJA's registration procedure (Article 4). Those procedures are described at pages 5-15 of Memorandum 2011-31.

The Commission has raised many questions about those procedures and how they are intended to work. Earlier this year, the staff sought guidance from representatives of the Uniform Law Commission ("ULC") on a number of issues, and received responses as discussed in Memorandum 2011-31. At the August meeting, the Commission began consideration of that memorandum. It had further questions about the transfer and registration procedures, and it expressed interest in having a ULC representative come explain how UAGPPJA is intended to work.

The staff has since been informed that the ULC is willing to send someone to California to help answer the Commission's questions. To make the most of that opportunity, however, it seems advisable to wait until the Governor has filled all, or at least most, of the vacancies on the Commission. That might not occur before the Commission meets in November.

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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.

Consequently, it is not clear how many issues, if any, the Commission will be in a position to decide at the upcoming meeting. This supplement seeks to achieve some progress primarily by presenting additional background information and analysis for the Commission to consider. Although the staff also makes some recommendations, these are very preliminary. It may be best not to resolve any of the issues until after the Commission has heard more about UAGPPJA in a face-to-face discussion with a ULC representative.

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 as much as possible 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.

## PERIODIC REVIEW OF THE APPOINTMENT

The discussion below begins by examining California's system for periodic review of the status of a conservatorship. We then describe the comparable rules in California's neighbors: Arizona, Nevada, and Oregon. Finally, we consider the potential impact of UAGPPJA's transfer and registration procedures on this aspect of conservatorship law.

As in the Memorandum 2011-31, the focus is on what is known in California as a "Probate Code conservatorship" or simply a "probate conservatorship" — a civil proceeding pursuant to Probate Code Section 1400 *et seq.*, in which a court has appointed someone to assist an adult who is either incapable of caring for himself or herself, or incapable of handling his or her own financial matters, or both. We have not attempted to cover any special types of conservatorships or civil commitments of adults, such as a limited conservatorship for a developmentally disabled adult, or a conservatorship of a "gravely disabled" person under the Lanterman-Petris-Short Act. There are a variety of such statutory classifications, with different rules applicable to each one. That presents a problem in modifying UAGPPJA for adoption in California: If a court proceeding relating to an incapacitated person were transferred to California

under UAGPPJA, should the proceeding thereafter be treated as a probate conservatorship or as some other type of arrangement under California law? How would that decision be made? Should UAGPPJA's transfer procedure be limited to certain types of out-of-state proceedings? What about UAGPPJA's registration procedure? This memorandum does not attempt to answer those questions. They will be the subject of a future memorandum.

**California Law**

As discussed at pages 56-57 of Memorandum 2011-31, when a petition for a conservatorship is pending, a court investigator must thoroughly investigate the situation and prepare a written report for the court. Detailed rules govern the nature of the investigation and the contents of the written report. See Cal. Prob. Code § 1826. 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.

After a court approves a conservatorship, the court must periodically review the conservatorship with the assistance of the court investigator. Cal. Prob. Code § 1850(a). The Legislature expressly intended that such periodic review "consider the best interests of the conservatee." Cal. Prob. Code § 1800 (e).

Unless the court determines that earlier review is needed, the first such review is supposed to occur "[a]t the expiration of six months after the initial appointment of the conservator …." Cal. Prob. Code § 1850(a), (b). At that time, the court investigator "shall visit the conservatee, conduct an investigation in accordance with the provisions of subdivision (a) of Section 1851, and report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances." Cal. Prob. Code § 1850(a)(1).

The cross-referenced statute — subdivision (a) of Section 1851 — imposes the following requirements:

> (a) When court review is required pursuant to Section 1850, the court investigator shall, without prior notice to the conservator except as ordered by the court for necessity or to prevent harm to the conservatee, visit the conservatee. The court investigator shall inform the conservatee personally that the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. The court investigator shall determine whether the conservatee wishes to petition the court for termination of the

> conservatorship, whether the conservatee is still in need of the conservatorship, whether the present conservator is acting in the best interests of the conservatee, and whether the conservatee is capable of completing an affidavit of voter registration. In determining whether the conservator is acting in the best interests of the conservatee, the court investigator's evaluation shall include an examination of the conservatee's placement, the quality of care, including physical and mental treatment, and the conservatee's finances. To the extent practicable, the investigator shall review the accounting with a conservatee who has sufficient capacity. To the greatest extent possible, the court investigator shall interview the individuals set forth in subdivision (a) of Section 1826 [i.e., the conservatee, all petitioners and proposed conservators, the conservatee's spouse or registered domestic partner, the conservatee's relatives within the first or second degree, and the conservatee's neighbors and close friends] in order to determine if the conservator is acting in the best interests of the conservatee. If the court has made an order under Chapter 4 (commencing with Section 1870) [regarding the conservatee's capacity to bind or obligate the conservatorship estate], the court investigator shall determine whether the present condition of the conservatee is such that the terms of the order should be modified or the order revoked. Upon request of the court investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship.

In undertaking these tasks, the court investigator "may personally visit the conservator and other persons as may be necessary to determine whether the present conservator is acting in the best interests of the conservatee." Cal. Prob. Code § 1851(d).

The court investigator's findings, and the facts upon which those findings are based, "shall be certified in writing to the court not less than 15 days prior to the date of review." Cal. Prob. Code § 1851(b)(1). Unless the court orders otherwise, the report is confidential, but it must be provided to the conservatee, the conservator, and certain other persons, with some restrictions. Cal. Prob. Code § 1851(b)(1)-(2), (e). In response to the investigator's report, the court may take appropriate action, including, but not limited to, ordering a review of the conservatorship at a noticed hearing, and ordering the conservator to submit an accounting of the assets of the estate. Cal. Prob. Code § 1851(a)(1), (b).

After the initial six-month review, the review process is to be repeated "[o]ne year after the appointment of the conservator and annually thereafter." Cal. Prob. Code § 1851(a)(2). However, if the court finds that the conservator is acting

in the best interests of the conservatee, the court may, subject to some restrictions, set the next review in two years. *Id.* Regardless of which review schedule the court selects, the review process is complemented by a requirement that a conservator of the estate submit an accounting one year after being appointed, and biennially thereafter. Cal. Prob. Code §§ 1060-1064, 2620(a); see also Cal. Prob. Code §§ 2620-2628.

After each periodic review, the court is to assess the conservatee for the costs of the court investigator's work. Cal. Prob. Code § 1851.5. "The court may order reimbursement to the court for the amount of the assessment, unless the court finds that all or any part of the assessment would impose a hardship on conservatee or the conservatee's estate." *Id.*

Although California's review system is supposed to work as just described, actually that is not the case. Some of the system's features were added by a 2006 bill that was intended to strengthen the system. See 2006 Cal. Stat. ch. 493, §§ 11.5, 12.5. The 2006 reforms included the following:

- Conducting the first review six months after the initial appointment, instead of one year after the initial appointment.
- Conducting subsequent reviews on an annual basis (with some exceptions), rather than a biennial basis.
- Expressly authorizing the court to take appropriate action, such as ordering a review on its own motion or at the request of a party, or requiring the conservator to submit an accounting of the assets of the estate.
- Requiring the court investigator's report to specifically address the conservatee's placement, quality of care (including physical and mental treatment), and finances.
- Expressly requiring the conservator to make books and records available to the court investigator.
- Requiring the investigator to review the accounting with a conservatee who has sufficient capacity, if practicable.
- Requiring that the court investigator's report (except confidential medical information and certain confidential law enforcement information) be provided to the conservatee's spouse or registered domestic partner, and the conservatee's relatives in the first degree, or, if there are no such relatives, the next closest relative.
- Requiring the court investigator to visit the conservatee without providing advance notice to the conservator, except as ordered by the court for necessity or to prevent harm to the conservatee.
- Requiring that "to the greatest extent possible," the court investigator interview the conservatee, all petitioners and

> proposed conservators, the conservatee's spouse or registered domestic partner, the conservatee's relatives within the first or second degree, and the conservatee's neighbors and close friends.

Pursuant to a bill enacted earlier this year, which took effect immediately upon approval of the 2011-2012 budget, the superior courts are not required to perform any duties imposed by the 2006 reforms "until the Legislature makes an appropriation identified for this purpose." See SB 78 (Committee on Budget & Fiscal Review), 2011 Cal. Stat. ch. 10, §§ 13, 15. As best the staff can tell, the Legislature has not yet made such an appropriation. California's current system for reviewing conservatorships is thus less stringent than initially appears from the statutory framework.

(The same bill also excuses the superior courts from performing certain other statutory duties relating to conservatorships until the Legislature makes an appropriation identified for those purposes. This includes the requirement that when a court investigator is initially investigating a conservatorship petition, the investigator must interview the petitioner, the proposed conservator, the proposed conservatee's spouse or registered domestic partner, the proposed conservatee's relatives within the first degree, and, to the greatest extent possible, the proposed conservatee's relatives within the second degree, neighbors, and close friends. See SB 78 (Committee on Budget & Fiscal Review), 2011 Cal. Stat. ch. 10, § 12; Cal. Prob. Code § 1826.)

**Law in Neighboring States**

California's system for periodic review of a conservatorship differs in some respects from comparable processes used in Arizona, Nevada, and Oregon. The processes used in those states are described below, in the order listed.

*Arizona*

In Arizona, someone who has been appointed to assist an incapacitated individual with personal care is known as a "guardian," and the incapacitated individual is known as the "ward." The guardian is required to "submit a written report to the court on each anniversary date of qualification as guardian, on resignation or removal as guardian and on termination of the ward's disability." Ariz. Revised Statutes (hereafter, "ARS") § 14-5315. The report must include:

(1) The type, name and address of the home or facility where the ward lives and the name of the person in charge of the home.
(2) The number of times the guardian has seen the ward in the last twelve months.
(3) The date the guardian last saw the ward.
(4) The name and address of the ward's physician or registered nurse practitioner.
(5) The date the ward was last seen by a physician or registered nurse practitioner.
(6) A copy of the ward's physician's or registered nurse practitioner's report to the guardian or, if none exists, a summary of the physician's or the registered nurse practitioner's observations on the ward's physical and mental condition.
(7) Major changes in the ward's physical and mental condition observed by the guardian in the last year.
(8) The guardian's opinion as to whether the guardianship should be continued.
(9) A summary of the services provided to the ward by a governmental agency and the name of the individual responsible for the ward's affairs with that agency.

*Id.* The guardian is required to mail the report to the incapacitated person, the court appointee handling the incapacitated person's financial affairs (known as the "conservator"), the incapacitated person's spouse (or parents if the incapacitated person is unmarried), the incapacitated person's court-appointed attorney, and any other interested person who has filed a demand for notice with the court. *Id.*

The statute does not state what the court is supposed to do in response to a guardian's report. There does not appear to be any requirement that anyone other than the guardian periodically investigate or report on the situation. All we found was a rule that "[b]efore removing a guardian, accepting the resignation of a guardian or ordering that a ward's capacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian [i.e., the procedures described at pp. 59-60 of Memorandum 2011-31] *may* send an investigator to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court." ARS § 14-5307(B) (emphasis added). The wording of this provision is permissive rather than mandatory. But the provision clearly contemplates that on some occasions a court may use an investigator to assist in reviewing the status of a guardianship.

See also ARS § 14-5308 (stating that investigator shall conduct investigation before court appoints guardian, and, "[a]s directed by the court, the investigator shall conduct additional investigations to determine if it is necessary to continue the appointment.").

Like an Arizona guardian, an Arizona conservator must regularly report to the court. Subject to a narrow exception,

> every conservator must account to the court for the administration of the estate *not less than annually* on the anniversary date of qualifying as conservator and also on resignation or removal, and on termination of the protected person's … disability, *except that for good cause shown* on the application of an interested person, *the court may relieve the conservator* of filing annual or other accounts by an order entered in the minutes.

ARS § 14-5419(A) (emphasis added). The court does not appear to be statutorily required to review or otherwise act on what a conservator submits, nor is anyone other than the conservator required to gather information about the situation. But the court is expressly authorized to "take *any appropriate action* on filing of annual or other accounts." ARS § 14-5419(B). In particular, the court "may require a conservator to submit to a physical check of the estate in the conservator's control, to be made in any manner the court may specify." *Id.* Any adjudication allowing an intermediate or final account "can be made only on petition, notice and a hearing." ARS § 14-5419(C).

In sum,

- Arizona does not have an initial six month review, as would occur in California if the Legislature appropriated money for that purpose.
- Instead of annually requiring a court investigator to conduct an investigation or prepare a report, Arizona annually requires the guardian (the appointee responsible for an incapacitated person's care) to submit a report to the court. A court investigator may also be used if the court so directs.
- Similarly, Arizona annually requires the conservator (the appointee responsible for an incapacitated person's finances) to account to the court. The court is authorized to take appropriate action in response, but no responsive steps are statutorily mandated.

*Nevada*

In Nevada, every guardianship established pursuant to Chapter 159 of the Nevada Revised Statutes (i.e., every proceeding in which a court has appointed someone to assist an incapacitated individual with personal care or financial matters) must be reviewed by the court annually. Nev. Revised Statutes (hereafter, "NRS") § 159.176. The procedure differs slightly depending on whether the guardian is responsible for personal care (a "guardianship of the person") or financial matters (a "guardianship of the estate").

A guardian of the person must

> make and file in the guardianship proceeding for review of the court a written report on the condition of the ward and the exercise of authority and performance of duties by the guardian:
>
> (a) *Annually*, not later than 60 days after the anniversary date of the appointment of the guardian.
>
> (b) Within 10 days of moving a ward to a secured residential long-term care facility; and
>
> (c) At such other times as the court may order.

NRS § 159.081 (emphasis added). The court may prescribe the form and contents of these reports, which must be provided to the guardian of the estate (if any), as well as to the court. *Id.* When a report is triggered by a move to a secured residential long-term care facility, the report must include a copy of the written recommendation upon which the transfer was made, and must be served on the attorney for the incapacitated person (if any). *Id.* The court is not required to hold a hearing or enter an order regarding such a report, or any other report on the status of a guardianship of the person. *Id.*

A guardian of the estate must

> make and file a verified account in the guardianship proceeding:
>
> 1. *Annually*, not later than 60 days after the anniversary date of the appointment of the guardian, unless the court orders such an account to be made and filed at a different interval upon a showing of good cause and with the appropriate protection of the interests of the ward.
>
> 2. Upon filing a petition to resign and before the resignation is accepted by the court.
>
> 3. Within 30 days after the date of his or her removal, unless the court authorizes a longer period.
>
> 4. Within 90 days after the date of termination of the guardianship or the death of the ward, unless the court authorizes a longer period.

> 5. At any other time as required by law or as the court may order.

NRS § 159.177 (emphasis added). The account must include the period covered by the account, all cash receipts and disbursements during the period covered by the account, all claims filed and action taken regarding the account, and any changes in the ward's property due to sales, exchanges, investments, acquisitions, gifts, mortgages or other transactions which have increased, decreased or altered the ward's property holdings as reported in the original inventory or the preceding account. NRS § 159.179. On the court's own motion, or on ex parte application by an interested person and a showing of good cause, the court may order production of the receipts or vouchers that support the account, and may examine or audit those receipts or vouchers. *Id.* At a hearing on an account, any interested person may appear and object to the account. NRS § 159.181. "If there are no objections to the account or if the court overrules any objections, the court may enter an order allowing and confirming the account." *Id.*

A special rule applies when the incapacitated person resides with "a care provider that is an institution or facility." In that circumstance, the care provider must give the guardian an itemized accounting of all financial activity pertaining to the incapacitated person once per quarter, and at any other time requested by the guardian. NRS § 159.184.

In sum, the situation in Nevada is much like that in Arizona:

- Nevada does not have an initial six month review, as would occur in California if the Legislature appropriated money for that purpose.
- Instead of annually requiring a court investigator to conduct an investigation or prepare a report, Nevada annually requires the guardian of the person (the appointee responsible for an incapacitated person's care) to submit a report to the court.
- Similarly, Nevada annually requires the guardian of the estate (the appointee responsible for an incapacitated person's finances) to account to the court.
- Unlike Arizona, Nevada expressly requires the court to annually review each guardianship.

*Oregon*

Oregon's approach is generally similar to the ones used in Arizona and Nevada. A "guardian" — i.e., someone who has been appointed to assist and

incapacitated individual with personal care — must file a written report with the court "[w]ithin 30 days after each anniversary of appointment." Oregon Revised Statutes (hereafter, "ORS") § 125.325. The report must include the case caption and a declaration under penalty of perjury, and must be in substantially the following form:

GUARDIAN'S REPORT

I am the guardian for the person named above, and I make the following report to the court as required by law:

1. My name is _____.

2. My address and telephone number are: _____ _____ Phone _____

3. The name, if applicable, and address of the place where the person now resides are: _____ _____

4. The person is currently residing at the following type of facility or residence: _____

5. The person is currently engaged in the following programs and activities and receiving the following services (brief description): _____

6. I was paid for providing the following items of lodging, food or other services to the person: _____ _____

7. The name of the person primarily responsible for the care of the person at the person's place of residence is: _____

8. The name and address of any hospital or other institution where the person is now admitted on a temporary or permanent basis are: _____ _____

9. The person's physical condition is as follows (brief description): _____ _____

10. The person's mental condition is as follows (brief description): _____ _____

11. I made the following contacts with the person during the past year (brief description): _____

12. I made the following major decisions on behalf of the person during the past year (brief description): _____

13. I believe the guardianship should or should not continue because: _____

14. At the time of my last report, I held the following amount of money on behalf of the person: $_____. Since my last report, I received the following amount of money on behalf of the person: $_____. I spent the following amount of money on behalf of the person: $_____. I now hold the following amount of money on behalf of the person: $_____.

15. A true copy of this report will be given to the person, any conservator for the person and any other person who has requested notice.

16. Since my last report:

(a) I have been convicted of the following crimes (not including traffic violations): _____

(b) I have filed for or received protection from creditors under the Federal Bankruptcy Code (yes or no):_____.

(c) I have had a professional or occupational license revoked or suspended (yes or no):_____.

(d) I have had my driver license revoked or suspended (yes or no):_____.

17. Since my last report, I have delegated the following powers over the protected person for the following periods of time (provide name of person powers delegated to): _____

*Id.*

The report must be given to the protected person, any other fiduciary who has been appointed to assist the protected person, anyone who has filed a request for notice in the proceedings, and sometimes certain others. *Id.*; see ORS § 125.060(3). There does not appear to be any statute directing the court to hold a hearing or take any action in response to the guardian's report. But the court "may act upon the … motion of any person or upon its own authority at any time and in any manner it deems appropriate to determine the condition and welfare of the … protected person and to inquire into the proper performance of a fiduciary …." ORS § 125.025.

Similarly, a "conservator" — i.e., someone who has been appointed to assist an incapacitated individual with financial matters — must periodically provide information to the court. In particular, the conservator must file an inventory of the protected person's estate within 90 days of the appointment (unless the court grants a longer time). ORS § 125.470. The conservator must also file a supplemental inventory whenever any property not included in the initial inventory or any subsequent accounting, or derived from an asset in the initial inventory or a subsequent accounting, "comes into the possession or knowledge of the conservator." *Id.*

In addition, the conservator must "account to the court for the administration of the protected estate within 60 days after each anniversary of appointment" and on certain other occasions. ORS § 125.475. Each accounting must include the time period covered by the accounting, the total value of the property with

which the conservator is chargeable according to the inventory (or, if there was a prior accounting, the amount of the balance of the prior accounting), all money and property received during the period covered by the accounting, all disbursements made during that period, the amount of the conservator's bond, and "[s]uch other information as the conservator considers necessary, or that the court might require, for the purpose of disclosing the condition of the estate." *Id.* In general, vouchers for disbursements must accompany the accounting. *Id.* A copy of the accounting must be served on the protected person (unless the court waives such service because it would not assist the protected person in understanding the proceedings), any other fiduciary who has been appointed to assist the protected person, anyone who has filed a request for notice in the proceedings, and sometimes certain others. *Id.*; see ORS § 125.060(3). The court "may require a conservator to submit to a physical check of the estate in the control of the conservator at any time and in any manner the court may specify." ORS § 125.475. The court may also take other appropriate action on motion of a party or on its own motion. See ORS § 125.025.

Like Arizona and Nevada, Oregon does not appear to mandate that anyone other than the appointee assisting an incapacitated individual (i.e., the guardian or conservator) periodically investigate or report to the court about the status of a protected person. However, Oregon courts routinely use a "visitor" to conduct an investigation before appointing a guardian, sometimes do the same before appointing a conservator (see Memorandum 2011-31, pp. 65-66), and are also authorized to use a "visitor" after the court makes an appointment:

> At any time after the appointment of a fiduciary, the court may appoint a visitor. The court may require the visitor to perform any duty the visitor could have performed if appointed at the time the fiduciary was appointed, including interviewing relevant persons, examining relevant records, reporting in writing to the court and being present at any hearing.

ORS § 125.160. As in California, an Oregon court may charge the protected person for the costs of the visitor's work, and the court "may order reimbursement to the state from the assets of the … protected person for the cost of any interview or report unless the court finds that the assessment would impose a hardship on the … protected person." ORS § 125.170.

In sum,

- Oregon does not have an initial six month review, as would occur in California if the Legislature appropriated money for that purpose.
- Instead of annually requiring a court investigator to conduct an investigation or prepare a report, Oregon annually requires the guardian (the appointee responsible for an incapacitated person's care) to submit a report to the court.
- Similarly, Oregon annually requires the conservator (the appointee responsible for an incapacitated person's finances) to account to the court.
- A "visitor" (similar to a "court investigator" in California) may also be used if the court so directs.
- There does not appear to be any statute directing the court to hold a hearing or take any other action in response to a guardian's annual report or a conservator's annual accounting. But the court is authorized to take appropriate action at any time, regardless of whether anyone asks it to act.

**Potential Impact of UAGPPJA's Transfer and Registration Procedures**

Due to lack of funding, California's current system for reviewing conservatorships is not as rigorous as was statutorily mandated in 2006. In a key respect, however, California's system nonetheless appears to be more rigorous than that of its neighbors: California has a court investigator check out each case, instead of relying on the appointed fiduciary to provide information to the court about the protected person and that person's assets. But until funding for the 2006 reforms is appropriated, California's review process occurs only biennially after the first review, not annually like the review processes used in neighboring states.

What does this mean in considering whether California should adopt (1) UAGPPJA's transfer procedure, and (2) UAGPPJA's registration procedure? We discuss the transfer procedure first, and then the registration procedure.

*Potential Impact of the Transfer Procedure*

If California adopted UAGPPJA's transfer procedure, an out-of-state proceeding involving an incapacitated adult could be "transferred" to California upon satisfaction of certain conditions. See Memorandum 2001-31, pp. 5-11. The California court accepting the transfer (the "accepting court") would then have a

specified period of time to assess whether the transferred proceeding has to be modified to conform to California law. UAGPPJA § 302(f).

The Commission has already tentatively decided that "if it proposes a version of UAGPPJA for adoption in California, its version should expressly state that after a proceeding relating to an incapacitated adult is transferred to California, the proceeding is henceforth subject to California law and will be treated as a California conservatorship." Minutes (Aug. 2011), p. 5. It follows that a transferred proceeding should eventually be put on the same review schedule as other California conservatorship cases. Once that occurs, that should eliminate any concern relating to the *frequency* (as opposed to *quality*) of reviews in the transferring state.

But how should such a transition be accomplished?

The staff sees at least two possibilities:

(1) **Review in conjunction with transfer.** Under this approach, a California court would conduct a review pursuant to California law at or shortly after the time of transfer. The court would treat that review as the initial conservatorship review for purposes of calculating when to schedule the next review. Assuming that California's review system is fully funded, the review in conjunction with transfer would be equivalent to the initial six month review of a conservatorship originating in California, and the next review would be six months later.

(2) **Review on California's schedule, using the other state's date of appointment and date of latest review, report, or accounting.** Under this approach, the time of the first California review would be determined by (a) applying California law regarding how frequently reviews should occur, and (b) having that time period run from the date of the most recent review, report, or accounting in the transferring state (if any), or the date when the out-of-state court appointed the fiduciary (if there has not been any review, report, or accounting).

    For example, suppose an out-of-state court appointed a fiduciary and the proceeding was transferred to California before there was a review, report, or accounting in the transferring state. Assuming that California's review system is fully funded, a California court would review the proceeding six months after the out-of-state court made the appointment (consistent with California's initial six month review period).

    Similarly, suppose an out-of-state court appointed a fiduciary, conducted several reviews, and then transferred the proceeding to California. Assuming that California's review system is fully funded, a California court would review the proceeding one year

after the date of the out-of-state court's latest review (consistent with California's practice of reviewing conservatorships annually after the first two reviews).

It is probably too early in this study to select which of these approaches to use. **We invite comment on this point.** The proper choice may become more clear as the study proceeds.

For now, the staff notes that **whichever approach the Commission chooses, its recommended legislation should clearly specify the approach to use.** Further, **if the Commission chooses the second approach** (review on California's schedule, using the other state's date of appointment and date of latest review, report, or accounting), **it may also be helpful to:**

- Require that a petition for transfer include the other state's date of appointment and date of latest review, report, or accounting, and
- Require that when a California court accepts a transfer, it specify the date of the next review.

As for which approach to select, the first approach (review in conjunction with transfer) would provide an opportunity for a California court to scrutinize a transferred proceeding and provide guidance to the fiduciary and other participants as soon as California assumes jurisdiction. That might help to ensure compliance with California law right away.

The first approach would also provide an opportunity to channel the proceeding in the right direction at the outset. For example, the Commission could structure its proposal such that if a California court accepted a transfer, a court investigator would immediately prepare a report for purposes of the review, and the court would have the benefit of that report in assessing whether to treat the proceeding as one involving a developmentally disabled adult, a "gravely disabled" person, or some other special category of conservatee.

But the second approach (review on California's schedule, using the other state's date of appointment and date of latest review, report, or accounting) would not be as burdensome on the parties and the court system as the first approach. Under that approach, the initial California review and concomitant expenditure of resources generally would occur later than under the first approach, subsequent reviews would run from that date, and ultimately the total number of reviews is likely to be lower than under the first approach.

A downside of the second approach is that a transferred proceeding might involve arrangements or conditions that would be unacceptable in California, yet

those problems would not be uncovered until the initial review is conducted in California. While this is undesirable, harm to an incapacitated person can also occur between reviews of a conservatorship that has always been supervised by a California court. Regardless of whether a conservatorship originated in California or elsewhere, problems may develop in the interval between reviews.

Yet the likelihood and severity of such problems might differ depending on where the conservatorship originated. California provides free educational programs for proposed conservators, so that they know about their duties, available resources, and other useful information. See Cal. Prob. Code § 1457; see also Cal. R. Ct. 7.1051 ("Before the court issues letters, each conservator must execute and file an acknowledgment of receipt of the *Duties of Conservator and Acknowledgment of Receipt Handbook* (form GC-348)."). Such educational efforts are intended to help to ensure that conservatorships are handled properly, in compliance with California's policies.

Other states might not provide this type of information to fiduciaries at all, or might provide information that differs in content from California's educational materials. If a proceeding from such a state were transferred to California under UAGPPJA, the fiduciary might be relatively ill-equipped to handle the proceeding in compliance with California law. That problem could perhaps be addressed by **alerting the fiduciary to California's educational programs and providing the fiduciary with California's educational materials at the time of transfer,** in the same manner that a proposed conservator receives such information when a case originates in California. In fact, **such a step would seem to make sense regardless of which of the two review approaches the Commission selects.**

Aside from the points discussed above, differences between California's process for reviewing conservatorships and the comparable processes used by other states appear to be of relatively little consequence in considering UAGPPJA's transfer procedure. The staff is not yet confident, however, that we have identified all of the relevant considerations. **Comments on this matter would be helpful.**

(Note: California also has specific educational requirements for certain types of conservators, such as private professional conservators (see Cal. R. Ct. 7.1060) and public guardians (see Cal. Prob. Code § 2923). It appears unnecessary to address these educational requirements when determining whether and how to modify UAGPPJA for adoption in California, because UAGPPJA would not

permit transfer of a proceeding in which the appointee is ineligible for appointment in California. See 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.)

*Potential Impact of the Registration Procedure*

If California adopts UAGPPJA's registration procedure, an out-of-state order appointing 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. See UAGPPJA § 403(a); see also Memorandum 2011-31, pp. 11-15. The appointee can thus act on behalf of the incapacitated person within California, so long as the appointee does not do anything that would violate California law.

Similarly, if California adopts UAGPPJA, a California conservatorship could be registered in another UAGPPJA state, enabling the conservator to take action there without having to be appointed by a court of that state. For example, a California conservator could sell a conservatee's vacation home in another UAGPPJA state, so long as the sale complied with the laws of that state.

This registration procedure would obviously be useful, making it possible for fiduciaries to efficiently handle situations that cross state lines. It would spare incapacitated persons, their families, and the court system much expense and effort.

Adoption of the registration procedure would also mean, however, that California's people, institutions, and particularly its courts might sometimes have to recognize the authority of a fiduciary who was appointed in a proceeding that has not been scrutinized as frequently or as rigorously as in the periodic reviews that take place in a California conservatorship. That result would to some extent contravene California's policy of closely supervising proceedings involving incapacitated adults. It might also implicate other policy interests, depending on what the out-of-state fiduciary does within California. For example, if the out-of-state fiduciary has poor recordkeeping practices, and this has not been detected because the out-of-state proceeding has not been closely supervised, the out-of-state fiduciary might fail to keep good records of a

transaction that occurs in California. That might not violate California law because the fiduciary is not a California conservator, but it would nonetheless be inconsistent with California's policy of requiring good recordkeeping by anyone appointed to assist an incapacitated adult.

If an incapacitated person has only weak ties to California, such impingements on California's policy interests are likely to be limited in frequency and degree. They may be a small price to pay for the benefits afforded by UAGPPJA's registration procedure.

But if an incapacitated person has strong ties to California, such as when an incapacitated person is relocated to California from another state, then the situation is different. In that case, it may be inappropriate to allow a fiduciary to use UAGPPJA's registration procedure to act on behalf of an incapacitated person within the state and thereby avoid the requirements of a California conservatorship, including periodic reviews by a court investigator pursuant to California law. **The potential for escaping such review is another reason why the Commission should consider limiting UAGPPJA's registration procedure to situations in which the incapacitated person has relatively weak ties to California.**

Respectfully submitted,

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