Study L-750 August 9, 2012

Memorandum 2012-35

Uniform Adult Guardianship Protective Proceedings Jurisdiction Act: Status of Study and Proposed Course of Action

At the upcoming August meeting, the Commission will resume work on the Uniform Adult Guardianship Protective Proceedings Jurisdiction Act ("UAGPPJA" or "the Act"), which was placed on hold in mid-2011. Because most of the current members of the Commission are new and did not participate in the earlier work on this study, this memorandum summarizes that work and suggests a plan of action.

For an introduction to UAGPPJA and California conservatorship law, see Memorandum 2012-34.

OVERVIEW OF THE COMMISSION'S STUDY PROCESS

Before describing the Commission's work on UAGPPJA, it may be helpful to briefly describe the process that the Commission typically uses in conducting a study.

By statute, the Commission is only authorized to make recommendations to the Legislature and the Governor for revision of the law in matters referred to the Commission by concurrent resolution of the Legislature, or by statute. See Gov't Code § 8293. In studying a topic, the Commission considers the topic at a series of public meetings, at which it makes decisions about how to proceed (what issues to investigate, what reforms to proposes, how those reforms should be drafted, and so forth). The Commission meets approximately once every two months. Interested persons are encouraged to attend the meetings and participate in the discussions. The Commission also welcomes written comments at any stage of its study process.

Before each meeting, the staff prepares and distributes a memorandum that serves as the basis for discussion of the topic at the meeting. These memoranda

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.

are posted to the Commission's website and sent to Commission members, stakeholders, and other interested persons electronically and by traditional mail.

After becoming familiar with a topic and making preliminary decisions, the Commission begins to prepare a tentative recommendation. The tentative recommendation will include:

(1) Proposed legislation.
(2) A Commission Comment to each code section in the proposed legislation.
(3) A narrative explanation of the proposal, which is sometimes referred to as the "preliminary part."

The staff posts the tentative recommendation to the Commission's website and broadly circulates it for comment. To afford persons ample time to formulate and express their positions, the comment period usually lasts about three months. Comments should be in writing, but they do not need to be in any particular form. It is just as important to express support for a proposed idea as to express concerns about the idea.

All comments received by the Commission are a part of the public record. At the conclusion of the comment period, the staff prepares a memorandum that collects and analyzes the comments. The Commission then considers the comments at one or more public meetings, and decides what, if any, recommendation it will make to the Legislature and the Governor. The Commission's final recommendation will have the same three components as the tentative recommendation: proposed legislation, a Commission Comment for each code section in the proposal, and a preliminary part explaining the reform. The final recommendation (sometimes referred to as the Commission's "report") may differ considerably from the tentative recommendation.

From start to finish, the process of preparing a final recommendation usually takes one or two years (sometimes longer or shorter, depending on the Commission's workload and the nature of the topic). After the Commission approves a final recommendation, the proposed legislation must go through the same legislative process as any other legislative proposal. That generally takes another year or so. The Commission's study process is thus slow, but careful and deliberative, with plenty of opportunity for research and debate. The end-product is typically well-crafted and broadly accepted; over 90% of the Commission's recommendations have been enacted in whole or in substantial part.

COMMENCEMENT OF THE UAGPPJA STUDY

The Commission undertook the UAGPPJA study at the request of the California Commission on Uniform State Laws ("CCUSL"), whose members include Diane Boyer-Vine (Legislative Counsel and Commission member) and Nathaniel Sterling (former Executive Secretary of the Law Revision Commission, now Chair of CCUSL). Other groups also wrote in support of the study, including the AARP, the Alzheimer's Association, the California Advocates for Nursing Home Reform ("CANHR"), the Congress of California Seniors, the Professional Fiduciary Association of California, and the State Long-Term Care Ombudsman.

The Commission is an appropriate entity to conduct this study, because one of its duties is to "[r]eceive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws …." Gov't Code § 8289. In addition, the Commission has previously done extensive work on conservatorship law. See the following recommendations, all of which were enacted: *Compensation in Guardianship and Conservatorship Proceedings,* 20 Cal. L. Revision Comm'n Reports 2837 (1990); 21 Cal. L. Revision Comm'n Reports 227 (1991); *Bonds of Guardians and Conservators,* 20 Cal. L. Revision Comm'n Reports 235 (1990); *Public Guardians and Administrators,* 19 Cal. L. Revision Comm'n Reports 707 (1988); *Notice in Guardianship and Conservatorship,* 18 Cal. L. Revision Comm'n Reports 1793 (1986); *Guardianship-Conservatorship* (technical change), 15 Cal. L. Revision Comm'n Reports 1427 (1980); *Guardianship-Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 451 (1980); *Procedure for Appointing Guardians,* 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 21 (1959).

The Commission commenced its UAGPPJA study in February 2011 by considering an introductory memorandum (Memorandum 2011-8), which was similar to the one for the upcoming meeting (Memorandum 2012-34) but did not describe any of California's conservatorship or civil commitment schemes other than a Probate Code conservatorship. The Commission approved the workplan recommended by the staff, which called for:

(1) Preparation of a memorandum comparing and contrasting California conservatorship law with the corresponding laws in other states.

(2) Preparation of a memorandum discussing the terminological issues relating to adoption of UAGPPJA in California.
(3) Analysis of each article of UAGPPJA (section by section) for possible adoption in California.

Minutes (Feb. 2011), p. 6.

The Commission also requested additional information on a number of matters:

- The import of the Full Faith and Credit Clause in the UAGPPJA context.
- The extent of reciprocity provided under UAGPPJA. In particular, if a state adopts UAGPPJA, to what extent (if any) is the state required to accept a capacity determination, appointment of a conservator, or similar ruling made in a state that has not adopted UAGPPJA? Is the answer different if the ruling was made in a state that has adopted a modified version of UAGPPJA?
- What types of modifications have states made to UAGPPJA?
- What concerns were raised in states that considered UAGPPJA but did not adopt it?

Id.

The Commission discussed a number of ideas, including the possibility of presumptively accepting a capacity determination, appointment of a conservator, or similar ruling made in another state, but allowing judicial review of that ruling on motion of an interested person. *Id.* Other suggestions were to (1) accept such rulings only from certain states, or (2) accept such rulings only if they satisfy certain safeguards or are made pursuant to specified procedures. *Id.*

FULL FAITH AND CREDIT CLAUSE

For the Commission's April 2011 meeting, the staff prepared an analysis of how the Full Faith and Credit Clause (U.S. Const. art. IV, § 1) applies to the types of proceedings covered by UAGPPJA. For the sake of simplicity, we will refer to such proceedings as "conservatorships" (the California term) throughout this memorandum, although UAGPPJA and many jurisdictions use different terminology.

UAGPPJA would establish a registration procedure for an out-of-state conservatorship. See Memorandum 2012-34, pp. 7-8. Upon completion of the registration process, a conservator appointed by another state could "exercise all

powers authorized in the order of appointment except as prohibited under the laws of the registering state." UAGPPJA Art. 4 General Comment.

According to UAGPPJA, the registration procedure is necessary because a state is not constitutionally compelled to recognize the validity of another state's order appointing a conservator:

> The Full Faith and Credit Clause of the United States Constitution requires that court orders in one state be honored in another state. *But there are exceptions to the full faith and credit doctrine, of which [conservatorship] proceedings is one*.

Prefatory Note to UAGPPJA, p. 2 (emphasis added). The ULC does not cite any authority in support of this statement.

In seeking to identify the underlying legal basis for the ULC's statement, the staff did not find any case holding that the Full Faith and Credit Clause is categorically inapplicable to conservatorship orders. There are, however, several exceptions to the Full Faith and Credit Clause that might apply in a conservatorship case. See Memorandum 2011-18, pp. 4-6. Of particular note, "a judgment has no constitutional claim to a more conclusive or final effect in [another state] than it has in the State where rendered." *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614 (1947). Under this rule, if a child custody order is subject to modification in the state where it is issued, the order is also subject to modification in a sister state. *See id.* at 615; *see also Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958). Like a child custody order, a conservatorship order is typically subject to modification, and thus would seem to fall within the scope of this exception to the Full Faith and Credit Clause. For this and other reasons, the staff concluded that although the ULC's assertion appears to be an oversimplification, "the crux of it is correct: There is no assurance that a [conservatorship order] will be recognized and enforced in other states." Memorandum 2011-18, p. 2.

The staff further wrote:

> California courts have been disinclined to accept sister state determinations regarding [conservatorship]. There does not appear to be any California Supreme Court or United States Supreme Court decision squarely addressing how the Full Faith and Credit Clause of the United States Constitution applies to such a determination. As previously discussed, however, there are several United States Supreme Court decisions regarding full faith and credit in the child custody context, which is comparable in many respects. *Based on those decisions, it seems likely the Court would*

> *conclude that the Full Faith and Credit Clause generally does not require a state to recognize and abide by a sister state's determination regarding [conservatorship].* Whether that result is sound policy, or should be avoided through the enactment of legislation such as UAGPPJA, is a question at the heart of this study.

Id. at 19 (emphasis added); *see also id.* at 9.

The staff's analysis also recounted the history of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which served as a model for UAGPPJA:

> (1) Oftentimes, state courts did not give full faith and credit to a sister state's child custody determination. Typically, this was justified on the ground that the custody determination was modifiable in the sister state and thus was also modifiable elsewhere.
> (2) The above situation led to widespread forum shopping.
> (3) To address that problem, the Uniform Law Commission developed the Uniform Child Custody Jurisdiction Act ("UCCJA"), which was widely adopted.
> (4) The UCCJA proved insufficient, because some states refused to adopt it, others adopted it with modifications, and states differed in how they interpreted it.
> (5) Congress determined that national legislation was necessary and adopted the Parental Kidnapping Prevention Act ("PKPA").
> (6) The relationship between the PKPA and UCCJA was complicated and created problems.
> (7) To harmonize the PKPA and UCCJA, the Uniform Law Commission developed the UCCJEA.
> (8) The UCCJEA has been adopted in every state. To the best of the staff's knowledge, it is functioning smoothly.

Id. at 8. From this history, the staff warned that a similarly long and complicated process might be necessary to achieve nationwide portability of conservatorship orders:

> By itself, UCCJA was insufficient to address the problems relating to interstate treatment of child custody judgments, because some states refused to adopt the UCCJA, others adopted it with modifications, and states differed in how they interpreted it. Federal legislation (the PKPA), followed by a uniform act harmonizing the law (the UCCJEA), was necessary to fully solve the problems. *The same could prove true with regard to UAGPPJA, depending on whether and how it is implemented across the country*.

Id. at 9 (emphasis added).

No Commission action was required or taken in response to the staff's memorandum on the Full Faith and Credit Clause. Minutes (April 2011), pp. 4-5.

COMPARISON OF CALIFORNIA CONSERVATORSHIP LAW TO COMPARABLE LAW IN NEIGHBORING STATES

UAGPPJA seeks to address three main problems:

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

See UAGPPJA *Prefatory Note,* pp. 1-2. For the Commission meetings in June and August 2011, the staff prepared memoranda focusing on the latter two aspects of UAGPPJA.

If California were to adopt UAGPPJA's procedure for transferring a conservatorship from one state to another (Article 3) and its procedure for registration and recognition of an out-of-state conservatorship (Article 4), California courts would be required to defer to some extent to capacity determinations and conservator selections made by courts in other states. See UAGPPJA §§ 302(g), 403(a); see also Memorandum 2011-31, pp. 5-11; Memorandum 2011-31, pp. 11-15; Memorandum 2012-34, pp. 33-34. To help assess the potential impact of according such deference, the staff's memoranda for June and August 2011 compared and contrasted California conservatorship law with corresponding law in neighboring states (Arizona, Nevada, and Oregon), which have all adopted UAGPPJA. Those memoranda and the Commission's responses to them are described in greater detail below.

June 2011 Meeting

The staff's memorandum for the June 2011 meeting (Memorandum 2011-24) focused on identifying *potential downsides* of giving deference to conservatorship determinations made by out-of-state courts, as required by UAGPPJA's procedure for transferring a conservatorship from one state to another (see UAGPPJA § 302(g)) and its procedure for registration and recognition of an out-of-state conservatorship (see UAGPPJA § 403(a)). The memorandum did not discuss the *potential benefits* of according such deference. That did not seem necessary, because previous materials and discussions had highlighted the potential benefits and importance of accepting another state's conservatorship

determination: Doing so would spare the affected parties and the court system from the expense, effort, and stress of having to relitigate the conservatorship from scratch. Those potential benefits are both clear and substantial. The memorandum acknowledged, however, that eventually the Commission (and ultimately, the Legislature and the Governor) would have to weigh the potential benefits against the potential downsides, and determine whether to adopt UAGPPJA's transfer and registration procedures, with or without modification. See Memorandum 2011-24, p. 6.

To begin identifying the potential downsides of accepting another state's conservatorship determination, the memorandum compared and contrasted California law on several points with corresponding law in neighboring states. For example, in determining who to appoint as conservator, a California court is required to give strong preference to the wishes of the proposed conservatee. See Memorandum 2011-24, pp. 6-7. None of California's neighbors (Arizona, Nevada, and Oregon) have such a strong statutory preference for appointing the person desired by the conservatee. See *Id.* at 7-8.

Having identified this difference between California law and the law in neighboring states, the staff went on to consider its potential impact:

> If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on California's policy of giving strong preference to the wishes of the [proposed conservatee] in selecting a conservator?
>
> With regard to the transfer process, a California court might sometimes be required to recognize the authority of, and to compel others to recognize the authority of, a person who would not have been selected to serve as conservator under California law, and who would not have been the [proposed conservatee's] choice. *That would be contrary to California's policy of giving strong preference to the wishes of the [proposed conservatee] in selecting a conservator.* However, it might be possible to revisit the choice of conservator at some point after the transfer is accomplished.
>
> With regard to the registration process, again UAGPPJA might require Californians to recognize the authority of a person who would not have been selected to serve as conservator under California law, and who would not have been the [proposed conservatee's] choice. *As before, that would be contrary to California's policy of giving strong preference to the wishes of the [proposed conservatee] in selecting a conservator.* However, the degree of impingement may be limited, because the [proposed conservatee] person may have only weak ties to California, requiring little involvement of Californians.

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

Id. at 8 (emphasis added).

Similarly, California treats spouses and domestic partners equally in determining who to select as conservator. Nevada does the same, but Arizona and Oregon do not. See *id.* at 8-9. Again, the staff explored the potential impact of this distinction in treatment:

> If California adopted UAGPPJA's transfer and registration procedures, to what extent would that impinge on California's policy of treating spouses and domestic partners the same way, and ranking them higher than any other equally qualified relatives, in selecting who to appoint [as conservator]?
>
> With regard to the transfer process, a California court might sometimes be required to recognize the authority of, and to compel others to recognize the authority of, a person who was selected over the [proposed conservatee's] domestic partner, and who would not have been selected to serve as conservator under California law. *That would be contrary to California's policy of ranking a domestic partner at the top of the list, equivalent to a spouse, in selecting a conservator.* However, it might be possible to revisit the choice of conservator at some point after the transfer is accomplished.
>
> With regard to the registration process, again UAGPPJA might require Californians to recognize the authority of a person who was selected over the [proposed conservatee's] domestic partner, and who would not have been selected to serve as conservator under California law. *As before, that would be contrary to California's policy of ranking a domestic partner at the top of the list, equivalent to a spouse, in selecting a conservator.* However, the degree of impingement may be limited, because the [proposed conservatee] may have only weak ties to California, requiring little involvement of Californians.
>
> Here again, these potential negative impacts must not be viewed in a vacuum. Eventually, the Commission should weigh them against the potential benefits of UAGPPJA's transfer and registration procedures, and attempt to strike an appropriate balance.

Id. at 11-12 (emphasis added). The staff also provided a similar analysis of another aspect of conservatorship law. See *id.* at 12-13.

This memorandum prompted a lively discussion at the Commission meeting, which was attended by representatives of the AARP, the Alzheimer's Association, the State Long-Term Care Ombudsman, and the Executive Committee of the State Bar Trusts and Estates Section ("TEXCOM"). The

Commission had many questions about how UAGPPJA's transfer process and registration process are intended to work. It asked the staff to attempt to obtain additional information about those matters. See Minutes (June 2011), p. 5. The Commission also directed the staff to "further explore how California conservatorship law differs from comparable law in neighboring states … and examine the implications of those differences under UAGPPJA." See *id.*

Further Information from ULC Representatives

As directed by the Commission, after the June 2011 meeting the staff contacted ULC representatives to obtain additional information about how UAGPPJA is intended to work. The staff posed three different questions to Prof. David English (the reporter for UAGPPJA) and Eric Fish (ULC Legislative Counsel), which had come up in the Commission's discussions. Each of those questions is described below, along with the response and some follow-up comments that the staff included in its memorandum for the August 2011 meeting (Memorandum 2011-31, pp. 6-15). To improve readability, we use California terminology throughout this discussion and have made a few other changes instead of quoting the August 2011 memorandum verbatim.

Question #1

Question

If a conservatorship was transferred to California from another state under UAGPPJA, would the proceeding henceforth be subject to California conservatorship law?

ULC Response

The ULC representatives confirmed that once a conservatorship 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 [conservatorship] 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 [conservator] must provide it. Other requirements would be analogous.*

Memorandum 2011-31, 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 [conservatorship] and the new state orders a new [conservatorship]. 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 [conservatorship] *to conform to the new state's law*.

Memorandum 2011-31, Exhibit p. 3 (emphasis added).

Staff Follow-up Comments

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.

Question #2

Question

To what extent, and under what conditions, may the issue of capacity or the choice of conservator 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's capacity is impaired, 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 conservator 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 conservator could be relitigated? Would it be sufficient for someone to object to the choice of conservator, 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 person whose capacity is impaired?

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 conservatee 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 conservatee be presumed to lack capacity (like other California conservatees), and bear the burden of showing that he or she has capacity?

ULC Response

In response to this set of questions, 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.

Memorandum 2011-31, Exhibit p. 4.

Similarly, Prof. English said:

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

Memorandum 2011-31, Exhibit p. 3.

Staff Follow-up Comments

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 the choice of conservator. 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.**

(The staff went on to discuss some possible ways to provide such clarification. We do not provide such detail here, because we will cover those points later in this memorandum.)

Question #3

Question

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

For example, suppose a State X conservator would like to move the conservatee from State X to a nursing home located in California, but the conservator does not want to run the risk that it might sometime be necessary to relitigate the conservatee's incapacity in accordance with California's strict standards. Would it be possible for the conservator to use the registration procedure to achieve the desired result (moving the conservatee 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 conservator would have to give notice to the State X court of intent to register the conservatorship in California. In theory, this requirement might afford the State X court an opportunity to prevent abuse of the registration process. But the State X court might be unaware of the conservator's intention to use registration as a means of moving the conservatee 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

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.

Memorandum 2011-31, 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 then-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 ….
>
> For example, even in the ubiquitous section on uniformity found in every act, CT inserted language referencing civil rights and due process ….

Memorandum 2011-31, Exhibit p. 4.

Staff Follow-up Comments

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 conservatee 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.**

(The staff proceeded to flesh out this idea a little. We will cover that ground later in this memorandum.)

Further Comparison of California Conservatorship Law to Comparable Law in Neighboring States

In addition to recounting the above-described exchange of questions and responses, the staff's memorandum for the August 2011 meeting continued the process of contrasting California conservatorship law to comparable law in neighboring states. Specifically, the memorandum focused on the following aspects of conservatorship law:

(1) Determination of capacity. See Memorandum 2011-31, pp. 17-37.
(2) Selection of the conservator. See *id.* at 37-54.
(3) Procedural protections. See *id.* at 55-69.

Each of those topics is discussed below.

Determination of Capacity

Upon reviewing California's standards for determining the capacity of a proposed conservatee, the staff concluded:

- California has detailed statutory requirements for determining whether a person is incapacitated.
- There is a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions.
- 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.
- 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.
- 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.

- 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.
- 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."
- The standard of proof for appointment of a conservator (any kind) is clear and convincing evidence.
- Once a conservatorship is established, the conservatee is presumed to lack capacity and bears the burden of showing that it has been restored.

Memorandum 2011-31, pp. 21-22. The staff noted that 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." *Id.* at 32.

The staff went on to examine the corresponding rules in Arizona, Nevada, and Oregon, and concluded that "[n]one of California's neighbors have rules that are as detailed as California's on this point." *Id.* The staff further commented:

> 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).

Id.

Having identified these differences in treatment, the staff tried to assess their import with regard to UAGPPJA's transfer process. We wrote:

> 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.

Id. at 32-33.

Although UAGPPJA's transfer process might to some extent impinge on California's policy interest in protecting personal liberties, the staff noted that such impingement need not 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." *Id.* at 33.

The staff suggested some possible ways to revise UAGPPJA to address relitigation of capacity:

- 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.

Id. Some if not all of the above points could perhaps be accomplished just by "expressly stat[ing] that existing California law on relitigation of the capacity of a conservatee applies … after a transfer to California has been completed." *Id.*

Keeping the possibility of such revisions in mind, the Commission will eventually need to weigh the costs of UAGPPJA's transfer procedure against its potential benefits. In its memorandum for the August 2011 meeting, the staff identified the following possible approaches:

> (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 [burdens of relitigating a conservatorship from scratch in a new state].
> (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 [conservator] should not be permitted to take any drastic or irreversible action relating to [the conservatee] 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.

Id. at 34. The staff expressed a tentative preference for either Approach #2 or Approach #3. *Id.*

Next, the staff turned to UAGPPJA's registration procedure and tried to assess what impact it would have, given the different capacity standards used in California and its neighbors. The staff wrote:

> [Adopting the registration procedure] would mean that on some occasions, Californians and California courts might be required to accept [a conservator's] authority to take action on behalf of [a conservatee], 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 [conservatorship], and

> California courts would not have any opportunity to reevaluate the [conservatee'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 [a conservator'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 [a conservator's] authority to close a small account that a [conservatee] opened long ago and forgot about before moving out of California. Or it might mean that [a conservator] is entitled to contract for sale of produce grown on a parcel of California land owned by a [conservatee] who lives in another state. In all of these situations, the [conservatee] has only weak ties to California, so it is more appropriate that the [conservatee's] capacity be assessed under the standards of the [conservatee'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 [conservators] to help [conservatees] 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 [conservatee] has close ties to California, such as when [the conservatee] 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.**

Id. at 35-36 (emphasis added). The staff observed that any constraint on the registration procedure "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." *Id.* at 36. Possible ideas include (1) making UAGPPJA's registration procedure unavailable when the circumstances would support transfer of the case to California in conformity with UAGPPJA's

guidelines on jurisdiction, and (2) making the registration procedure unavailable if the conservatee is domiciled in California. See *id.*

Selection of the Conservator

As with determination of capacity, states have differing rules on how a court should select a conservator. After researching the selection rules used in California and its neighbors, the staff found that those rules differ with respect to such matters as:

- How much weight a court must give to the preference of [the conservatee].
- Whether there are any protections against appointment of a spouse or domestic partner [as conservator] 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 [as conservator].
- 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 [a conservatee] 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.

Id. at 52.

As a result of differences like these, transfer of a case to California under UAGPPJA "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." *Id.* at 53. To illustrate this point, the staff gave the following example:

> [S]uppose a court in another state appointed an incapacitated person's sister [as conservator], 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*.

Id. (emphasis added).

However, the Comment to Article 3 of UAGPPJA makes clear that in some circumstances the choice of conservator could be reevaluated following a transfer. Thus, with respect to a transfer, the impingement on California's policy interests may be temporary as opposed to long-lasting.

In addition, an appointment made by another state could not be transferred to California if the conservator were ineligible for appointment in California. See UAGPPJA § 302. "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." *Id.* at 53.

Nonetheless, it is clear that UAGPPJA's transfer and registration procedures could to some extent undermine the policies underlying California law on selection of a conservator. The Commission will need to take this potential negative impact into account when it ultimately balances the costs and benefits of adopting those procedures. The staff noted as much in its memorandum for the August 2011 meeting. See *id.* at 53.

The staff further suggested that the Commission consider the following possible refinements of UAGPPJA, which might help to alleviate any concerns about use of differing standards for selection of a conservator:

- Expressly state that in some circumstances the selection of [the conservator] 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 [the conservator] 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.

Id. Some if not all of the above points could perhaps be accomplished just by "expressly stat[ing] that existing California law on relitigation of the choice of conservator applies after a transfer to California has been completed." *Id.* at 54.

Procedural Protections

Lastly, the memorandum for the August 2011 meeting compared the procedural protections provided in a California conservatorship proceeding with those provided in a comparable proceeding in each of its neighboring states (Arizona, Nevada, and Oregon). In particular, the staff examined each state's rules regarding:

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

See *id.* at 55-67.

After conducting such analysis, the staff concluded:

> 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, [a student law clerk] 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.

Id. at 67 (emphasis added).

The staff then considered what impact the states' differing procedural protections would have with regard to UAGPPJA's transfer procedure. It concluded that if another state followed procedures closely similar to California's in determining capacity and selecting a conservator, temporarily deferring to that state's decisions on those points due to transfer of a conservatorship would not seriously offend the policies underlying the procedural protections provided

in California. *Id.* at 68. In contrast, however, if the other state's procedural protections were much more lax than those in California, "the situation would be more troubling." *Id.*

The staff pointed out that the Connecticut UAGPPJA bill mentioned by Eric Fish (which has since been enacted) apparently sought to deal with this concern. Instead of simply directing courts to interpret UAGPPJA to promote uniformity (UAGPPJA § 501), the Connecticut version directs courts to act "in accordance with due process" and to consider both the "need to promote uniformity of the law" and the "need to protect individual civil rights." Conn. HB 5150 (Judiciary Committee) (2012), Pub. Act No. 12-22, § 22.

The staff noted that such language might not be necessary, because every provision in the California codes must be construed in accordance with constitutional requirements, including the right to due process. Memorandum 2011-31, p. 68. The staff also expressed concern that including such language in California's version of UAGPPJA might raise questions about the lack of such language in the many other uniform acts that have been enacted in California. *Id.*

However, the staff suggested two other ideas for the Commission to consider:

- Make UAGPPJA's transfer procedure available only if the proceeding to be transferred to California complied with due process.
- Make UAGPPJA's 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.

Id.

The staff also made two points concerning UAGPPJA's registration procedure:

- The Commission might want to consider tying the availability of the registration procedure to the procedural protections provided in an out-of-state conservatorship, or lack thereof.
- If a person has strong ties to California, the state has an interest in ensuring that parties follow California procedures (or comparable procedures) when establishing a conservatorship for the person. If the person's ties to the state are weak, California has less justification for seeking to control which conservatorship procedures are used. This is another reason to consider restricting UAGPPJA's registration procedure to situations in which the conservatee has only weak ties to California.

Id.

Concluding Thoughts

After examining the law of California and its neighbors on determination of capacity, selection of the conservator, and procedural protections, the staff offered the following words of advice:

> 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 [conservatee], 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.

Id. (emphasis in original).

August 2011 Meeting

The August 2011 meeting was well-attended; representatives from the AARP, the Alzheimer's Association, Disability Rights California ("DRC"), and the State Bar Trusts and Estates Section all participated in the discussion of UAGPPJA. This type of input is very helpful in a Commission study and we are grateful to these groups for taking the time to share their views.

The discussion focused primarily on UAGPPJA's transfer procedure (Article 3). The Commission tentatively decided that if it proposes a version of UAGPPJA for adoption in California, its version should expressly state that after a conservatorship 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.

The Commission also extensively discussed whether any special rules should apply to relitigation of capacity or the choice of conservator, such as requiring proof of incapacity, instead of placing the burden on the conservatee to prove capacity. The Commission did not resolve this matter, nor did it resolve any of the other issues raised in the meeting materials (i.e., the memorandum described above and a supplement to that memorandum, which dealt with a different matter and will be described later). *Id.* at 5-6.

The Commission expressed interest in having a ULC representative come explain to the Commission how UAGPPJA is supposed to work. *Id.* at 6. The Commission also asked the staff to examine how other states have addressed relitigation of capacity and the choice of conservator in their versions of UAGPPJA. *Id.* In addition, the Commission encouraged stakeholders and other interested persons to submit input on this issue, and on the other issues raised in the meeting materials. *Id.*

Comparison of California Law on Periodic Review of a Conservatorship with Comparable Law in Neighboring States

The staff initially expected that the Commission would continue consideration of the August meeting materials (Memorandum 2011-31 and its First Supplement) in October 2011. The staff therefore prepared another supplement to the same memorandum, which continued the process of comparing California conservatorship law to comparable law in neighboring states. This supplement examined California's system for periodically reviewing

a conservatorship, and contrasted that system to the ones used in Arizona, Nevada, and Oregon. See Second Supplement to Memorandum 2011-31.

In broad brush, the staff found some significant differences between California's review system and those used by its neighbors:

> 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.

Id. at 14.

The staff then began to explore how the review process would work if a conservatorship were transferred to California under UAGPPJA. Because the Commission had already tentatively decided that a transferred conservatorship would be subject to California law, it was clear that "a transferred proceeding should eventually be put on the same review schedule as other California conservatorship cases." *Id.* at 15.

But it was less clear how that transition should be accomplished. The staff saw 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).

Id. at 15-16.

The staff did not take a position on which approach to adopt, but it did discuss some of the pros and cons to consider:

> [T]he 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 [a conservatee] 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.**

Id. at 16-17 (emphasis in original).

The staff further noted that whichever approach the Commission chooses, its recommended legislation should clearly specify the approach to use. In addition, the staff pointed out that 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 might 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.

Id. at 16.

Finally, the staff turned to UAGPPJA's registration procedure, reminding the Commission that the procedure "would obviously be useful, making it possible for fiduciaries to efficiently handle situations that cross state lines." *Id.* at 18. By permitting an out-of-state conservator to take action in California without having

to establish a California conservatorship, the registration procedure would spare conservatees, their families, and the court system much expense and effort. *Id.*

The staff warned, however, that adoption of the registration procedure "would also mean … 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." *Id.* That "would to some extent contravene California's policy of closely supervising proceedings involving incapacitated adults," and "might also implicate other policy interests, depending on what the out-of-state fiduciary does within California." *Id.*

The staff then concluded:

> If [a conservatee] 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 [a conservatee] has strong ties to California, such as when [a conservatee] 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 [a conservatee] 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 [conservatee] has relatively weak ties to California.**

Id. at 19 (emphasis in original).

The anticipated October 2011 meeting was canceled for lack of a quorum. Once the Commission regained a quorum, it had to concentrate on the redevelopment study, because that study had an unusually short statutory deadline. See Memorandum 2012-29. Thus, the Commission has not resolved any of the UAGPPJA issues relating to periodic review of a conservatorship.

STAKEHOLDER INPUT

The Commission has been fortunate to have received considerable stakeholder input during the course of its UAGPPJA study. As previously discussed, representatives of the AARP, the Alzheimer's Association, DRC, the Office of the State Long-Term Care Ombudsman, and TEXCOM have taken the

time to participate in Commission meetings on the subject. We are hopeful that other groups will participate in the future; the California Advocates for Nursing Home Reform ("CANHR") has already indicated that a representative will attend the Commission's upcoming October meeting (but not the upcoming August meeting).

The Commission has also received a number of written communications. In addition to the above-described email exchanges with ULC representatives and the letters from various groups urging or thanking the Commission for undertaking this study, the Commission has gotten written input from a TEXCOM working group, CANHR, DRC, and the Alzheimer's Association.

TEXCOM's working group on UAGPPJA was assembled several years ago by Palo Alto attorney Peter Stern. In early 2009, he prepared a memorandum for TEXCOM on UAGPPJA and how it would fit with California law. He drew the following general conclusions:

> 1. What role should TEXCOM play in endorsing or moving to adopt this statute? We should examine the history of prior uniform laws. I would recommend referring this to CLRC, with a recommendation that the uniform Act provides for needed ground rules when there is a struggle in more than one jurisdiction to take responsibility for an incapacitated person or to control the property of such a person.
> 2. This Act will require substantial redrafting to fit California law. Standards for capacity determination; for basic threshold findings for establishment of conservatorships; for roles of professional fiduciaries; to mention only a few areas, will have to be redrafted.
> 3. Coordinating authority of an out of state conservator whose powers are registered in California (Section 403) will be a chore that will require a harmonization process in every case.
> 4. The core of the Act is Article 2 on jurisdiction. The Act does provide ground rules, much needed, to determine where a conservatorship proceeding should be filed.

Memorandum 2011-8, Exhibit p. 26. Mr. Stern provided his memorandum to the Commission at the outset of its study and explained that TEXCOM's working group would "prepare reviews and critiques of parts of the law to be held in reserve, so that TEXCOM can be a helpful partner in the future when CLRC would like our input." *Id.* at Exhibit p. 21. More recently, TEXCOM's working group has provided additional written materials, which will be presented in Memorandum 2012-36.

In mid-2011, CANHR submitted a letter responding to some of the ideas raised by Mr. Stern. The letter explained that "[a]lthough CANHR is generally supportive of a uniform approach to conservatorship jurisdictional issues, *we share some of the concerns raised by Peter Stern and TEXCOM* that accepting out-of-state conservatorships could allow California residents to lose very intimate rights to control their lives and property without the substantive and due process protections provided by California law." First Supplement to Memorandum 2011-24, Exhibit p. 1 (emphasis added). In particular,

- CANHR "agree[s] with Mr. Stern that California should reject any conservatorship based on an incapacity standard less stringent than California's."
- CANHR hopes California will reject any out-of-state conservatorship that does not include medical evidence of incapacity.
- CANHR hopes California will reject any out-of-state conservatorship in which the conservatee had no right to counsel when such a right exists in California.

Id.

Later in the Commission's study, CANHR submitted a second letter, which opined that "comparing California conservatorship standards with neighboring states is a good strategy for investigating the propriety of the UAGPPJA." First Supplement to Memorandum 2011-31, Exhibit p. 1. CANHR warned, however, that "similar statutory standards and conservatorship/guardianship processes can nonetheless lead to very different outcomes in practice." *Id.* CANHR urged the Commission to seek statistical data regarding how such cases are handled in neighboring states. *Id.* CANHR also offered to provide the Commission with such data for a sample of 250 California conservatorship cases, once it finished gathering that data. *Id.*

CANHR submitted a third letter early this year. That letter will be presented in Memorandum 2012-36.

Unlike CANHR, the Alzheimer's Association maintains that California should enact UAGPPJA without making any modifications. In October 2011, it submitted a letter urging the Commission to reject the modifications under study. Third Supplement to Memorandum 2011-31, Exhibit p. 1. The letter explained:

> Modifications of these procedures hampers the uniform process that will be understood by lawyers in other states who are

> transferring wards in or out of California and may inhibit the judicial economy that this act aims to achieve. Diverging from what has become the national standard may encourage more litigation, disrupt interstate court communications, and inhibit this act from accomplishing its goals.

Id. The letter further explained that "[t]he Alzheimer's Association, both nationally and here in California, endorses the UAGPPJA because it provides statutory guidance on jurisdictional issues and facilitates the ease of transfer without imposing additional burdens on already burdened caregivers." *Id.* A more recent letter from the Alzheimer's Association will be presented in Memorandum 2012-36.

DRC's position is more similar to CANHR's than to that of the Alzheimer's Association. In October 2011, DRC submitted a lengthy letter that covered six main points:

- **Use of the term "incapacity."** DRC expressed concern about use of the term "incapacity" to refer to the basic standard for establishment of a conservatorship. DRC recommended that the Commission use the term "establishment standard," instead of "incapacity." In making this suggestion, DRC emphasized that a determination that an adult needs a conservator *is not equivalent* to a determination that the adult is "incapacitated" for all purposes.

  (DRC is correct that a California conservatee is not necessarily incapacitated for all purposes. Absent special proof, a California conservatee retains certain decisionmaking rights. In light of DRC's comments, the staff resolved to use the term "conservatee" rather than "incapacitated person." But the staff recommended against using the phrase "establishment standard," because that phrase does not appear in any California case or statute.)

- **Conservatorships involving involuntary mental health care.** DRC suggested that California's version of UAGPPJA should not permit transfer of a court proceeding involving involuntary mental health care to California, or registration of such a proceeding in California. It explained that "California policy provides more protections to its residents with psychiatric disabilities than in other states," making it inadvisable to apply UAGPPJA in the context of involuntary mental health care.

  (In response to these comments, the staff urged other stakeholders to share their views on application of UAGPPJA to a conservatorship involving involuntary mental health care. The staff also queried whether DRC and others would apply UAGPPJA to a conservatorship in which a conservatee with dementia has been placed in a secured facility.)

- **Potential impact of UAGPPJA's transfer procedure on California's policy of accommodating the desires of a conservatee.** DRC noted that California has a strong policy of respecting the desires of conservatees. DRC expressed concern that UAGPPJA would impinge on that policy, a risk it viewed as "unacceptable." DRC "encourage[d] the Commission to develop appropriate standards."

- **Procedure for bringing a transferred proceeding into compliance with California law (UAGPPJA § 302(f)).** DRC expressed support for the Commission's decision that when a conservatorship is transferred to California, it should become subject to California conservatorship law. DRC also agreed with the Commission that California's version of UAGPPJA should expressly state as much. DRC had concerns, however, about the transitional period for a transfer. It cautioned that "some kind of documentation before transfer should be required that would ensure the conservator will comply with California laws — for instance, a declaration by the [conservator] that the [conservator] will comply with all of California's protections."

  (In response to these comments, the staff suggested a number of possible ways to address DRC's concern about compliance with California law during the transitional period.)

- **Transfer from a state with fewer due process protections than California.** DRC said it agreed with CANHR that a conservatorship should be transferred to California only if there was medical evidence of incapacity and the conservatee had a right to counsel. DRC also expressed support for modifying UAGPPJA Section 501 to require that courts construe UAGPPJA so as to protect individual civil rights and comply with due process, as well as to promote uniformity.

- **UAGPPJA's registration procedure.** DRC said it was "very concerned about [UAGPPJA] Article IV because it appears that the registration provision could be used to circumvent the transfer procedure." DRC urged the Commission to impose some constraints on the availability of the registration procedure.

Third Supplement to Memorandum 2011-31, Exhibit pp. 2-11; *see also id.* at 4-14 (staff analysis of DRC's comments).

The Commission lost its quorum before it could consider DRC's letter or the letter in which the Alzheimer's Association urged the Commission to enact UAGPPJA without making any modifications. The Commission should bear those comments in mind as it proceeds with this study, as well as the other input it has received from stakeholders.

RESUMPTION OF STUDY AND PROPOSED PLAN OF ACTION

In late June 2012, the Governor signed a budget trailer bill that eliminated the directive requiring the Commission to prepare redevelopment clean-up legislation in short order. See Memorandum 2012-29. That made it possible for the Commission to resume work on several studies it had put on hold, including UAGPPJA.

Because the UAGPPJA study is still in an early stage and most of the current Commissioners have not previously considered the topic, the staff does not anticipate that the Commission will be ready to make many substantive decisions at the upcoming August meeting. However, we do hope that Commissioners will be able to **share some preliminary thoughts about UAGPPJA, and settle on a proposed plan of action for the next couple of meetings.**

When the Commission last considered UAGPPJA, it raised many questions about how the Act is supposed to work, and expressed interest in having a ULC representative attend a Commission meeting to explain the ULC's intent. Unfortunately, neither of the ULC representatives (Prof. English and Eric Fish) is available to attend the Commission's October meeting. But Eric Fish is available and willing to attend the Commission's December meeting, which is currently scheduled for Thursday, December 13, 2012, in southern California.

The Commission should take advantage of that opportunity. We recommend that the Commission **devote a substantial portion of its December meeting to UAGPPJA (at least half a day), so that it can engage in a productive exchange of ideas with Eric Fish and other interested persons.**

Before then, the staff proposes to prepare several memoranda for the Commission to consider:

(1) A memorandum exploring the extent to which states adopting UAGPPJA made modifications in the language proposed by the ULC. The memorandum will seek to assess whether similar modifications are warranted in California.

(2) A memorandum presenting student research (done in 2011) on conservatorship proceedings in a number of different states. This memorandum will further illustrate the range of different conservatorship approaches used in other jurisdictions. In supervising this student research, the staff deliberately selected states (other than California's neighbors) that might be especially important in determining whether to adopt UAGPPJA.

(3) A memorandum presenting some student research (done in 2011) on how other states handle relitigation of capacity. This memorandum may be helpful in resolving some of the issues that the Commission raised regarding relitigation of capacity.

(4) A memorandum discussing constitutional constraints applicable to conservatorship proceedings and similar arrangements. The Commission will need to bear these constitutional constraints in mind in deciding what legislation to recommend.

(5) A memorandum discussing how UAGPPJA would interrelate with the special rules applicable to certain types of actions or decisions involving a conservatee, such as medical treatment, sale of the conservatee's residence, and execution of a will. If it appears necessary, the staff will examine how such matters are treated in neighboring states, not just in California. We suspect that it might be sufficient to focus on California law, because any conservatorship relocated to California under UAGPPJA would be governed by that body of law, and a conservator registered in California under UAGPPJA would have to comply with California law. But we think these points require scrutiny and careful consideration.

The staff expects to have some of these memoranda ready for the Commission's October meeting. We hope to complete all of them by the December meeting. If the Commission wishes to prioritize certain memoranda, we should be able to accommodate that.

The Commission is working towards preparation of a tentative recommendation, to be circulated for comment in accordance with the Commission's usual practice. The staff is hopeful that the Commission will have enough information by the time of the December meeting to provide preliminary guidance on the content of the tentative recommendation. The staff will then prepare a draft of it for the Commission to consider in early 2013.

Is this plan of action acceptable to the Commission? Should any changes be made to it?

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel