Study L-750 October 1, 2012

Memorandum 2012-42

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Registration and Recognition of Orders from Other Jurisdictions

Article 4 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") addresses what is sometimes referred to as the "problem of out-of-state recognition." As the Uniform Law Commission explains, "[s]ometimes, guardianship or protective proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship or protective order issued in another state." UAGPPJA *Prefatory Note,* p. 2. To address this problem, Article 4 establishes a registration procedure.

The advantages and disadvantages of the UAGPPJA registration procedure have been discussed in prior memoranda. See generally Memorandum 2012-35, pp. 13-15, 18-20, 23-24, 28-29, 32-32. This memorandum continues that discussion, with a focus on implementation issues.

States use varying terminology to refer to a proceeding in which a court appoints someone to assist an adult with personal care and/or financial matters because the adult cannot adequately handle those activities without such assistance. In California, this type of proceeding is referred to as a "conservatorship," the person appointed to provide assistance is referred to as the "conservator," and the adult who requires assistance is referred to as the "conservatee." **For the sake of simplicity, we will use California terminology throughout this memorandum.**

This memorandum focuses on what is commonly known as a "Probate Code conservatorship" or "general conservatorship." For a discussion of other types of California conservatorships and similar arrangements, see pages 20-32 of Memorandum 2012-34. For purposes of this memorandum, we have assumed that any Commission recommendation to enact UAGPPJA would limit that enactment to the context of a Probate Code conservatorship. The pros and cons

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.

of that approach will be addressed in future memoranda. If the Commission ultimately recommends that California extend UAGPPJA to other conservatorship contexts, it may be necessary to revisit some of the points discussed in this memorandum.

SUMMARY OF UAGPPJA REGISTRATION PROVISIONS

General Registration Procedure

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

> If a [conservator] has been appointed in another state and a petition for the appointment of a [conservator] is not pending in this state, the [conservator] appointed in the other state, after giving notice to the appointing court of an intent to register, may register the [conservatorship] order in this state by filing as a foreign judgment in a court, in any appropriate [county] of this state, certified copies of the order and letters of office.

See UAGPPJA § 401; see also UAGPPJA § 402.

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

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

UAGPPJA § 403(a).

The staff has two technical concerns about the UAGPPJA registration procedure. They are discussed below.

Terminology

The UAGPPJA registration provisions require that notice of an intent to register in another state be given to the "appointing court." Such language could create problems as applied to a conservatorship that had previously been

transferred under UAGPPJA. For example, suppose that a conservatorship was created in Arizona. Later, it was transferred to Nevada. The conservator then proceeds to register the conservatorship in Oregon. Which court is the "appointing court," the court in Arizona or Nevada? The notice should probably be given to the court that currently has supervisory jurisdiction (i.e., Nevada), regardless of whether it made the original appointment.

This is an example of a minor terminological problem that will need to be worked out at the drafting stage, if the Commission recommends the adoption of UAGPPJA.

"Filing as a Foreign Judgment"

In order to register a conservatorship in another state, UAGPPJA requires that the specified conservatorship papers be "[filed] as a foreign judgment" in the appropriate court of that state.

The requirement of "filing as a foreign judgment" does not have a clear meaning under California law, because California does not seem to have a general procedure for "filing" a foreign judgment. To the contrary, California law expressly provides that a foreign judgment "can only be enforced in this state by an action or special proceeding." Code Civ. Proc. § 1913(a). (California does have a special procedure for enforcement of sister state *money* judgments, but it cannot be used to enforce *non-money* judgments. See Code Civ. Proc. §§ 1710.10-1710.65; *Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973).)

It seems likely that UAGPPJA was drafted with an assumption that an adopting state would have also adopted the Revised Uniform Enforcement of Foreign Judgments Acts (1964) (hereafter "RUEFJA"). That would be a reasonable assumption, as it appears that California and Vermont are the only states that have not adopted RUEFJA.

RUEFJA provides that any foreign judgment "may be filed" with the clerk of any state court. The reference, in UAGPPJA, to "filing as a foreign judgment" was probably intended to incorporate the RUEFJA procedure.

Because California has not adopted RUEFJA and appears to have no directly analogous provision, there would be a significant gap in the UAGPPJA registration provisions if they were adopted in California.

One way to fill the procedural gap would be to incorporate relevant elements of RUEFJA.

In simplified terms, the main elements of RUEFJA are as follows:

(1) A copy of a foreign judgment may be filed in the office of the Clerk of any state court. RUEFJA § 2. The person filing a foreign judgment shall pay a fee to the Clerk. RUEFJA § 5.
(2) The person filing a foreign judgment shall provide the name and address of the judgment debtor and creditor. RUEFJA § 3(a). The Clerk shall mail notice of the filing of the foreign judgment to the judgment debtor. RUEFJA § 3(b).
(3) On filing, the foreign judgment shall have the same effect and may be enforced in the same manner as a judgment of the state in which it is filed. RUEFJA § 2. Enforcement of the judgment shall be delayed for a specified period of time. RUEFJA § 3(c). The court shall stay enforcement of the foreign judgment if the judgment debtor establishes the specified grounds for a stay. RUEFJA § 4.

Of those three main elements, only the first seems to be plainly relevant and appropriate in the UAGPPJA context. Under that law, a UAGPPJA registration order would be filed with the clerk of the superior court, with payment of the appropriate fee. In other words, only a ministerial filing would be required.

The second element of RUEFJA does not seem to be relevant to UAGPPJA registration. It provides procedural protections for judgment debtors. A conservatorship order does not involve a judgment debtor.

The third element is more substantive than procedural. It relates to the force and effect of a foreign judgment that has been properly filed. The application of that element would seem to be unnecessary and potentially problematic, because UAGPPJA itself directly addresses the effect of a registered order.

In light of the above, the simplest and most conservative approach would be to incorporate some version of the first element of RUEFJA into the UAGPPJA registration provision. **If the Commission is interested in developing that approach, the staff will prepare implementing language for consideration at a future meeting.**

One other related point has occurred to the staff: If a registered order is used as authority to purchase, sell, encumber, or otherwise affect the title to real property, should the registered order be recorded with the property title? It seems likely that title insurers would value having such evidence of the conservator's authority in the title records. **If the Commission is interested in developing that approach, the staff will prepare implementing language for consideration at a future meeting.**

Finally, another possibility was suggested by a working group of the Executive Committee of the Trusts and Estates Section of the California State Bar ("TEXCOM"):

> For conservatorship orders, we propose a procedure similar to a 'notice of proposed action' in probate estates, by requiring notice and an opportunity to object to all interested parties before the other state's conservatorship order may be registered in this state as a foreign judgment, but not otherwise requiring a court hearing on every petition to register a foreign conservatorship order.

Memorandum 2012-36, Exhibit p. 39.

The distinguishing feature of that suggestion is that it would require notice to interested persons, who would then have an opportunity to object, thereby halting the registration process (at least temporarily). The staff is not sure that third parties should be granted that power.

If third parties have a fundamental objection to the underlying conservatorship (e.g., an objection relating to the conservatee's capacity or the choice of conservator), it would seem that those concerns should be addressed in the state having jurisdiction over the conservatorship. Similarly, if the interested persons are opposed to specific actions being taken in California, on the grounds that those actions would not be in the best interests of the conservatee, it would again seem that the issue should be resolved in the court having supervisorial jurisdiction.

If the Commission sees this differently and is interested in pursuing the approach proposed by the TEXCOM working group, the staff could develop the matter more fully in a future memorandum.

SUBSTANTIVE CONCERNS ABOUT UAGPPJA REGISTRATION

The remainder of this memorandum discusses specific concerns about the substantive effect of the UAGPPJA registration provisions, if they were adopted in California.

Deference to Determinations of Other Jurisdiction

If California were to adopt UAGPPJA, a conservatorship from another state could be registered in California. Upon registration, the appointee would have the same powers in California as in the other state (except for any powers that cannot legally be exercised in California). In other words, people and institutions in California would be required to recognize the authority of the appointee to act

on behalf of the incapacitated person, and California courts would be available to enforce such authority, so long as the appointee's actions are legal here.

This would mean that on some occasions, California might be required to accept an appointee's authority to take action on behalf of an individual, even though (1) the individual would not be considered incapacitated if evaluated under California's strict standards for determining capacity, or (2) the person acting as conservator would not have been appointed under California law.

This degree of deference to the determinations of another jurisdiction would probably not be a problem if the conservatee has only weak ties to California. Below, the staff discusses three common scenarios that might arise if registration were permitted in California.

Business and Property Transactions

Suppose that a conservatee who resides in another state needs to transact business in or manage property located within California. In such a case, California's interest in enforcing its conservatorship policy would probably not be strong enough to justify requiring that a new conservatorship be established in California. The state where the conservatee resides arguably has the stronger case for applying its law and policy to its own resident. (Indeed, under UAGPPJA's jurisdiction provisions, the "home state" has highest priority for conservatorship jurisdiction. See UAGPPJA §§ 202-203.)

Any harm to California's interests that might arise from allowing an out-of-state conservator to transact business within California seems minor as compared to the benefits afforded by the registration procedure: making it easy for appointees to help incapacitated individuals in an increasingly mobile and interconnected country.

Routine Medical Care

It appears that the registration process could also be used to authorize routine medical care within a foreign jurisdiction. Suppose, for example, that a Nevada conservatee travels to Oregon to visit her grandchildren for a month. During that month, she needs to have prescriptions filled and visit a dialysis clinic three times a week. It appears that the UAGPPJA registration process could be used to authorize the conservator to handle those routine medical matters.

Although medical treatment might be of greater policy concern than business transactions, the importance of facilitating medical care for a person who wishes to travel between states is also of great importance. If a person who needs

routine medical care on a regular basis cannot obtain it without going to the expense and delay of establishing a conservatorship from scratch in every state that the person wishes to visit, those requirements would impose a significant burden on the freedom of travel.

It seems reasonable to the staff to allow a conservator appointed by another state's courts to procure routine medical care for a conservatee who is visiting California. Recall that registration of a conservatorship does not authorize a conservator to take actions that are illegal in the registration state. For example, California does not authorize a conservator to consent to convulsive treatment for a conservatee. Prob. Code § 2356. An out-of-state conservator who has registered in California would be subject to the same prohibition.

Establishment of California Domicile

If a conservatee were to move to California and establish a permanent domicile in this state, California would have very strong ties to the conservatee — equivalent to the ties that it has to any of its citizens. Under UAGPPJA's jurisdiction provisions, California would (after six months as a resident) be considered the conservatee's "home state" and would have the highest priority claim to jurisdiction. See UAGPPJA §§ 202-203.

In that situation, it would seem to be inappropriate to allow the conservatorship to be registered in California (thereby preserving the foreign state's supervisory jurisdiction), rather than transferring the conservatorship to California. That issue is discussed more fully below.

Use of Registration in Lieu of Transfer

As noted above, if a conservator moves from another state to California and establishes a residence here, California would have very strong ties to that person. The staff believes that such strong ties between the conservatee and this state would make it problematic for that person's conservatorship to remain under the supervisory control of another state. Once a conservatee becomes a California resident, the conservatorship should be *transferred*, so that California law and policy can be applied to fully protect the conservatee. It would be inappropriate to use *registration* as a means of avoiding such a transfer.

In order to address that concern, the staff has previously suggested placing some sort of constraint on the use of registration:

> [A]ny such constraint would need to be very carefully drafted, to provide clear guidance, be administratively efficient to apply, and avoid undue inroads on the goal of nationwide uniformity. Possible ideas include:
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> - Make the registration procedure unavailable when the circumstances would support transfer of the case to California in conformity with UAGPPJA's guidelines on jurisdiction. This idea would need to be fleshed out.
> - Make the registration procedure unavailable if the protected person is domiciled in California. This is a variant on the first idea, but more specific. It could be implemented by requiring the registration documents to include an attestation that the protected person is not a California resident. A potential problem with both this approach and the preceding approach concerns third party reliance on a UAGPPJA registration. How would third parties be able to determine whether a protected individual is domiciled in California or has other ties to California that would support jurisdiction under UAGPPJA? Under what circumstances would they be entitled to rely on such a registration? This problem may not be insurmountable, but it illustrates the care with which any constraint on the registration procedure would have to be drafted.
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> **We encourage other suggestions about how to ensure that the UAGPPJA registration procedure is used only when an incapacitated person has relatively weak ties to California**, not closer ties that more strongly implicate California's policy interests. In attempting to develop such a constraint, Commissioners and other interested persons should bear in mind the potential benefits of the registration procedure, easing the burden of providing assistance to an incapacitated individual in a world in which transactions and other business often span state lines. Any constraint on that procedure may reduce those benefits. That downside must be weighed against the potential value of the proposed constraint in protecting California's policy interests. In the end, it might be best not to impose any constraint at all.

Memorandum 2011-31, pp. 35-37 (emphasis in original).

The idea of prohibiting registration if a conservatee is already domiciled in California seems sound, but it would not be a complete solution. A conservator could avoid that restriction simply by registering *before* the conservatee establishes a domicile in this state. That problem could perhaps be avoided by providing that the authority conferred by registration ends some fixed period of time after a conservatee establishes a domicile in California. (The holdover period would provide for continuity while effecting a transfer.)

It might also make sense to *require* a conservator to commence transfer proceedings within some period of time after a conservatee establishes a domicile in California.

The main problem with the approach outlined above is that it would not provide any notice to third parties if a registered conservatorship becomes invalid as a consequence of a conservatee moving to California. Instead, it would rely on the conservator complying with the law. The likelihood that a conservator would follow the law could perhaps be increased by requiring that a registering conservator execute an oath expressly promising to abide by California law. See discussion in Memorandum 2012-43, pp. 21-22.

The staff believes that the approach described above might be the most practical way of limiting use of the registration process as a means of avoiding transfer. If the Commission agrees, the staff will prepare draft statutory language for future consideration by the Commission.

Of course, the alternatives discussed in prior memoranda also remain open for consideration. For example, the Commission could choose either of the following approaches:

- **Do not impose any limits on the availability of the registration process.** This would probably provide the greatest degree of uniformity with other UAGPPJA-adopting states, but it would not address the concern that is discussed above.
- **Prohibit registration whenever the conservatee has sufficiently strong ties to California.** This approach would need significant further development before it could be properly evaluated. The staff's initial thought is that it would be difficult to establish a bright line standard that could be used to implement this approach.

Finally, the TEXCOM working group has made another proposal: prohibit registration if California is either the conservatee's "home state" or a "significant connection" state, as defined by UAGPPJA. See Memorandum 2012-36, Exhibit p. 38. Under UAGPPJA, a conservatee's "home state" is "the state in which the [conservatee] was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition…." A "significant connection state" is "a state, other than the home state, with which a [conservatee] has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available." The effect of the first of the two standards would be similar to the

effect of the approach described earlier — a conservatorship could not be registered if the conservatee resides in California. The second standard would require a determination of whether a conservatee's connections to a state are "significant." That might be a difficult standard to apply in practice, especially if the registration process involves only ministerial filing of papers with a clerk, followed by private transactions between the conservator and third parties.

If the Commission would like to see further development of any of the approaches discussed above, the staff could do so in a future memorandum.

Unauthorized Action

UAGPPJA Section 403(a) expressly provides that a conservator's authority may not be exercised in a way that is prohibited by the laws of the registration state. In other words, UAGPPJA requires that a conservator act according to the law of *both* of the affected states. Whichever state's law is most restrictive would control.

However clear that legal principle might be, there could still be practical problems relating to its application. Two potential problems are discussed below, both involving third parties.

Notice to Third Parties

After completing the registration process, a conservator will presumably need to show some sort of documentation to third parties before transacting business with them, in order to prove that the out-of-state conservatorship has been registered in California. However, those third parties may not realize that the powers enumerated in the foreign state's orders are subject to any relevant restrictions that exist in California conservatorship law.

That problem could be addressed fairly simply, by adding advisory form language to whatever documentation is provided to certify registration of a conservatorship. For example, the certification document could state something along the following lines:

> The powers granted to the person named in the attached documents are subject to all California laws governing a conservatorship. The person named in the attached documents may not take actions that would be prohibited under California conservatorship law. Any procedural requirements that govern the action of a conservator under California law, including any required court approval for specified types of actions, also apply to the person named in the attached documents.

If the Commission would like to pursue this option, the staff will draft implementing language for consideration in a future memorandum.

Liability of Third Parties

Even with a notice of the type described above, a third party may not know whether an action proposed by a registered conservator would be permissible under California law. The answer to that question may be legally uncertain or may require legal knowledge that a third party does not possess.

That could be a problem, if a third party's reliance on the apparent authority of a registered conservator turns out to be misplaced. If that occurs, and the action taken by the conservator causes an injury, could the third party be liable? In other words, would the third party have any duty of inquiry, to determine whether the registered conservator's course of action is permitted under California law?

If there is any doubt on that point, third parties may refuse to accept registration documents as sufficient authority for a proposed action. That would significantly undermine the value of the registration process.

That kind of problem has been addressed in other areas of the law through the enactment of statutory protections for a third party who acts in good faith reliance on a person's apparent authority. For example, persons who are asked to rely on a power of attorney are protected by the following provision:

> (a) A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied:
> (1) The power of attorney is presented to the third person by the attorney-in-fact designated in the power of attorney.
> (2) The power of attorney appears on its face to be valid.
> (3) The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witnesses.
> (b) Nothing in this section is intended to create an implication that a third person is liable for acting in reliance on a power of attorney under circumstances where the requirements of subdivision (a) are not satisfied. Nothing in this section affects any immunity that may otherwise exist apart from this section.

Prob. Code § 4303.

Conservatorship law does not seem to provide such general third party protection, but there are two provisions that protect third parties in specific circumstances:

- Probate Code Section 2355(a) protects a health care provider from liability for acting on a decision made by a conservator in specified circumstances.
- Probate Code Section 2545(d) protects a person who purchases property from a conservator in good faith and without actual knowledge that the sale was in violation of statutory limitations on the conservator's authority.

The Commission should consider whether it would be appropriate to provide express statutory protection to a third party who transacts with a registered conservator in good faith reliance on the apparent authority conferred by the registration documents. Such protection should increase the likelihood that third parties would be willing to accept the authority of a registered conservator. **If the Commission is interested in pursuing this approach, the staff will prepare implementing language for consideration at a future meeting.**

Respectfully submitted,

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